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Book Review: Politics and the Regulatory Agencies

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BOOK REVIEWS

POLITICS AND THE REGULATORY AGENCIES. By WILLIAM L. CARY. New York: McGraw-Hill Book Co. 1967. Pp. 149. \$5.95.

When William Cary went to the SEC as Chairman in 1961, his background was primarily academic—professorships in law and business at Columbia, Harvard, and Northwestern and numerous writings in the tax and corporate fields¹—but included active practice and Wall Street consulting as well as government service. When he left the SEC in 1964, he had become an astute politician and political scientist as well.

This book is a distillation of experience and observation at the SEC. His years as Chairman spanned the Kennedy and early Johnson presidencies, when the agencies were generally in an upswing of activity and support after the quieter (somnolent?) Eisenhower period. The SEC was particularly exciting; its landmarks were the Special Study,² *Cady, Roberts*,³ and the 1964 Amendments.⁴ But the book is neither a history nor a legal analysis, although it has elements of both. It is essentially a political essay. Nor is it limited to the SEC. The CAB, FCC, FPC, FTC, ICC, and various departments are discussed from time to time. But the SEC is, naturally, the center of attention.

As the title indicates, the agencies are studied in their political setting, particularly in relation to the White House and the Congress. The discussion of appointments, hearings, budgets, policies, and operations is frank and revealing. Cary's appraisal of the independence of the agencies is best stated in his own words: "In fact, government regulatory agencies are step-children whose custody is contested by both Congress and the Executive, but without very much affection from either one."⁵ Chapters 1 and 2 give the pros and cons of "oversight" and a number of intriguing examples of the ways agencies react to subtle and unsubtle pressures from the legislative and the executive bodies.

Students of the administrative process will be most interested in chapter 3, which considers why agencies atrophy and how they can be rejuvenated, in terms of people, practices, finances, and ideas. For example, the "balanced" commission, representing diverse political and economic viewpoints, is desirable in theory and perhaps useful for quasi-judicial decisions, but tends to inhibit innovation. Cary examines the degree to which agencies (both federal and state) may become "captives" of the industries with which they deal. Then, he notes, there is the tendency to overjudicialize, handling existing cases at the expense of formulating basic programs and policies. Much of this ground has been covered before, but rarely from such a good vantage point.

¹ In the corporate field, his writings include a leading casebook, R. BAKER & W. CARY, *CASES AND MATERIALS ON CORPORATIONS* (3d ed. 1959).

² *REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE S.E.C.* (6 vols. 1963-1964).

³ *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961).

⁴ Securities Act Amendments of 1964, 78 Stat. 565 (1964).

⁵ P. 8. See also p. 27, noting that, in Congress, the stress is on agency independence from the White House.

Securities lawyers, as well as political historians, will find chapter 4 highly informative. It describes the conception, lobbying (by industry and government forces), modification and eventual passage of the Securities Acts Amendments of 1964. I can think of no better behind-the-scenes account of this, or any other piece of major SEC legislation. Also valuable is the discussion of the *Cady, Roberts* case as an illustration of one of the ways (e.g., in addition to rule-making) that an agency develops law and policy.

Cary's other important beliefs about the agencies appear throughout the book, but especially in chapter 5. Policy making is a basic part of their job. Judicial functions should not be split off. Revitalization best comes from within. Changes by legislation are preferable to those by presidential reorganization plan. A "czar" for the agencies is undesirable. The agencies should retain such independence as they have, but they must be continually aware of their political environment. This awareness requires them to conform to the broad policies of the incumbent administration.

This reasoned, informed, and perceptive book is a significant contribution to *realpolitik* of the administrative agencies. It should be read by all who deal with the agencies, or carp about them.

Alan R. Bromberg*

THE GOVERNANCE OF MEDIAEVAL ENGLAND FROM THE
CONQUEST TO MAGNA CARTA. BY H. G. RICHARDSON & G. O.
SAYLES. Edinburgh: Edinburgh University Press. 1963. Pp. ix, 514. 70s.

LAW AND LEGISLATION FROM AETHELBERHT TO MAGNA
CARTA. BY H. G. RICHARDSON & G. O. SAYLES. Edinburgh: Edin-
burgh University Press. 1966. Pp. vii, 201. 50s.

ENGLISH LAW AND LEGISLATION IN THE ELEVENTH AND TWELFTH CENTURIES

Richardson and Sayles are well acquainted with legal and related documents of mediaeval English history. Though neither is a lawyer,¹ their ad-

