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BLACKSTONE*

W. S. HOLDSWORTH**

Two recent biographies¹ of Sir William Blackstone are a welcome and interesting proof of the fact that Blackstone is still as much (if not more) revered by the lawyers of the United States as by the lawyers of England. Necessarily both books have much in common. Both relate the necessary biographical facts, both attempt an estimate of the *Commentaries* and of Blackstone's other writings, and both give accounts of the influence of the *Commentaries* in the United States. But the method of approach and the manner in which the story of Blackstone's life and achievement are told are very different. Of the two I think that Mr. Lockmiller's biography is the better for reasons which I shall now give. I propose to say something, first of Mr. Lockmiller's book, secondly of Mr. Warden's book, and thirdly of my own view of Blackstone's achievement.

MR. LOCKMILLER'S BOOK

In my opinion Mr. Lockmiller gives a good, straightforward account of Blackstone's life and achievement. In his ninth chapter he gives a useful summary of the *Commentaries*. He considers that the second Book, and more especially the part dealing with real property, is the best part of the whole treatise. No doubt Blackstone's account of the old law of real property, as it was in the eighteenth century, is classical; but I think that his treatment of other branches of the law, notably his account of the common law system of pleading in Book III, is equally classical. When dealing with Bentham and other critics of Blackstone I think that Mr. Lockmiller is quite right when he says (p. 165) that, though Blackstone did not claim to be a legal reformer "the blackest charges that he opposed change and that he was ignorant of the reforms being made by Mansfield and others will not bear close scrutiny". As a general rule Mr. Lockmiller's work is accurate; but in the following instances he seems to me to have fallen into error:

At pp. 12-13 it should have been noted that, in the course of the fourteenth century, the serjeants at law ceased to be members of the

* Though originally intended as a book review, at the request of the editors this manuscript was extended somewhat in its scope. Its merit as a contribution to periodical literature on legal history prompted its inclusion as an article rather than a review.—Ed.

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¹ *Sir William Blackstone*. By David A. Lockmiller. Chapel Hill: The University of North Carolina Press. 1938. Pp. 280. \$3.00. *The Life of Blackstone*. By Lewis C. Warden. Charlottesville: The Michie Company. 1938. Pp. xiv, 451. \$5.00.

Inns of Court. When a barrister became a serjeant he left his Inn of Court, and became a member of one of the Serjeants' Inns. Consequently it is not correct to say (p. 14) that the Readings at the Inns were given by "select serjeants". They were given by the senior barristers who were generally made Benchers just before or just after they had read. Codrington left to All Souls, not £50,000 (p. 26), but £10,000. I think it is quite clear from the date of Viner's will that the success of Blackstone's lectures had nothing to do with Viner's bequest, nor is there any evidence for Mr. Lockmiller's statement (p. 45) that he desired Blackstone to be the first Vinerian professor.² New Inn Hall was one of the Halls, *i.e.*, the lesser colleges, of the University of Oxford. It had no connection with the London Inns of Chancery which were appendages of the Inns of Court. It is therefore wrong to call New Inn Hall "a chancery Inn" (p. 48). There was an Inn of Chancery called New Inn, but it had nothing to do with New Inn Hall. At pp. 55-57 Mr. Lockmiller has not quite clearly grasped the point of the controversy as to the right of certain copyholders to vote for members of Parliament. The copyholders in question were not copyholders pure and simple. They were tenants in ancient demesne, who had some of the characteristics of copyholders in that they held according to custom of the manor and conveyed their tenements by surrender and admittance, and some of the characteristics of freeholders, in that they did not hold at the will of the lord. They were as Blackstone said a *tertium quid*, and hence the doubt as to their right to vote. It should have been noted (p. 59) that Blackstone (unlike Burke) did not approve of the rotten boroughs.³ Wilmot was not (p. 83) Lord Chief Justice of England—there was no such title in those days: he was Chief Justice of the Court of Common Pleas. I have noted two misprints: p. 17 n. the Chief Justice referred to was Lord Reading not Redding, and p. 73 n. the famous architect was Inigo, not Indigo, Jones.

But these are minor errors. I think that Mr. Lockmiller's book is a worthy memorial to the great man who did more than any other single person to create, as between the United States and England, the all important link of common legal principles.

MR. WARDEN'S BOOK

Mr. Warden has put a great deal of work into his book. He tells us that he has read over two thousand books, papers, magazines, and manuscripts. One of these manuscripts, which he prints for the first time at pp. 58-61, is a most interesting letter written by Blackstone to a

² 12 HOLDSWORTH, HISTORY OF ENGLISH LAW (1938) 92-93.

³ 1 BL. COMM. *172, *174.

