A HISTORY OF ENGLISH LAW, VOL. XIV. By Sir William Holdsworth, O.M., K.C., D.C.L., LL.D. Edited by A. L. Goodhart, K.B.E., Q.C., D.C.L., LL.D. and H. G. Hanbury, Q.C., D.C.L. [London: Methuen & Co., Ltd. and Sweet and Maxwell. 1964. xxxv + 403 pp. £4.4s. Od.]

It is an extremely difficult task even to attempt to review *Holdsworth* simply because it is difficult to know just what *Holdsworth* is. Ostensibly it is a history of English law from Anglo-Saxon times down to the Judicature Acts which, according to the current publisher's announcement, is to be published in sixteen volumes. To attempt to review sixteen volumes — or even the fourteen which have been published so far — would be like attempting to review *Halsbury* or even the *Encyclopaedia Britannica.* Indeed in one sense it would be even more difficult, for *Holdsworth* is an extremely complex work. The first edition of the first volume was published in 1903, and had already reached its seventh edition by 1956. Other volumes have run through various editions over the course of the years, and not even Holdsworth's death in 1946 stemmed the tide. The seventh edition of the first volume, of course, appeared after Holdsworth's death, as did the thirteenth volume and, of course, the volume under review. Thus far then the publication of the work has occupied more than sixty years, and today, fifteen years after the author's death, is still proceeding. The publication of the work is thus itself part of English legal history, and is an extraordinary monument to the single minded industry of its author and to the devotion of his literary executors: but one does not attempt to review a monument.

To review the fourteenth volume in isolation, however, is equally difficult, for in this volume we have but one third of the fifth chapter of the fifth book of the work as a whole; and to review but part of a chapter is a difficult, if not perilous task. This volume, and the two succeeding volumes — which will constitute chapter five — are concerned with the history of English law from 1832 to 1875, and if the editors' estimate of the size of the succeeding volumes is correct, chapter five, as a whole, will occupy some one thousand pages: one thousand pages devoted to the history of English law over a period of 43 years — an average of just over 23 pages per year. The present volume is devoted to the history of 'public law' during this period, considered under three main headings: 'central government', 'local government' and 'the colonies'.

It should be stressed, however, that the limitations of the volume as regards subject-matter and period should not be taken over-seriously. Thus, although in general the volume is limited to what most readers would regard as 'public law', it also contains Holdsworth' s account of the history of arbitration in English law (pp. 187-198), under the general heading 'central government' and sub-heading 'the courts'. Again, although the volume is ostensibly concerned with the history of English public law from 1832 to 1875, the cases cited range from the Yearbooks of Edward III (1371) to 1950, whilst the statutes cited cover the period from 1215 to 1958. Indeed of all the cases cited it would appear that nearly two-thirds were decided before or after the period with which the volume is supposed to be concerned, whilst of the statutes cited nearly one third were passed either before or

after that period. For an historical work this is very heavy reliance upon authorities from outside the period to be covered.

This particular fact, however, merely highlights what seems to be one of the more remarkable features of the volume, namely, that neither Holdsworth, nor his learned editors, seem to have been very clear whether they were writing law or history. The learned editors seem to be particularly confused on this point. They write in their preface (p. *v*):

> The volume ends with a review of the empire. Much of it is, of course, now out of date, but to the legal historian it is indispensible, and all has been preserved, excepting only the relations between the British Government and the Indian States. Valuable as his account was, it ceased to have much bearing on the modern situation when the last of the States 'acceded' to India or Pakistan.

It is surely a most curious view of history that can speak of primary material as being 'out of date' and which can even justify the deletion of such material on the ground that it has 'no bearing on the modern situation'. The learned editors are, however, even more explicit in the text itself. They thus comment, (p. 341) that Holdsworth's account of the relations between the Paramount Power and the States in India 'belong entirely to the old order of things' and state that 'such speculations have, from the standpoint of contemporary jurisprudence, to a large extent lost their utility'. But what, one may surely ask, is the 'standpoint of contemporary jurisprudence' doing in an historical work? Speculations as to, say, the jurisdiction of the hundred courts surely also belongs to the 'old order of things' and certainly have little utility from the 'standpoint of contemporary jurisprudence': are these then also to be deleted from the scope of legal history? If only things which were of utility from this standpoint were to be included, then courses in and textbooks of legal history would radically change their aspect. Such an attitude, it is submitted, betokens considerable confusion of thought.