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¹ Henry G. Richardson, F.B.A., is former Secretary of the Tithe Redemption Commission. George O. Sayles, F.B.A., is former Burnett Fletcher Professor of History, University of Aberdeen, and was the Kenan Professor of History, New York University, in 1967. Likewise, Professor Plucknett was not a lawyer, in spite of his LL.B. and the fact that he was a member of the law faculties of both Harvard and London Universities. See Milsom, *Theodore Frank Thomas Plucknett 1897-1965*, 51 PROC. BRIT. ACADEMY 505, 506, 509, 511 (1965). Nor were Vinogradoff and Stubbs, "whose handling of law Maitland admired so much that he almost wished he had been a judge." T. PLUCKNETT, *EARLY ENGLISH LEGAL LITERATURE* 14 (1958). See also *id.* at 15-16. On Maitland's brief practice at the bar, see *id.* at 6-8. In commenting on Maitland's inaugural lecture of 1888 Plucknett had this to say: "Deep at the roots of the question [Why the history of English law had not been written?], Maitland found certain irreconcilable contradictions which make it especially hard for a man trained exclusively in English law to become a historian. In the first place, English law was isolated from every other study and was traditionally taught at the Inns Then there is the pseudo-historicity of our law. . . . [W]e have to invoke [Maitland's] fundamental distinction between legal and historical method [that the

vocacy of conclusions with respect to various historical documents is more in the tradition of the bar than of a chair of history. In 1963 the Edinburgh University Press brought out their *The Governance of Mediaeval England from the Conquest to Magna Carta*. Its sequel, *Law and Legislation from Aethelberht to Magna Carta*, appeared three years later. We have waited to review both together.

The Governance of Mediaeval England is not a comprehensive history of the period, but an episodic and topical commentary. Compared to the earlier and later work of the authors, it is very uneven. There are passages of careful synthesis and real eloquence, but there are long stretches of desert as well, especially in the opening chapters. Though their criticisms of Stubbs, Round and others are generally well taken, some of their own conclusions are, it seems to me, as open to criticism. What they sometimes refer to as "evidence" is nothing more than speculation. Indeed, if their persistent citation of their own writings in the second volume may be characterized as auto-beatification, this first work may be said, with somewhat more justice, to constitute the decanonization of Stubbs.²

For the general reader and the lawyer, the second book is decidedly the better and should be read first. I will therefore direct my primary attention to it, weaving related material from the first volume into my discussion. The authors have deliberately directed the second and thinner book to the "many who would not in the ordinary course open a book of legal history."³ Although it is not directed at "the minutiae of the law,"⁴ the authors occasionally indulge themselves in minutiae rather vigorously. However, they move their story along without the interruptions encountered in the first volume that might better have been treated as appendices. No final analysis of these books, which may very well be the most controversial contribution to legal history of the last half-century, will be possible until all the documents which the authors re-analyze have been reassessed by others in the light of these studies. Time does not permit a restudy of the documents for this review. It is necessary, therefore, merely to summarize the authors' conclusions with which legally trained readers will be most interested.⁵

In *Law and Legislation* the reader is given a thorough look at the scanty remains of English legislation up to the reign of Henry III. The remains are so scanty, in fact, that the authors are able to sketch the whole foundation

lawyer wants authority regardless of its history, whereas the historian wants evidence]. Once the professor of law embarks upon legal history he has become a historian, for legal history is not law, but history. And so the legal historian commits no trespass in the pleasant fields of history—he is treading his own soil It is still too often said that English law can only be understood historically. Now English law may be bad, but is it really as bad as that?" *Id.* at 11-12, 14, 17.

² By the time their next volume appears their invective against Stubbs may have finally stilled. In *LAW AND LEGISLATION* Stubbs is criticized at several points, but in measured and moderate language. The *SELECT CHARTERS* is even cited with apparent respect at times.

³ *LAW AND LEGISLATION* vii.

⁴ *Id.*

⁵ For the legal reader the most significant sections of *THE GOVERNANCE OF MEDIAEVAL ENGLAND* are those parts of chapters IV and V dealing with feudalism and the Conquest, chapters IX and X on the judicature, chapter XIV on Henry II and the last three chapters on John. Since the volume is not a continuous narrative, skipping through the book does not present serious difficulties.

of pre-Norman, English law back to the legislation of the old Kentish kingdom of the sixth century. The Kentish legislation, which was concerned almost exclusively with the criminal law (and a little procedural law as well), receives a full examination. The authors are careful to point out that land law, which provided so much of the content of legislation after the Conquest, is not mentioned in the earliest surviving Kentish legislation. But status had a significant place, particularly that of women. It appears that the Christian conception of marriage was unknown to the legislators, as marriage seems to have been a matter of purchase, "even marriage by capture seems a distinct possibility. There is no thought of marriage as an indissoluble union. Separation—we can hardly call it divorce—is a matter of monetary compensation, and so is adultery."⁶ The Kentish conception of crime, as well, was for the most part in terms of "wrong-doing to be redeemed with money, though in [some of] the most serious . . . cases . . . the penalty may be forfeiture."⁷ With the coming of Christianity, new delicts and penalties came into the law. Some were ecclesiastical, like excommunication for adultery. There is also a place in the later Kentish law for social legislation,⁸ and the earliest English legislation for the regulation of coinage also dates from this period.

Among the early English kings the authors have the highest regard for Edgar (d. 975), but his reign was not distinguished for its legislation. The few remains of the legislation of Ethelred (978-1016), however, contain some significant fragments.⁹ There is little that is new in Cnut's code (c. 1020), and his Danish and English successors, we are told, promulgated no new laws at all. Williams I and II were no legislators either. "The Normans were without learning, without literature, without written law."¹⁰ At first, at least, they were content to leave English institutions as they found them.