Mr. Richmond. But I think that in too many cases Mr. Warden has used his reading to introduce matters which are irrelevant—*e.g.*, it is difficult to see the relevancy of his description at pp. 404-406 of the death of Socrates to his account of the death of Blackstone, or the relevancy of his introduction of the parable of the prodigal son (p. 172) to his account of Blackstone's return to practice in London.

This failing is partly due to Mr. Warden's desire to use "the most picturesque style that I could call to my use". It has led him to introduce descriptions into his narrative, and to impute motives for which there is no or at best dubious authority, with the result that his book sometimes reads like one of those unsatisfactory biographies which are half historical novel and half history. Why, for instance, is it necessary to describe Cheapside, and the weather experienced there on the day of Blackstone's birth? What is meant by the statement (p. 32) that by the time Blackstone got to Oxford he had outgrown Milton? What evidence is there for the statement at p. 43 that a study of *The Doctor and Student* caused Blackstone to adopt the profession of the law? At p. 200 Mr. Warden says that "some have said" that Blackstone did not decide to publish his *Commentaries* till "he learned that pirates were selling pirated editions of his lectures". The fact is that Blackstone himself says that he published them because he feared that a pirated edition would be published. At pp. 257 and 362 Gilbert's famous lines in *Iolanthe* about the law being the "embodiment of everything that's excellent" are imputed to Lord Mansfield! At p. 66 we are told that Blackstone was "dull and sullen in appearance" and "very seldom did he smile": at p. 243 that "he was known upon the most inauspicious occasions to bubble over with wise and facetious remarks, especially in his class rooms". At p. 70 we are told that Blackstone "turned to drinking" as the result apparently (p. 108) of an unsuccessful love affair with a lady he met at one of Lord Mansfield's parties—what the evidence for the party and the love affair is I don't know; but at p. 196 we are told that "Blackstone did not grow fond of drink till long in the afternoon of life". All this is in the face of Sir William Scott's statement that Blackstone was a sober man. What is the evidence for the surprising statement (p. ix) that more copies of the *Commentaries* were sold in France than in England?—more especially as Mr. Warden says at p. 270 that seventy editions were sold in English and fifty-six in French. Why is London always called the "White City"? But the most astounding of Mr. Warden's statements is the following at p. 257: "the fact remains, however, that Blackstone was too much of a poet to be a legal writer, for though he wrote as a scholar and a gentleman he did not feel himself bound to accuracy and truth" (and see also a

similar statement at p. 277). Are we to suppose that the verdicts of the great English lawyers of Blackstone's day and later, and the verdicts of the great American lawyers, which Mr. Warden has cited, were all mistaken? Is it to be supposed that a book devoid of accuracy and truth could have exercised the great influence which Mr. Warden admits that it has exercised on the development of American law?

Unfortunately Mr. Warden's ignorance of the details of Oxford life, and of the details of the law and the legal profession have caused him to make a further series of mistakes.

First, mistakes as to the details of Oxford life. We are told at p. 52 that "Blackstone decided to enter All Souls". Then, as now, no one could decide to enter All Souls. He can only enter All Souls if he is elected a fellow by the existing fellows; and he will only be elected if he proves himself to be the most intellectually distinguished of the candidates for a fellowship. We are told at p. 56 that if Blackstone "wanted to delve deeply into legal lore" he must go back to Oxford. At that date the Inns of Court had libraries which were quite as fully stocked as the library at All Souls. At p. 99 we are told that Blackstone held at All Souls the impossible post of "Bursar of Laws"; and at pp. 99-100 that he took "several courses pertaining to design"—a remark which seems to confuse the educational arrangements at eighteenth century Oxford with those at a modern American University. At p. 156 there is a confusion between the University of Oxford and the College of All Souls. On the same page there is an imaginative account of the attendances at Blackstone's first and subsequent lectures for which there is no evidence.

Secondly, mistakes as to the details of the law and the legal profession. It is not true to say, as Mr. Warden says at p. 152 and elsewhere, that English law was "codified" by Edward I, if by the term "codified" is meant completely stated in statutory form. The statement at p. 158 that Viner "virtually made Blackstone his heir" because he was impressed by Blackstone's lectures is, as I have already pointed out, not true. What evidence is there for the statement that the Vice-Chancellor of Oxford University caused Blackstone's introductory lecture to be read "in all the public schools in England"? The Coif was not, as Mr. Warden states at p. 175, a "London Lawyers' club". The order of the Coif was the order of the serjeants-at-law; and the serjeants-at-law were, till the rise of the order of King's Counsel, the leading rank in the legal profession. They became members of that order by royal appointment, and it was from their members that the Bench was recruited. Blackstone was never a King's Counsel. The fact that he had a patent of precedence did not, as Mr. Warden states