It is, however, presumably this confusion which has led the learned editors to attempt to bring the text 'up to date'. Thus on page 152 the learned editors add, in a footnote to Holdsworth's discussion of the House of Lords, a reference to both the Parliament Act 1949 and the Life Peerages Act 1958, whilst on page 249 they add a reference to the Law Reform (Limitation of Actions) Act 1954, although what this has to do with the history of English law between 1832 and 1875 is not made clear. In the section dealing with the 'colonies' the learned editors have been most anxious to keep the reader up to date with the latest developments. We are thus told, on pages 268 and 332 that India and Pakistan became dominions in 1947; on page 270 that the Federation of the West Indies was formed in 1958 and dissolved in 1962; on page 274 that South Africa left the Commonwealth in 1961; on page 342 that Newfoundland joined the Dominion of Canada in 1949, that Ceylon became a dominion in 1947 and that Burma left the Commonwealth in the same year. This information is doubtless very interesting but its relevance to the history of English law between 1832 and 1875 remains mysterious.

If, however, despite its dubious relevance, this type of annotation is to be attempted then surely it should be done systematically and comprehensively. If we are to be told that in 1946 the descendents of Raja Brooke ceded their rights over Sarawak to the Crown (p. 434) then surely we should also be told about the disbandment of the Straits Settlements, the formation of the Malayan Union and later of the Federation of Malaya. Again, if this type of annotation is to be undertaken then surely the reader should be referred to more authoritative sources in relation to these developments than the eighth edition of Ridge's *Constitutional Law*. It is, we would submit, dubious whether such annotation should be attempted at all, but if it is to be done then it might as well be done thoroughly.

The attitude of the learned editors, however, is no more than a reflection of that of Holdsworth himself, because for Holdsworth also it would appear that the line between law and history was, to say the least, very blurred. Thus Holdsworth's discussion of 'the relations of English law to international law' reads more like a law review article on the present state of the law relating to this topic than an account of the history of this topic during the period 1832 to 1875. This is perhaps not surprising since it was originally published as a law review article in 1941. Much the same comment can also be made with regard to that section of the book which

is concerned with 'the history of Acts of State in English law' (pp. 33-52) which reads like a piece of legal exposition rather than a piece of legal history.

There are occasions on which Holdsworth remembers that he is writing history and not law and that he is concerned with the period between 1832 and 1875, as on page 128 where he wrote:

> The story of how the education department organized elementary education and in the last year of the century became a separate board of education, is outside the scope of this history.

but such moments are rare, and in general it seems to be true that Holdsworth does not distinguish at all carefully between the writing of history and the writing of law: Indeed on occasions he so far forgets this distinction as to enter into contemporary controversy. Thus discussing civil service recruitment (pp. 134-6) he puts forward his own suggestions as to the mode of selection that should be adopted, and the learned editors dutifully inform us, in a footnote, that subsequently the method of selection was changed along the lines which Holdsworth had suggested. In his discussion of the House of Lords (pp. 150-2) it is difficult to distinguish between Holdsworth the lawyer, Holdsworth the historian and Holdsworth the polemicist: he seems to be as much concerned with defending the House of Lords as an institution as he is with discussing its history. Again, in his discussion of the 'rule of law' (pp. 202-4) he enters into a criticism of the views of writers such as Sir Ivor Jennings and Professor Wade all of which seems very remote from the legal history of the nineteenth century.

What, it is submitted, that this demonstrates all too clearly is simply how perilously easy it is for lawyers to commit the 'Whig fallacy' when they attempt to write legal history: the fallacy which arises when the past is studied with reference to the present. As Butterfield has put it: 'the whig historian stands on the summit of the 20th century, and organises his scheme of history from the point of view of his own day', from which viewpoint Butterfield adds, he sees the course of history 'only inverted and aslant'.

Maitland, in his inaugural lecture, had made much the same point when he stated that:

> a mixture of legal dogma and legal history is in general an unsatisfactory compound.

but Holdsworth does the very thing about which Maitland, on that occasion, complained; he is mixing the logic of evidence with the logic of authority. Indeed so far is Holdsworth from appreciating the significance of this distinction that, on another occasion — his Tagore lectures — he gave a most surprising account of Maitland's genius. On that occasion Holdsworth stated that one of the things which gave to Maitland's work the stamp of genius was that, because he was a learned lawyer, 'he knew the end of the story', and he added:

> If a legal historian does not know the end of the story he is apt to waste his time on relating the history of rules which did not survive, of tendencies which were never realized, of institutions which failed. He is in danger of becoming a mere antiquarian.