The first law book of any consequence after the Conquest is, of course, the so-called *Leges Henrici*. Like so much of the previous law, it is strongly

⁶ LAW AND LEGISLATION 4.

⁷ *Id.* at 10.

⁸ In the reign of Athelstan (925-939) there is a remarkable quantity of legislation among which are laws for the relief of the poor.

⁹ For example, separate sets of laws were made up for those parts of England under English law and those under the Danelaw. Included in the latter were the "well-known articles providing for a court . . . with a body of twelve thegns to act as jury both of presentment and trial. Though there has been reluctance to admit any connection between these . . . articles and the English jury of post-Conquest times, the intention of the legislation for the Danelaw seems as a whole to be so plainly the extension to it of English institutions that there can hardly be room for the supposition that in this one particular the intention is to preserve a Norse Custom and not to introduce an English institution." LAW AND LEGISLATION 25. There are many who would vigorously dispute this judgment. E.g., T. BAKER, *THE NORMANS* 62 (1966), McKnight, Book Review, 21 Sw. L.J. 880 (1967). In their treatment of the assizes of Henry II, our authors again insist on the Englishness of the jury principle, relying on van Caenegem. But in their view of the civil or popular jury, they may go further than van Caenegem himself. R. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL* 69-81 (1959). Not Stubbs but Brunner, Round and others bear the brunt of our authors' general discussion of the origin of the English jury. They find a prima facie case against the Norman origin of the jury in the fact of its preoccupation with oath taking. In matters of law the English, our authors feel, were as much addicted to oaths as the Normans were not. Within twenty years of the Conquest, Richardson and Sayles find the Normans using not only the jury trial but a process of attain. "That this advanced procedure was a recent introduction by the Norman king and was without roots in the Old English past defies all probability: where is the Norman parallel to be found?" *THE GOVERNANCE OF MEDIAEVAL ENGLAND* 208.

¹⁰ LAW AND LEGISLATION 30.

concerned with criminal law, though it says nothing of "the summons of the eyre, of presentments and verdicts."¹¹ Since this book contains little that would be useful to a judge or his clerk, Richardson and Sayles doubt that it is the work of one of the king's justices.¹² The authors conclude that the principal interest of the composer of the *Leges Henrici* was the local courts, though they doubt that the book was ever of great practical use. But in their earlier volume, the authors note how vigorous the local (*i.e.*, non-royal) courts were in this period.¹³

The *Quadripartus*, of the same general period (c. 1110-1120), incorporates what Richardson and Sayles regard as the one genuine piece of legislation of William I. It is found in the well-known *Ten Articles*, the main source of which is found in the *Instituta Cnuti*, which our authors also place as originating in the same period (c. 1103-1120). Included in the *Ten Articles* is that rather startling provision for the abolition of capital punishment. Knowing what we do of the Conqueror, it is extremely difficult to attribute this to him.¹⁴ In the view of our authors, then, substantial parts of the *Ten Articles* are fiction. And they take the same view of the *Leis Willelme*, which they place early in the reign of Henry II. The invention of the *Leges Edwardi Confessoris* is put late in the reign of Henry I. But the authors do not underestimate the importance of the *Instituta Cnuti* or the *Leges Edwardi Confessoris*, both of which were later used by Bracton. The *Ten Articles* enjoyed "an adventitious success because it travelled down the centuries with this companion [the *Leges Edwardi Confessoris*] and it attained the crowning glory of inclusion in the *Select Charters* as the 'Statutes of William the Conqueror.'" ¹⁵

The chapter which I most admire is that devoted to the apocrypha of the law, those compilations and fabrications that were turned out in the twelfth and early thirteenth centuries. Though many will doubtless disagree with Richardson's and Sayles' analysis of the various books and their dating of many of them, their treatment is both more thorough than that of Plucknett in his *Early English Legal Literature*¹⁶ and his *Concise History*,¹⁷ as well as being more readably expounded. Our authors' handling of the "so-called Assize of Clarendon" is fascinating as well as controversial. As to the *Constitutiones de Foresta* "of Cnut," which excited such great interest in Tudor times, they are at a loss to suggest its author or its purpose, terming it a *jeu d'esprit*.¹⁸ This term is also applied to the *Ten Articles*, the *Leis Willelme*, the Assize of Clarendon, and the Assize of

¹¹ *Id.* at 44.

¹² It is strikingly different from that book which goes under the name of GLANVILLE, which is devoted almost exclusively to the land law—with only a brief appendix on criminal law.

¹³ See THE GOVERNANCE OF MEDIAEVAL ENGLAND 93.

¹⁴ See D. DOUGLAS, WILLIAM THE CONQUEROR 60, 219-21, 371-74 (1967). "And indeed it would have been strange if the Peterborough chronicler or some other of William's contemporary—or nearly contemporary—panegyrist had not remarked upon this stroke of uncharacteristic humanity." LAW AND LEGISLATION 47. Although the compilation of Domesday Book is termed a "vast administrative mistake," its "lucky survival" is credited with having enhanced the Conqueror's reputation among grateful historians. THE GOVERNANCE OF MEDIAEVAL ENGLAND 28.