at p. 175, make him a King's Counsel—in fact this is clear from his patent which is printed at p. 176. When a lawyer is raised to the Bench he is not raised to the woolsack (pp. 228, 349). To attain the woolsack is to become Lord Chancellor. The term "Bencher" does not mean, as Mr. Warden seems to think (p. 365), the occupants of the Bench, *i.e.*, the judges: it means the governing body of the Inns of Court. In fact in Blackstone's day a Bencher could not become a judge, since to become a judge a lawyer must first become a serjeant-at-law; and when a lawyer became a serjeant-at-law he left his Inn of Court, and ceased to be a Bencher. Blackstone was not, as Mr. Warden seems to think, a blind copyist of Montesquieu.⁴ It is not true to say (p. 308) that Blackstone thought that the "representative system was practically perfect".⁵ At p. 357 n. 8 the rule in *Shelley's Case* is inaccurately stated. At p. 369 the reason for the rule which excluded the parties to an action from giving evidence is also inaccurately stated.

Mr. Warden's book gives his readers information as to the main facts of Blackstone's life; and I think that when he says at p. 253 that we owe the *Commentaries* to some of Blackstone's misfortunes—to his early failure to get a practice in London, and to his failure to become regius professor of Civil Law, he is right. But Mr. Warden has so embroidered the facts of Blackstone's life with his own imaginative speculations that it is difficult for an unlearned reader to see the point at which fact ends and speculation begins. No doubt an historian or a biographer should possess imagination; but it must be an instructed and a disciplined imagination. If it is not, it leads, as this book only too plainly shows, to the making of statements which are sometimes erroneous and sometimes inconsistent, and to judgments upon motives and actions which are not borne out by the evidence.

MY OWN VIEW OF BLACKSTONE'S ACHIEVEMENT

I have already expressed at some length my own view of Blackstone and his *Commentaries*.⁶ I shall therefore at this point merely summarize what I have there said; and in conclusion I shall say something of the reasons why Blackstone's reputation and influence have been greater and more permanent in the United States than they have been in England.

The reasons why the *Commentaries* were, from their first appearance, regarded as a classic, are as follows: (1) They were almost the only English law book which could be classed as literature. When they first appeared Gibbon described them as "a rational system of English

⁴ 12 HOLDSWORTH, HISTORY OF ENGLISH LAW (1938) 734-735.

⁵ 1 BL. COMM. *172, *174.

⁶ 12 HOLDSWORTH, HISTORY OF ENGLISH LAW (1938) 702-737.

Jurisprudence, digested into a natural method, and cleared of all the pedantry, the obscurity, and the superfluities, which rendered it the unknown horror of men of taste". Bentham's praise of their literary style is well known. (2) As Dicey has pointed out, the excellence of Blackstone's style is seconded by great literary tact—"he selected for special exposition topics which are at once interesting and important, and thus has enlisted the attention of one generation after another of charmed readers". (3) The *Commentaries* are a very accurate account of the law of Blackstone's day. Hammond, the most learned of all the American editors of Blackstone, says that the *Commentaries* are "one of the few books upon any subject in which the reader will see fuller meaning and more precision of statement in exact proportion with the knowledge of the subject which he himself brings to the reading". (4) Both Lord Campbell and Maitland have emphasized the completeness of the *Commentaries*. Blackstone, like Bracton five hundred years earlier, gives us one of the very few complete statements ever made of the law of England; and both Fitz-James Stephen and Professor Lévy-Ullmann consider that this quality of completeness is unique not only in the English, but also in the foreign, legal literature of the eighteenth century.

These were the qualities which gave the *Commentaries* their great reputation and their great influence in England and the United States. But in England, in the middle years of the nineteenth century, their influence declined, because they were made the target of criticisms which caused many lawyers to under-value them. The reason for this phenomenon is the growth of the influence of Bentham and his school. Bentham tells us that his hostility to Blackstone dated from the years 1763-64 when, at the age of sixteen, he had listened to Blackstone's lectures at Oxford. His hostility became more bitter as he grew older, and as he exchanged his former conservative political outlook for the political outlook of an advanced radical. It became a sort of obsession, which caused him to descend to abuse which was scurrilous; and his example was followed by his followers and notably by his disciple Austin, who even went so far as to deny the merits of Blackstone's literary style. Bentham's criticisms are the reasons for the very exaggerated views held by many as to Blackstone's optimism and conservatism, and as to his weakness as a political and jurisprudential thinker.

But why did the criticism of Bentham and his school have so great an effect upon Blackstone's reputation? The reason is due partly to the condition of England at the end of the eighteenth and the beginning of the nineteenth centuries, and partly to the abilities of Bentham and his school.

