

Review Article

Passing Judgment: Legal Writing in the 80s

by H.T. HOLMAN

Law & Justice in a New Land. LOUIS KNAFLA ed. Toronto: Carswell, 1986. xv, 379 p. ISBN 0-459-38110-5 \$52.00.

The Case of Valentine Shortis. MARTIN LAWRENCE FRIEDLAND. Toronto: University of Toronto Press, 1986. xi, 324 p. ISBN 0-8020-2606-0 \$24.95.

Mr. Attorney. The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899. PAUL ROMNEY. Toronto: University of Toronto Press, 1986. xiii, 396 p. ISBN 0-8020-3431-4 \$45.00.

Manners, Morals & Mayhem. DAVID BELL ed. Fredericton: Public Legal Information Services, 1985. vi, 105 p. ISBN 0-920114-61-X \$8.95.

Legal records provide one of the paradoxes of the archival world. While such records constitute the largest collections of material in many Canadian archives, they are probably the least utilized. In fact few archives have anything but minimal control over these huge collections, and most have tried merely to utilize whatever order these collections had at the time of their transfer to the institution. This has resulted in a very limited appreciation of the contents of the dockets, judge's bench books, minute books, ledgers, and, most of all, case files in these collections. It is only in the last few years that any serious attention has been paid to the legal holdings of archives. While the number of volumes published concerning legal history has risen considerably in the 1980s, the expectations by archivists that a growing interest in legal history would result in extensive use of legal collections have been, by and large, unfulfilled.

Chief among the reasons for this disappointment has been a great divergence of opinion about just what constitutes "legal history." In the first half of the twentieth century, Canadian legal history consisted in great measure of anecdotal information gathered by retired judges, or else the detailed analysis of the written decisions made by the courts of the land. The latter type of writing is still with us, and the contents of most

university law journals and the *Canadian Bar Review* consist of this re-reading of the entrails of legal judgments as set down in the written decisions of those who made them. This analysis does provide us with a sort of history of legal thought, or at least of judicial thought, but ends up being a one-dimensional history with all but the lawyers and judges left out.

Rather than writing of law as it flowed from the Crown through the legal system down to the subjects, recent British and American studies have reversed the analysis and have studied the impact of the law on those most affected by it. E.P. Thompson's *Whigs and Hunters* and the essays of Douglas Hay and others in *Albion's Fatal Tree* have turned attention away from the narrow examination of the pronouncements of the wigged judges, and towards those facing the bench as either defendants or complainants. In a slightly different way, the emerging American tradition of legal history, marked by the study of the effect of commercial interests on the law (pioneered by W.W. Hurst), and of the economic and social basis of many legal decisions (studied by Morton Horwitz in *The Transformation of American Law*), has also turned attention in recent years to the economic and social context of legal affairs.

In Canada, a good deal of enthusiasm was generated by the publication, in 1981 and 1983, of two volumes of *Essays in the History of Canadian Law*, edited by David H. Flaherty. Many of the writers in the volumes attempted a transfer of some of the themes in the British and American writing to a Canadian context, and while not all essays were successful they did demonstrate just how much had been lacking in earlier writing on legal history. Unfortunately not all of the work that has followed these volumes has been of the same quality. While much of the recently-published writing (a history of the Supreme Court and biographical examinations of leading judicial figures such as John Beverly Robinson and Lyman Poore Duff) has provided the necessary groundwork, it is not markedly different, except in terms of quality of writing and research, from much of what was written before 1980.

Several volumes published in the last two years are noted here and it is useful to compare them because they show that, rather than moving towards a unified view of legal history, writing on the subject retains several distinct forms.

A small volume intended as a "popular" history of the law in New Brunswick shows that legal history has indeed garnered some respectability. Published as a bicentennial project, *Manners, Morals & Mayhem* is the type of volume that ten years ago would have been the pet project of a retired judge. Instead, under the editorship of historian and lawyer David Bell, the thoroughly-researched and well-written chapters provide an overview of some of the legal problems faced by the province in the last two hundred years. While stressing the more noteworthy legal incidents in the history of the colony, the slim volume is far from being a litany of murders and duels. Most of the sections are really too short to be more than an introduction, but the range of subjects is ambitious: pauperism and poor relief, family law, the legal profession, religious freedom, slavery, liquor and the law, and several others. Several entries in the volume's bibliography serve as a reminder that not all legal history can be segregated from other types of history, and we are reminded that recent articles on hydro-electric power, transit strikes, and the treatment of the mentally ill all have a significant legal component. It is refreshing to note that even in a volume intended for popular consumption most footnote references are to original material and indicate that a large amount of research has been undertaken, notwithstanding the limited purpose of the project.

Paul Romney's *Mr Attorney* is a much more substantial and ambitious work but, like the New Brunswick volume, it was also a bicentennial project. Commissioned by the Ministry of the Attorney General for Ontario for publication in 1984, the volume is unfortunately not a comprehensive history of the office, owing to time constraints. Possibly because it is such an ambitious project, it is not as successful a volume as some of the others noted here.

Although the office of the Attorney General has become an institution, it cannot be easily separated from the individuals who held that office until the twentieth century. The history of the office becomes the history of a series of individuals, but only for the period during which they held the office, and there is a great danger of losing the biographical context when dealing only with one period of a person's life. P.B. Waite, writing about J.S.D. Thompson's career as Attorney General of Nova Scotia, discusses the "penumbra of mystery" surrounding the office and while Romney ably reveals the individuals, he is less successful in dealing with the office.