¹⁵ LAW AND LEGISLATION 48.

¹⁶ T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 24-31 (1958).

¹⁷ T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 252-58 (5th ed. 1956).

¹⁸ See LAW AND LEGISLATION 128.

Woodstock. Richardson and Sayles express the hope that their analysis will terminate the respectability of the apocrypha and "may in some measure hinder the continuance of their bad work."¹⁹

Most of us have begun the study of real property with the doctrine of feudal tenures.²⁰ We have been taught that feudal tenures were based on the rendering of services. A good deal has been made of knight service and its alleged importance in land holding until the passage of the Statute of Wills and the ultimate abolition of knight service tenure in 1660. Our authors stress that the use of military tenure achieved little toward the provision of an effective army. In the end, the problem of providing troops for military purposes defeated the Norman and Angevin kings, and "military tenures ultimately became no more than a means of raising money in oppressive ways."²¹ The whole truth, as our authors see it, is that, by the time "feudal" tenures were introduced into England, they were almost an anachronism. "The professional soldier, the professional lawyer,²² the professional civil servant, had made their appearance and were becoming ever more professional and more necessary: without them, the organized state, such as England was, would have collapsed."²³

This is not to say that the positive obligations and negative restraints of liege homage did not have some significance in the twelfth century. But by the thirteenth century the relationship was essentially an economic one. There was little thought of rendering actual military service, but those incidents such as relief, homage, marriage and wardship were quite significant. These, our authors point out, were really the theme of the statute *Quia Emptores*. Because the mesne tenant encountered little difficulty in alienating parts of his fee and, therefore, new relationships occurred constantly, "'the chief lords of fees had many times lost their escheats, marriages and wardships'—there is no word of any other loss."²⁴ The strict system of tenures that many of us have been taught to imagine enduring well into the sixteenth and sometimes the seventeenth century did not really exist. An accommodation between the "immutable nexus between land and service and the rapidly evolving conception of property as a means of gratifying the needs or whims of the possessor"²⁵ was achieved through the agency of money. Thus, when our authors abstract what was essential in primitive feudal tenures, they are left "with little more than meaningless 'feudal incidents' that endured because they were a source of profit."²⁶

Richardson and Sayles not only question the validity of the feudal so-

¹⁹ *Id.* at 131.

²⁰ Apart from some instruction in terminology, using the study of real property as a vehicle for teaching legal history has been a particularly sterile exercise, from the point of view of both law and history.

²¹ THE GOVERNANCE OF MEDIAEVAL ENGLAND 77.

²² The twelfth century seems a bit early for professional lawyers. See T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 216 (5th ed. 1956). See also S. G. SAYLES, SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD III, at xxix, xl-xli, lx-lxi (1958), McKnight, Book Review, 108 PA. L. REV. 934 (1960).

²³ THE GOVERNANCE OF MEDIAEVAL ENGLAND 115.

²⁴ *Id.* at 112, citing W. STUBBS, SELECT CHARTERS 473 (2d ed. 1874), and 1 STATUTES OF THE REALM 106 (reprint 1963).

²⁵ THE GOVERNANCE OF MEDIAEVAL ENGLAND 113.

²⁶ *Id.* at 115.

ciety which King William is credited with bringing to England, but also doubt that the Conqueror introduced a new doctrine: that all lands are held of the king. "There is nothing to suggest that William conceived himself as asserting a right that did not belong to the Confessor or that the Old English kings stood in any different relation to their landowning subjects."²⁷ The Anglo-Norman and Angevin kings, then, maintained their primacy not because of feudalism but in spite of it.²⁸

Our authors refer to the post-Conquest *fyrð* as "mythical"²⁹ and regard the passage of the *Ten Articles* which makes the Conqueror demand of all freemen defense of the king's lands and honor as equally fictional beyond those who held by military tenure. Henry II's Assize of Arms, which gave freemen alone "the privilege or obligation" of bearing arms, the authors "unquestionably" place in 1176, thereby rejecting Howden's dating at 1181.³⁰ Among the legislative events of John's reign, our authors regard his Assize of Arms of 1205 as second only in importance to the Great Charter. This "panic legislation" was issued at a time when invasion by the French king was anticipated and provided that should this eventuality occur, all men were to assemble *armed*. Our authors feel that it could not have been effective. But this scheme of arming all men at the age of twelve was resuscitated in 1230, and John's legislation is important in that it "marks a significant point in the passage of a great part of the population from unfreedom to freedom."³¹ Though there may be garbled spots in their recounting of the position of the free and unfree in view of the law and the fact, Richardson and Sayles are probably correct in saying "the unfree were never so much at the mercy of their lords as legal theory implied."³²

The reforms of Henry I, our authors believe, laid the foundation for the curious tripartite structuring of the English common law judicial system which (though mightily rationalized in the late nineteenth century) has never been wholly put to rest. "Save for the contrivances of a king who died more than eight centuries ago, there would have been but one central court, as there was, for example, in France."³³ And there are, to be sure, other reminiscences of the "greatest of the Norman kings." From time to time lawyers bewail the infringement of administrative agencies upon the judicial process. A fact that is not sufficiently appreciated is that our judicial system sprang from what might be called Anglo-Norman and Angevin administrative practice. Though, in the course of the reign of Henry II, barons and justices tended to specialize, the common bench and the exchequer were not really different tribunals. They were not completely sep-

²⁷ *Id.* at 116.