At the end of the eighteenth and the beginning of the nineteenth centuries changing economic and social conditions demanded large reforms in English law. This fact was recognized by statesmen like Shelburne, by thinkers like Gibbon, and by a few lawyers. But for the making of these large reforms some guiding principle was needed. Bentham supplied that principle—the principle of utility, the greatest happiness of the greatest number. The opening words of one of his earliest works, *An Introduction to the Principles of Morals and Legislation*, are: "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire; but in reality he will remain subject to it all the while. The *principle of utility* recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law." This principle Bentham spent his life in applying to all existing legal institutions and rules of law, and in advocating the reforms which the application of this principle suggested.

It was no new principle—it had been stated by Hume and Paley and Priestley: What was new was Bentham's thorough and detailed application of the principle to law and legal institutions, and the number of practical measures of reform which he proposed and justified by its detailed application. That the principle and its detailed application gained an increasing measure of acceptance after the close of the Napoleonic wars is no doubt largely due to the needs of the time; but the fact that the reforms took the shape which they took in the nineteenth century is due to Bentham and his school. That Bentham's influence was so great is due, primarily to his intellectual power, to his amazing industry, and to the consistency and logical force with which he worked out the implications of his theory and applied them to the reform of the law. But it was also due to three pieces of good fortune. First, his long and healthy life, and the fact that he had an inherited income, enabled him to give his whole time to his work over a long series of years. Secondly, he founded a school of enthusiastic admirers, such as Dumont, James Mill, and J. S. Mill, who reduced his scattered manuscripts to order and published them to the world; and those admirers, under the leadership of James Mill, formed a school of philosophic radicals whose literary and Parliamentary activities

helped forward the reforms which he advocated. Thirdly, his suggestions for reform were worked up into practical shape by practical lawyers and statesmen—by such men as Romilly, Mackintosh, and Brougham. The result was that the principles underlying the reforming legislation of the nineteenth century were largely shaped by Bentham.

It was inevitable that as Bentham's star rose Blackstone's should decline. Blackstone was the representative of the static eighteenth century: Bentham of the age of reform. Blackstone represented the school of eighteenth century lawyers and statesmen who were proud, and justly proud, of the law and constitution of England which, as the one free constitution in Europe, had won the praise of such representative foreigners as Montesquieu and Voltaire. They were not averse to reform; but they were conservative reformers, for they would have agreed with Horace Walpole's dictum that "There is a wide difference between correcting abuses and removing landmarks." And because Blackstone was a typical representative of this school, he used his legal and historical learning, and his literary skill to explain and justify many of those rules of law, which, when tested by the principle of utility, were proved to be unsuited for the needs of the day. It is easy therefore to understand why the philosophic radicals and the analytical jurists of Bentham's school despised and undervalued Blackstone's work. But, when the reformers of this school had done their work, the narrowness of their philosophy began to appear. Human nature and the laws which regulate human activity cannot be explained or regulated on any one principle or set of principles, and therefore they cannot be treated, as Bentham and his followers thought they could be treated, as if they were exact sciences, on a par with such sciences as chemistry or mathematics. The Darwinian hypothesis suggested that human activities and the laws which governed them were the product of an evolution which could not be understood without a study of their history,—without, that is, the use of the method which Blackstone had employed to explain the law of England; for in his inaugural lecture he had emphasized the need for the study of legal history; and it is to the use which he made of legal history that the *Commentaries* owe much of their excellence. And so the rise of the historical school of jurists, associated with such men as Maine, Vinogradoff, Maitland, Pollock, Holmes, Ames, Thayer, and Wigmore, has done much to restore Blackstone's fame, by correcting the unfair criticism of those followers of Bentham who were unable to understand how any one could honestly adopt a philosophy other than their own.

It would appear from these two biographies of Blackstone that his reputation, so far from experiencing this setback in the United States,

continued to grow all through the nineteenth century. One reason for the continuous growth of his fame in the United States is no doubt that stated by Mr. Lockmiller (at p. 183). He says: "In England, Blackstone was only one of that galaxy of great lawyers which included such men as Hardwicke, Wilmot, Mansfield, Thurlow, and Eldon; but in the United States, where the *Commentaries* represented the man, he was almost without peer, and the distance of the Atlantic tended to obscure the fame of greater lawyers." But I think that the main reasons for the continuous fame of Blackstone in the United States were partly the fact that Bentham and his school of philosophical radicals never had the influence in the United States that they had in England, and partly the fact that the federal form of the Constitution of the United States does not, for good or ill, permit sweeping reforms with the same ease as in England. However that may be, it is entirely fitting that the two first full length biographies of Blackstone should be written by the lawyers of a country which has never ceased to admire his work.