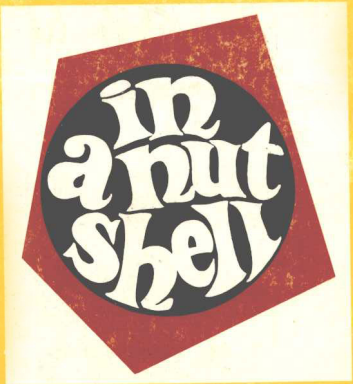
Historical introduction to Anglo-American Law



FREDERICK G. KEMPIN, JR.

HISTORICAL INTRODUCTION
TO
ANGLO-AMERICAN LAW
IN A NUTSHELL

By

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PREFACE TO THE SECOND EDITION

The first edition of this book was written to provide a short treatment of the history of the Anglo-American legal system. It developed out of a set of materials prepared for use at the University of Pennsylvania's Wharton School in 1959. In 1963 an altered version was published by Prentice-Hall, Inc., titled *Legal History: Law and Social Change*, as one volume in its Foundations of Law in a Business Society series. Each volume in that series was limited to approximately 120 pages.

After a mutually pleasant decade of association, the opportunity arose for the author to prepare a second edition for West Publishing Company as part of its Nutshell series, a series which permits more extensive treatment while stressing the goal of providing a basic, introductory treatment of each subject.

The added space was utilized in three ways. In all areas more expository material was used in the hope of fostering clarity and understanding. Second, more material was included bearing on policy, competing interests, and the interrelationship of law and other aspects of society. Third, some new subject matter was introduced. In addition, gen-

eral changes were made in all chapters, particularly those on Custom and Cases, Legislation and Codification, Real Property, and Contracts. The chapter on Torts was substantially expanded and modified.

The broad distribution of readership of the first edition among lawyers, law students, undergraduate students and others both here and abroad, and its adoption as course material in a variety of institutions, was gratifying. This experience indicates that the impressions and opinions expressed in the preface to that edition on the value of an acquaintance with Anglo-American legal history are widely shared. This encourages the hope that this new and enlarged edition will serve even better to advance the basic purpose of fostering interest in the field of legal history among lawyers, educators, students, and the public.

I express my sincere thanks and deep appreciation to those who have, personally, by letter, and in print, given me the benefit of their comments and criticisms. I trust their efforts have not entirely been in vain.

FREDERICK G. KEMPIN, JR.

January, 1973

PREFACE TO THE FIRST EDITION

This book is about the history of Anglo-American law. It assumes that the reader is only casually acquainted with either English history or the law. It tells a continued story of the development of the institutions of the law—its courts, juries, judges, and lawyers—and traces the beginnings and development of selected legal concepts such as property in land, contract, liability for injury, negotiability of commercial paper, and the business corporation.

A knowledge of legal history is essential in three areas: first, as a part of general cultural history, for law is a significant part of all cultures; second, as a necessary tool in the understanding, criticism, and assessment of the current state of the law; third, as an integrating medium in the understanding of economic, social, and political history, for each of these affects, and is affected by, the law.

Legal history can dispel many commonly held illusions about the law. One of the most common of these illusions is that the law is held in the iron bands of tradition through the doctrine of precedent. Like most errors, this one is partly fact and

partly fancy. While the law values experience more highly than logic, this grounding in reality is intended to promote desirable and orderly change, not to forestall it. Logic may presuppose unalterable truth. In the law, unalterable truth may take the form of a fixed and doctrinaire code, or the form of revealed principles of natural law. In giving second place to logic in the formulation of law, the common law denies the primacy of legal codes and hesitates to adopt the principles of natural law, not knowing who is capable of expounding them. The common law prefers to adopt as law the practical rules that experience has proved to be workable. Experience, however, is only a starting point for change. It is only one factor in the legal process. History, sociology, economics, politics, and natural-law philosophy—all have had their influence. Viewed in this way, the law's approach to its problems is not much different from the Anglo-American approach to social and economic problems in general. Rigid conformity with doctrine is alien to this society.

Two subsidiary errors stem from the basic error of overestimating conservatism of the law. The first, made by those who are suspicious of all change, is criticism of the law when it does change, on the ground that it should not. The other, a mistake made by those who desire radical change, is to criticize the law when it does not change, believing that it cannot. The first group would raise experience to the status of doctrine, an elevation leading to stagnant traditionalism. The

second group would ignore our legal heritage and perhaps lead us to unworkable utopianism. The law chooses the middle path.

Precedent, experience, and tradition provide the basis for stability but are also the starting points for change. Successive cases provide opportunities for subtle changes in the meanings of words, unnoticed alterations of approaches to analysis, and minute developments of concepts. Sometimes gradually, sometimes suddenly, it will be realized that a new legal idea has come into being.

The history of the law is one of change. Without the need for violent social revolution, the common law has adapted to changes in our social and economic structure from feudalism through mercantilism and into a modern industrial capitalistic society. It has conquered royal absolutism. It has overcome domineering judges. It has absorbed the world of business and has kept the power of money within controllable limits.

Not all of this has been done by the judges. From time to time they have needed legislative prodding in order to respond to new conditions. The common law's balance between stability and change, tradition and experiment, was too much at times for courts to maintain. This, too, is a part of legal history.

The twentieth century is not the end of legal history. It is, however, as every century before

it has been, a time for assessment and choice. In law, as in other areas of human activity and learning, three valid questions may be asked: where did it come from, where is it, and where is it going? Where law came from can be traced only through legal history; where it is, now, can be partly explained by legal history; where it is going is indicated by trends revealed in the study of legal history. It is the task of legal history to refresh the social recollection and to add criticism and analysis to basic historical information.

Frederick G. Kempin, Jr.

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PART I

THE BACKGROUND OF THE COMMON LAW

CHAPTER I

WHAT LEGAL HISTORY IS ABOUT

The law—as was said with resignation of the poor—is always with us. Some twenty centuries before the Christian Era, Hammurabi promulgated his famous code for Babylonia; and the Mosaic code of the Israelites is only eight centuries younger. Even before those ancient codes, practices and customs were the equivalent of law, if not true law in the modern sense, among primitive people. Some primitive societies in our own day are still controlled by such amorphous law.

Every legal rule, idea, or norm had its own genesis. All started somewhere and had some cause. Some came about by chance, and thought gave birth to others. Some stemmed from one man's weakness; others were the fruit of strength. Some still echo with the noise of ancient struggles; while passing time and change of custom formed some others.

Today, as ever, law pervades our lives. This is its nature, because law guides our relations with each other. It tells us how we may be punished for our crimes; it makes us pay when, by our fault, we injure others; it says what we must do if we want our promises to be enforced as contracts; it makes us pay our taxes; it requires us to take out licenses in order to engage in business, to get married, and even to practice such a pastoral pastime as the art of angling.

Every mature system of law has a long history from its inception as a system, back through its archaic and almost forgotten predecessors, to its remote origin in its primitive-law background. Our Anglo-American system of law has been relatively mature (in the sense that it has been the object of study by a separate legal profession) for the past eight hundred years. It was preceded by the archaic and almost lost legal system of the Anglo-Saxons and finds its remote origins in the laws of the Germanic tribes which settled England in the middle of the first millennium.