²⁸ The authors point out that a good deal of confusion has grown up from applying the word "feudal" in the context of jurisdiction as well as that of tenures. But England was not feudal in the former sense—as the course of the twelfth and thirteenth centuries ultimately proved. The thrust of feudalism is, after all, "to diminish by fragmentation lordship as a whole—the authority of the king and whatever other lords there might be." *Id.* at 117.

²⁹ However, they find some evidence of defensive duty of burgesses in some instances. LAW AND LEGISLATION 101.

³⁰ *Id.* at 138.

³¹ *Id.*

³² *Id.* at 143.

³³ *Id.* at 33.

arate even in the reign of John, when a general eyre might demand the full strength of the judiciary and sessions of the bench might be suspended for a term or two. Differentiation in function and personnel was not achieved until the office of justiciar was abolished in 1234; then the tripartite division of the courts achieved its ultimate form.³⁴

None of this would have been possible were it not for the remarkable extent of literacy among the laity in the twelfth century—a fact which our authors feel has been almost universally doubted or denied. “The secularization of learning—or perhaps literacy would be the better word—made possible Henry’s achievement and gave it permanence.”³⁵ Language of clerks, officers and courtiers was that of northern France and our authors believe that proceedings in courts of law, including exchequer, were conducted in that language and “that Latin was a stumbling-block and was rarely spoken, except when a document was read.”³⁶ Nor did the king’s absence from the realm interrupt judicial and administrative routine. The clerks and the office of the justiciar then issued writs in the justiciar’s name.³⁷ Thus the precursor of the Chancery’s writ-issuing function has a continuous history from the twelfth century.

Though the writ process is traced to the Old English kingdom, the jurisprudence of the early twelfth century and beyond is concerned primarily with the land law “built up, writ by writ, into a loose series of related, if ill-defined, forms of action, which were reshaped by the assizes of Henry II and finally systematized by the anonymous lawyer of genius who gave us *Glanville*.”³⁸ In the writ system our authors find no Norman invention but merely a “clumsy adaptation of English forms by men unskilled in English ways and the English tongue.”³⁹ Our authors doubt that *wer*, *wite* and *bot*, which had been of great significance before, signified very much by the early twelfth century. The evolving law of tort took no notice of them.⁴⁰ The office of justiciar itself, created early in the twelfth century,⁴¹ had a great influence on the evolution of English administration and also on that of the writ system.

The authors categorically assert that there is no evidence of direct influence of Roman law upon the law of England before the reign of Henry II. However, our authors find the impact of Rome beginning at that time. The “first and foremost lesson” that the Romanists taught was order,

³⁴ THE GOVERNANCE OF MEDIAEVAL ENGLAND 215, 248 n.2. As to the mixed element of personnel on the two courts, see *id.* at 250; on the King’s Bench, see *id.* at 213.

³⁵ *Id.* at 269. See also *id.* at 167, 278-79.

³⁶ *Id.* at 278.

³⁷ The clerks of the chapel who followed the king were responsible for charters and exceptional writs.

³⁸ LAW AND LEGISLATION 49. See also THE GOVERNANCE OF MEDIAEVAL ENGLAND 284.

³⁹ LAW AND LEGISLATION 50. Though “nothing has survived that can be connected” with any of the eyres of Henry I, there may have been civil pleas, by writ or by plaint, as well as pleas of the crown that foreshadow those standardized under Henry II. THE GOVERNANCE OF MEDIAEVAL ENGLAND 181.

⁴⁰ In this regard, see T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 370 n.2 (5th ed. 1956), which calls our attention to the twelfth century customal of 1 BOROUGH CUSTOMS 30-31 (M. Bateson ed. 1904).

⁴¹ Richardson and Sayles put the origin of the institution of the justiciarship in the reign of Henry I. For another view, see F. WEST, THE JUSTICIARSHIP IN ENGLAND 1066-1232, at 18-19 (1966).

which harmonized and reduced to a system a mass of writs, casually and sporadically invented or modified, that had accumulated over many years.⁴² This orderly approach to legal institutions was to culminate about 1250 in our second important textbook, *Bracton*.

Richardson and Sayles find the influence of Roman law "more certain" in the development of the action of trespass⁴³ than in the development of novel disseisin, to which most leading authorities until recently have ascribed a canon law origin.⁴⁴ They reiterate their views on the origin of trespass so extensively developed in the introduction to their *Select Cases of Procedure Without Writ Under Henry III* in 1941. Their view has since been adopted by Fifoot.⁴⁵ But to the last, Plucknett was somewhat wary of it and blended it with his own view that trespass (or the idea of it) originated in the local courts and was transmitted into the royal courts as the writs *ostensurus quare* began to develop in the late twelfth and early thirteenth centuries.⁴⁶ As Plucknett suggests, there really need be no conflict between his views and those of Richardson and Sayles. But our authors have stuck to their original position without mention of Plucknett, or Fifoot.

