
BOOKS

THE MAKING OF LAW.

Law: Its Origin, Growth and Function. Being a Course of Lectures Prepared for Delivery Before the Law School of Harvard University, by James Coolidge Carter, LL. D., of the New York Bar. Published by G. P. Putnam's Sons, New York and London.

The distinguished author of these lectures, prepared for the law school of Harvard University, died soon after completing the rough draft of his manuscript and shortly before the time fixed for delivery. With only slight verbal revision the manuscript is published at his dying request and under the supervision of his partner, Lewis Cass Ledyard.

Mr. Carter's interest in the general subject of his lectures dates back to the heated controversy provoked many years ago by David Dudley Field's proposed codification of the laws of New York. Mr. Field, sought to bring the entire subject of jurisprudence within the boundaries of legislative or written law; Mr. Carter opposed Mr. Field with the contention that the written law has different functions from the unwritten, and that the former not only should not, but cannot swallow up the latter. In his will he provided a fund for the establishment in the Harvard law school of a professorship for the special cultivation of the distinctions between the provinces of the written and the unwritten law, and the manuscript of this posthumous book is his especial intellectual contribution to the same object.

The author finds that custom is the only law of society in the stages in which society is first exposed to scientific observation. Custom is traditional public opinion, passing on from one generation to another, varying with place and altering with time, and it is this that constitutes the unwritten law of a people. Individual conduct being regulated with reference to custom, disputes arise over differences of opinion regarding the custom or customs involved or their application. This necessitates the intervention of experts, judges, not to make a law for the case, but to decide with reference to the unwritten law or custom out of which the dispute arises. "Accordingly we find that the first step in the way of improving the administration of justice is to establish a tribunal for the sole purpose of determining controversies." In those early tribunals there was no written law. Judicial precedents did indeed come to be recorded and regularly followed, but precedent was simply a judicial declaration of custom, "authenticated custom," as the author calls it. Written law by de-

ree or legislation, was introduced with two objects: "to compose differences between various classes in society, and to furnish machinery by which the customary law might be more efficiently administered." From time to time it was resorted to, the better to adapt that machinery to the changing and developing wants of society; and where it was aimed directly at individual conduct it was for the purpose of securing better obedience to the customary law by public punishment of the more flagrant violations of custom, which is the office of the criminal law. Accordingly, legislation appears at first to have had nearly the same province as public law—the law governing the relation of the individual to society. Its operation on private law—the law governing the relation of individual to individual—has always been "remote and indirect and aimed only to make the unwritten law of custom more easily and certainly enforced." In this connection the author does not overlook the codifications of private law which began with Rome; but he regards these as exceptions only in name, the law enacted in such codes having existed before and having received little or no force from codification.

To existing custom, therefore, Mr. Carter assigns the standard of existing law—customs which the law condemns as bad being "really practices contrary to custom."

Proceeding then to inquire into the nature and meaning of custom and the secret of its powers, he concludes that it arose out of experiences indicating that "the square deal" makes the best game. Man learned in this way, for instance, "that he must not take the fruits of another man's labor," if he would be secure in the fruits of his own; and so the custom of private property arose. And as he discovered the beneficent results of experience in the direction of industrial specialization and social intercourse, moral sentiment began to develop. It was in soil like this that custom grew. It "is not the accidental, trivial and meaningless thing which we sometimes think it to be," but "the imperishable record of the wisdom of the illimitable past reaching back to the infancy of the race, revised, corrected, enlarged, open to all alike and read and understood by all."

At first impression it might seem that Mr. Carter regards custom so defined as the creator rather than the discoverer of moral law. Yet this quotation from page 129 suggests a philosophy more profound: "The moral nature becomes more sensitive, men become more inclined to act more and more upon motives of justice and benevolence to others." While he does not inquire "whether there is any such thing as absolute right," that question being outside the scope of his lectures, he thinks "it true that we all have a

certain feeling that there is such a thing as right in itself," and that "there is at times a real opposition" between custom and conscience. He believes, too, that in such cases it is the voice of conscience—provided it be "the true voice of conscience, and not what it is apt to be, that of ignorance, self-conceit or obstinacy"—that should be obeyed. His conclusion in this connection is that custom, however incompatible it may be with right in itself, "does in nearly every case dictate what is just, according to the common sense of justice" prevalent at the time and place in the circumstances. For customs, "being common modes of action, are the unerring evidence of common thought and belief."