There has surely never been a clearer and more explicit assertion of the attitude which lies behind the Whig fallacy, nor a more misleading assessment of the factors which gave to Maitland's work the authentic stamp of genius. If Maitland's genius lay anywhere it lay in the fact that although he knew the 'end of the story' he never allowed this knowledge to distort his view of the past.

It is not at all clear what is the conception of history which emerges from Holdsworth's pages, beyond that of merely recording, in some sort of chronological sequence, the events of legislative and judicial history. Indeed at times Holdsworth's text degenerates into a mere list of either events or of the provisions of some statute. This is particularly noticeable in his treatment of local government and of the

colonies. With regard to the latter he wrote (p. 259):

> Since I am writing a history of English law, and not a history of the British Empire, I shall not attempt to outline the history of, or even attempt to enumerate all the territories comprised in it.

Nevertheless, there are passages of which the following is but an example (p. 278) :

> Gibralter is essentially a military post, and is governed by a Governor and a supreme court. The island of Ascension was governed by the Admiralty. St. Helena, which was taken over from the East India Company in 1833, is governed by a Governor and an executive council. The Falkland Islands which were ceded by Spain in 1777, and became a colony in 1833 are governed by a Governor, an executive council and a nominated legislative council. Malta, like Gibralta, is important as a military post. It was therefore at first governed by a military governor and a chief secretary. It acquired a nominated legislative council in 1835, and in 1847 it was provided that eight of its eighteen members should be elected.

This is little more than a collection of facts thrown together with very little consideration for the problems of historical writing: it is chronicle not history. It also illustrates, however, further confusion as to whether we are reading law or history. Gibralter, Holdsworth tells us, 'is' governed by a Governor and a supreme court, to which statement the learned editors have added a footnote to the effect that it 'now' has a legislative council with an elected majority. The learned editors' 'now' presumably refers to the date of publication of the book (1964) but to what date does Holdsworth's 'is' refer?

Again Holdsworth sometimes merely summarises the provisions of a statute irrespective of whether the details that he records have any significance for the history of English law. Thus speaking of the Metropolis Management Act 1855 he wrote (p. 242):

> The Act regulated the constitution and procedure of all these bodies, gave them power to appoint officers, powers to levy a rate, and powers to borrow money. The vestries and district boards were given power to regulate drainage and sanitation, the paving, lighting and cleansing of the streets, the paving of new streets, the construction of buildings, the collection of refuse, the removal of nuisances. The Metropolitan Board of Works was given powers to regulate the main sewers by vestries and district boards, to name streets and number houses, to widen and improve streets, to make bye-laws, to hear appeals against the orders of vestries and district boards as to the construction and repair of buildings or drains.

This can hardly be regarded as historical writing of a very high order. Facts possess significance only when placed within their context; only when they form an integral part of the story as a whole. To be merely recorded as part of the precis of a statute without even being related to their antecedents is virtually to deprive them of any significance at all, and if they are to be thus deprived of significance it is difficult to see why they should even be recorded.

This sort of precis, moreover, which attempts no sort of selection, and which attaches to every fact an equal weight, can at times be very misleading. Thus Holdsworth refers to the provision in the 1828 Act which applied a statutory reception of English law in New South Wales and Van Diemen's land in the same breath as the provision in the same Act under which the number of members of the Governor's Council could be increased; and there is no suggestion that possibly the former is a vital provision in the history of the expansion of the common law, whilst the latter is a very trivial fact in the history of the New South Wales constitution.

All these points must be accounted weaknesses in any volume or series of volumes entitled 'A History of English Law', but it would be false to assume from the fact that Holdsworth's work is not great history that therefore it is without significance. Holdsworth's volumes remain one of the great achievements of English legal writing, and despite its title, it is as legal and not as historical writing that Holdsworth's work must be judged.

If the history of English law is ever written the path of the historian who does so will have been made immeasurably easier by the fact that Holdsworth had written his sixteen volumes. Holdsworth's volumes will become — indeed already are — the almost inevitable starting point for research into the history of English law, and it is as a starting point for research that these volumes have their greatest significance. It is for this reason that it is good to learn that with the publication of the sixteenth volume the earlier volumes will be re-issued together with a new consolidated index to the work as a whole.

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