The traditional view, which can be traced back to Coke and Hawkins (based presumably on deductions from *Bracton*, Fleta, Britton and the *Mirror*),⁴⁷ was that the action of trespass was developed from the appeals of felony.⁴⁸ Our authors also find a relationship between the origins of trespass and practice with respect to appeals of felony, but they reach this

⁴² LAW AND LEGISLATION 79.

⁴³ In GLANVILLE there is no mention of the action of trespass. Our authors, however, argue that its direct ancestor begins to appear in the plea rolls referred to as an *actio iniurianrum*, a phrase still used by Bracton. A fuller discussion on which Richardson and Sayles rely is their own introduction to H. RICHARDSON & G. SAYLES, *SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY III*, at cviii-cxiii (1941). They feel that the reason for the "inexplicable" failure of the author of GLANVILLE to speak of the action is the fact that it was then begun by plaintiff. Perhaps a better explanation might be that in that author's experience pleading by plaintiff may have been irregular or even nonexistent, or that he regarded it as so irregular or so unusual as not to warrant comment.

⁴⁴ They have ascribed the origin of the assize of novel disseisin to the canonical action *actio spoli*, framed in terms of the Roman interdict *unde vi*. But our authors point out that "the *actio spoli* . . . had not emerged until Henry II and author of *Glanville* had long been laid to rest." LAW AND LEGISLATION 82.

⁴⁵ C. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW—CONTRACT AND TORT* 44-54 (1949).

⁴⁶ T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 366-72 (5th ed. 1956).

⁴⁷ See H. RICHARDSON & G. SAYLES, *SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY III*, at cviii, n.1 (1941).

⁴⁸ This view was accepted and embellished by Holmes, Ames, Maitland and Holdsworth. One reason for this insistence on derivation of the action from a widely recognized, formalized proceeding may be found in the statement of GLANVILLE that one need not answer for his lay fee except in response to the King's writ, 12 GLANVILLE 25 (G. Hall ed. 1965), a statement that perhaps implies an over-emphasis on writ pleading in general. Another possible reason is that little consideration was given to non-royal courts in our legal-historical or other legal literature until comparatively recently. This sole preoccupation with writs, founded on GLANVILLE's ignoring of non-writ procedures, was not really questioned until W. Bolland's publication of *SELECT BILLS IN EYRE* in 1914. There he pointed out that the records indicate that actions were frequently commenced without writ, although the mediaeval writers from GLANVILLE onward had seemed to ignore this fact in an effort, perhaps, to achieve uniformity through stressing the necessity of writ practice. As van Caenegem points out, "A picture of the legal system of any society gathered from theoretical sources only is liable to be misleading. Legal practice is often a great distance away from legal texts in theory. . . . The actual cases which accorded with the scheme of things described in the law books were a minority." R. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILLE* 41 (1959).

conclusion in a rather different way than those before them who had not mined the underlying material nearly so deeply or so thoroughly. In its essentials their conclusions may be boiled down to those constituents underlying the traditional view as Fifoot summarized them: (1) the linguistic similarity of language of the appeal and the later developed writ of trespass, (2) the semi-criminal character of trespass, and (3) the inadequacy of the appeal as a remedy in that damages were not recoverable through it. Professor Woodbine's objections to the first and second points are refuted. With regard to the third, Fifoot observes that "inadequacy of the appeal may be confessed, but the conclusion drawn avoided. . . . *Post hoc*, even in legal history, is not *propter hoc*."⁴⁹ In this regard it would seem that Fifoot did not fully appreciate the arguments which Richardson and Sayles offered in 1941, or chose to mellow them without saying so. Richardson and Sayles point out that one need not confess the long asserted view that damages were in no way related to the appeals since proceeding without writ to claim damages used much of the language of the appeals. Although they cite twenty odd instances from the plea rolls of the period, they do not demonstrate that these actions claiming damages were pursued to a successful conclusion.⁵⁰ It is in these formless complaints—some written, some oral—that they find the origin of the action of trespass. But as Plucknett points out, this finding does not necessarily demonstrate the origin of the action. As he puts it, "The origin of trespass . . . is part of the larger question of origin of all the actions which were directed against a defendant who had done damage to a plaintiff. The original writ in all these cases is in the same form *ostensurus quare*, and origin of that form is the real root of the matter."⁵¹ Though he can only speculate as to the origin of the idea that wrongs in the nature of trespass gave rise to recovery, he concludes that this idea must have been prevalent in the local courts, which indeed were the only courts available for recoveries in general prior to the development of the Anglo-Norman royal courts in the mid-twelfth century. But Richardson and Sayles remain unmoved by Plucknett's argument.⁵²

Though it is no inconsequential fact "that the judicial system of the thirteenth century was, in its essentials, already in being under Henry II," an organized judiciary in the thirteenth century sense had scarcely been achieved on the resumption of the general eyres in 1166.⁵³ At a council

⁴⁹ C. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW—CONTRACT AND TORT* 44-54 (1949).