Liberty is estimated by Mr. Carter as the primary condition of normal custom. By liberty he means freedom "to do what one pleases to do without any external restraint" other than what is necessary "to distinguish and separate the things which each individual may do or enjoy from the things which he may not do or enjoy without invading the equal liberty of others." One is somewhat staggered, however, upon finding that the author, as at page 342, is at a loss for an answer to the parasitical contention that if wealth were distributed among its producers equably in proportion to their production, it would "be wasted and misspent." Yet he has already answered it not only in general, with his plea for liberty, but with his statement on the preceding page that "whoever has power over his fellow men will use it in part at least for his own purpose." There are other instances of confusion when the author deals with the subject of what custom ought to be, which is not surprising, perhaps, from a man whose whole professional life was spent in contentions over what it is in its applications to individual controversies.

His summary, however, of the origin and function of law in those applications is altogether consistent. Law "begins as the product of the automatic action of society;" and is "self-created and self-existent" in custom. It is, therefore, impossible either "to make law by legislative action" or to abrogate it; for, although legislation may "reinforce custom and prevent violations of it," it will be ineffectual "if aimed against established custom." As to conduct "in plain conformity to custom, or the contrary," judgment as to right action is instantaneous and expert advice is unnecessary; but if the conduct is novel, its consequences must be deliberately considered, and in this work the study of the lawyer differs from that of other men "only in being pursued scientifically." Finally, conformity to custom being "the necessary form which human conduct assumes in social dealings, it is the only just and right form," and "no other standard can be erected over it."

BOOKS RECEIVED

—Iblis in Paradise. A Story of the Temptation. By George Roe. Published by the Henry Altemus Co., Philadelphia. 1908. Price, \$1.25.

—The Gullick Hygiene Series. Book Three. Town and City. By Frances Gullick Jewett. Published by Ginn & Company, Boston. Price 50 cents.

—The Gullick Hygiene Series. Book Five. Control of Body and Mind. Frances Gullick Jewett. Published by Ginn & Company, Boston. Price 50 cents.

—The A. B. C. of Taxation. With Boston Object Lessons, Private Property in Land, and Other Essays and Addresses. By C. B. Fillebrown, Pres. Massachusetts Single Tax League. Published by Doubleday, Page & Co., New York. 1909. Price, \$1.20 net.

—Lectures on the Industrial Revolution of the Eighteenth Century in England. Popular addresses, notes and other fragments. By the late Arnold Toynbee, Tutor of Balliol College, Oxford. New edition. Together with Reminiscences by Lord Milner. Published by Longmans, Green & Co., 39 Paternoster Row, London. Also New York, Bombay and Calcutta. Price \$1.

PERIODICALS

In Moody's Magazine (New York) for February, John Moody tells of the tobacco trust, and Arthur J. Dodge contributes a phenomenal article on "The Folly of Free Trade."

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The "Evolution of Religion From the Psychological Point of View," by Irving King of the University of Michigan, the first section of an extended study in primitive religious development, appears in the Journal of Sociology (Chicago), which also contains the third of Louis Wallis' "Biblical Sociology." (Vol. xi, p. 645.)

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Prof. John H. Wigmore, perhaps the most distinguished expert on the law of evidence in the world, contributes to the Illinois Law Review (Chicago) a unique and breezy but none the less searching criticism of Munsterberg's (p. 188) "Psychology of Crime," insofar as it proposes innovations upon existing rules of evidence.

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Under the title of "Recent Socialism," C. F. Hunt contributes to the January-February Single Tax Review (New York) a deserved and keenly pointed, but well-tempered rebuke to those socialistic caricaturists of Henry George, who seem to find more satisfaction in quarreling with friends over academic differences than in fighting the common enemy.

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Professor Kleene's paper on statistical study of causes of destitution, in the September Quarterly of the American Statistical Association, (491 Boylston