⁵⁰ H. RICHARDSON & G. SAYLES, *SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY III*, at cviii-cxxviii (1941). Their language at cxix may not be of general reference in this regard, but they seem to appreciate this difficulty. Their pleas (Nos. 38 and 31 from 1227 and 1267, at 59-60 and 45-46) closely approach this result. But unsuccessful efforts toward recovery based on pleading by analogy to existing forms may be nothing more than blind alleys of legal development. See, e.g., Fifoot's discussion of experiments in the nature of actions for deceit in the evolution of *assumpsit*. C. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW—CONTRACT AND TORT* 332-34 (1949).

⁵¹ T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 370 (5th ed. 1956).

⁵² However, they have recognized the complexity of the early history of the action of trespass: "To look for a single strand to guide us from the clarity of the fourteenth century to the obscurity of the twelfth would be to mistake the nature of the problem." H. RICHARDSON & G. SAYLES, *SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY III*, at cxxviii (1941). See also *id.* cxxv-cxxvi, cxxxii.

⁵³ *THE GOVERNANCE OF MEDIAEVAL ENGLAND* 212.

held at Clarendon in the winter of 1165-1166, a series of measures for the suppression of crime and the reform of the land law appear to have been adopted and received their definitive form in a council at Northampton in 1176. It was here that the assize of novel disseisin was devised, after long hours of deliberation and not copied from a canonical model, which in fact did not exist.⁵⁴ But beyond this our authors do not attribute to the Assize of Clarendon the importance which Stubbs and his followers have given it. If Richardson and Sayles are right in their conception of the events of 1166, the Assize of Clarendon did not institute or establish the principle of the grand jury,⁵⁵ and they are certain that the eyre of 1166 proceeding under the Assize of Clarendon failed generally in its immediate purpose of insuring that its decrees would be promptly and readily obeyed.

The authors also reinterpret some other aspects of the reign of Henry II. In the preoccupation of the *Leges Edwardi Confessoris*⁵⁶ with prerogatives and privileges of the crown is found a deliberate effort to buttress the objectives and aspirations of Henry II. Though William of Newburgh's allegation that in nine years, more than a hundred unpunished murders (as well as other serious crimes) had been committed by men in holy orders is dismissed as a fabrication concocted long after the fact, our authors find clear justification for Henry's irritation with the school of thought adhered to by Becket and others that criminous clerks should not be subject to secular jurisdiction. In both volumes the juxtaposition of temperaments of Henry and Becket is scarcely that described by Anouilh or by Eliot. Henry is seen as "a difficult man to live with; a serious, studious, frugal man, at a time when frivolity, lavishness, extravagance were the means of conquering the hearts and commanding the goodwill of youth. . . . There were few contemporaries with the perspicacity to set the king's achievements above his errors and oddities, his failures and defects."⁵⁷ In our authors' view, Henry's greatest mistake was in choosing and trusting "the flashy, shallow, and egotistic Thomas Becket,"⁵⁸ a choice made by a young and inexperienced man on the reliance of the judgment of the old and experienced Archbishop Theobald.

⁵⁴ H. RICHARDSON & G. SAYLES, *SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY III*, at cxxx (1941). Our authors also purport to find early twelfth century antecedents of the basic principle underlying novel disseisin. *LAW AND LEGISLATION* 83. See also R. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL* 271-83 (1959).

⁵⁵ The major argument, though by no means the only argument, for the antiquity of the accusing jury seems to us to be the close resemblance—we had almost said the identity—between the general eyres of Henry II and those of Henry I. It is hard to believe that there was any substantial difference between the presentment and trial of criminals over the thirty or forty years that intervene The only possible alternative to our hypothesis is that under Henry I juries, sworn *ad hoc*, already represented the hundreds before the itinerant justices. That the function of presenting criminals was then performed in one way or the other, either by the *judices* or by specially sworn *juratores*, cannot reasonably be doubted.

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⁵⁶ Our authors consider this the first significant utterance on English constitutional law and date it in the early years of the reign of Henry II. See *LAW AND LEGISLATION* 37.

⁵⁷ THE GOVERNANCE OF MEDIAEVAL ENGLAND 268. The authors point out that Henry was scarcely the fashionable model of the French noble "to which Henry's sons endeavored to conform, and it may well be that in this we should see the source of their enmity with their father." *Id.* at 267-68.

⁵⁸ *Id.* at 267. The authors complain of Stubbs' characterization of Archbishop Langton as all good and John as all bad. *Id.* at 337. Here they might fall under the same sort of criticism.

An analysis of the relation of church and state during the twelfth century and the struggle for jurisdiction between Henry II and Becket is fully treated in the first volume. Our authors conclude that a sensible settlement which both canonists and laymen could accept was clearly available. But, as Gilbert Foliot reminded Henry forcibly, "Becket was not sensible." As far as the rank and file of the clergy were concerned, whether it was a secular or ecclesiastical tribunal that decided a dispute in which churchmen found themselves "mattered very little, so long as they won."⁵⁹ But however absurd the violence of the dispute with regard to criminous clerks may appear to us, it did not so appear to contemporaries. Our authors conclude that Henry's handling of the controversy compares unfavorably with John's much more astute disposition of his not very dissimilar problem with Archbishop Langton.⁶⁰ Richardson and Sayles rather blandly conclude that the Becket fracas is important merely as a test of strength between England and Rome (having some significance in the long range relationship of those powers), but, with respect to jurisdiction and its immediate effect on the shape of the criminal law, its significance has been very considerably exaggerated. The controversy did not deflect Henry "more than momentarily from his course or materially affect . . . relations between Church and State."⁶¹

Richardson and Sayles begin their discussion of the reign of John by putting right various tales and fantasies with respect to his marriages. As for John's evil reputation, it was well based and well known in his own time, despite efforts of some modern historians to rehabilitate it.⁶² But the shrewd side of his character, "which historians have recently discovered with rather naive surprise, his contemporaries took for granted."⁶³ Putting aside John's personal faults, which do not differ remarkably from those of the other actors of the late twelfth and early thirteenth centuries, "the major count against John is that he was not prudent or considerate enough to live on good terms with his barons and that he provoked them to civil war over an issue not worth armed conflict."⁶⁴ With respect to the effects of the papal interdicts under which John's, as well as Richard's, domin-

⁵⁹ LAW AND LEGISLATION 62.

⁶⁰ The authors point out that "John smothered his resentment and took his stand upon the established law, quite plainly stated in the twelfth article of the Constitutions of Clarendon, that vacant churches were to be filled with the king's assent and by the advice of those he should appoint for the purpose." LAW AND LEGISLATION 70. They go on to state that the law of 1164 for which John contended is still the law today. In the light of this statement, a related comment (*id.* at 63) that an advowson "remained until very recent years" an interest in property is puzzling. The reference is presumably to the Benefices (Suspension of Presentation) Measure, 1953, 1 & 2 Eliz. 2, No. 5, and previous measures of a like kind in 1946 and 1949 which are consolidated therein with amendments. See 33 HALSBURY'S STATUTES OF ENGLAND 47-54 (2d ed. 1953). Within the past year Magdalen College, Oxford, made an appointment of the living of Ashton Tinold upon Ashton Upthorpe, Berks.

⁶¹ THE GOVERNANCE OF MEDIAEVAL ENGLAND 268.

⁶² In reviewing, D. STENTON, ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER (1964), Richardson says that "her tenderness for . . . king [John] has sometimes led her astray." Richardson, Book Review, 75 YALE L.J. 1076 (1966). Lady Stenton is not quite as gentle in her review of LAW AND LEGISLATION, particularly with regard to our authors' handling of the pre-Conquest materials. Stenton, Book Review, 67 COLUM. L. REV. 1341 (1967).

⁶³ THE GOVERNANCE OF MEDIAEVAL ENGLAND 379.

⁶⁴ *Id.* at 394.

ions lay during much of their reigns, the treatment is full and fascinating, laying the groundwork that leads up to the events culminating in the Great Charter.

Our authors close both volumes with the discussion of the Great Charter. In spite of their other revisionist views, they are not debunkers of Magna Carta. They point out that the document is, of course, of greater political than of legal interest. They term it essentially a compromised action. The reforms that were demanded were reasonable ones, fully justified by experience, "and not the experience of the rule of John alone."⁶⁵ In the evolution of English legislative forms, the Charter earns its high place in the course of English political development because it reflected an attitude toward public affairs that was of outstanding historical significance and to which no earlier parallel can be found. The authors find as a partial cause for the changed attitude between 1174 and 1215 the personal wrongs of John, and the exploitation of oppressive customs by John, his father and his brother. But to say that the influence of Langton transferred the selfish revolt of the barons "to a higher plane . . . is against [what little] evidence" there is.⁶⁶ Our authors find a changed political climate induced by Henry II's strong central administration and a system of uniform law. The growing awareness of Roman law, they feel, also promoted an attitude toward law as a rational system, although it is as unlikely that John's opponents knew "the sources from which their political ideas were derived as modern politicians are unlikely to know the sources of political ideas they take for granted."⁶⁷

The Charter was indeed a hasty draft to meet urgent needs, and it was revised several times before it reached its final form in 1225. But because it was something out of the ordinary (a first of its kind) "it became a symbol and assumed mystic properties. It became the symbol of the rule of law, the vindication of the right of the barons to maintain the law and be consulted on changes in the law."⁶⁸ It took another century, however, for it to become integrated into the general law and to become impossible of being undone. Thus our authors close their studies of England from the Conquest to the Magna Carta, expressing the most provocative views on the legal history of that period in this century.

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⁶⁵ *Id.* at 388.

⁶⁶ *Id.* at 372.

⁶⁷ *Id.* at 373.

⁶⁸ *Id.* at 391.

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