While Romney states that the historical importance of the office of the Attorney General can be understood only in the context of the social values of the colony, he is not always successful in transmitting this social background, especially when dealing with the period after 1860.

Because the volume is not a definitive history, it is somewhat episodic in its organization. The problems are compounded by the legal, social, and political interaction which is the subject of the book. While the relationship of the early attorneys general to the political process was important, it was at least understandable. By the 1850s the position was becoming a job as well as a political position; not wishing to re-tell the story of Upper Canadian and Ontario politics for the last fifty years of the century, Romney assumes that the reader has complete knowledge of just what these attorneys are doing when they are not wearing their hats as chief legal officer.

Yet the limited biographical approach, which does not appear to succeed in some parts of the book, is most successful in others. Romney has used almost a third of the volume to examine the remarkable career of Oliver Mowat as Attorney General for Ontario. Here we are introduced, not to the premier of the province for almost a quarter of a century, but to his alter ego who, under Romney's examination, leads the province in a drawn-out legal battle with Ottawa for provincial rights. It is a complex subject, but the comment made by Romney in asserting its complexity is one which could well be applied as a direction for those writing legal history:

The discussion is technical in parts but law is a technical subject and the neglect of the technicalities condemns a historian to superficiality even if by chance he escapes egregious error. More to the point, it is historical, for abstract analysis of individual 'cases' by constitutional experts, neglecting the historical context and dynamics that link them in causal succession, is largely to blame for the errors that still mar historical writing on the subject.

Romney's contribution is not that he has made the office of the Attorney General understandable in its historical context, but rather that he has illuminated several complex legal problems which plagued the early years of Upper Canada and complicated its history. These problems have not successfully been explained by historians approaching this period from a more traditional (and non-legal) position.

If Romney's book reads like a series of related essays on the theme of a single office, then it has some similarities to *Law and Justice in a New Land*, a series of essays organized around a geographic theme. This volume edited by Professor Louis Knafla is based on papers which were presented at a conference on legal history held at the University of Calgary in 1984. The volume responds in part to criticisms made of Flaherty's collection of essays as being too Ontario-centred; eleven of the twelve articles in the book concern western Canada. The exception is an overview by Graham Parker on Canadian legal culture, which sits uncomfortably as the first paper in the volume. The real introductory essay is that by Knafla on the common law tradition in the West. Unlike Parker's paper, Knafla's contribution does focus on western Canada and provides a thoughtful background to the other essays. He makes the point that there still seems to be an inherent conflict between legal history from an historical viewpoint and legal history from a legal viewpoint. While Knafla bemoans the lack of hard research into, and innovative consideration of, the legal aspects of legal history (the courts, procedural and substantive law, and the judiciary and legal profession), he concedes that it is in studying the impact of the law on labour, on economics, and on society where innovative work is taking place.

The papers in the volume come from both sides of this academic watershed. Some, such as Thomas Flanagan's "From Indian Title to Aboriginal Rights," deal with substantive law. In Flanagan's case, the references, although put in historical context, are to legal decisions and the article is an exploration of the changes in the jurisprudence of the decisions themselves, with little additional supporting documentation. A related piece, Douglas Sanders' "The Queen's Promises," uses some of the same case law in an investigation of treaty obligations, but Sanders also utilizes other sources, including Hansard, newspaper articles, and the Laurie Papers at the Glenbow-Alberta Institute. The contrast between the two articles is an excellent illustration of the point made by Romney about the need for the historical context and the causal relationship frequently lacking in case analysis.

A case study of a different sort is to be found in "The Sproule Case: Bloodshed at Kootenay Lake, 1885" by W.F. Bowker. In spite of the title, the bloodshed is of little concern; rather, the efforts to establish courts and apply English law in a new country are amply documented using material at both the Public Archives of British Columbia and the National Archives of Canada, in addition to the several reports of the judgment at trial and appeal levels.

However, in spite of the bulk of primary material, only Terry Chapman, in a paper on homosexuality in western Canada, uses the actual case files of legal actions. The depositions, formal charges, correspondence, and evidence in such files are rarely replicated in the judge's summary of the facts in his disposition of the case and, unless particularly noteworthy, are not to be found in newspaper reports of the proceedings.

The final volume under consideration may well be the most successful of the volumes reviewed. Martin Friedland won the Crime Writers of Canada Award for Non-Fiction for his previous book, *The Trials of Israel Lipsky*, and his present volume, *The Case of Valentine Shortis, A True Story of Crime and Politics in Canada*, is a rare combination of legal scholarship and popular writing. It is a murder mystery where the killer is arrested on page six, and yet the interest of the reader is sustained until the end of the volume. The volume is, however, much more than a well-written factual "thriller." By using the Shortis case, Friedland, a University of Toronto law professor who has written several legal texts on criminal procedure, explores several complex aspects of Canadian criminal law and

procedure, and provides an especially lucid description of the insanity defence and how it has altered over the period of one hundred years. The hero, villain, or victim, Valentine Shortis, was originally sentenced to be hanged in 1895 and was finally paroled in 1937, having served over forty-two years in custody, some of that time in mental institutions. Through the experience of Shortis, Friedland provides an extensive history of the prison system.

Although each of these four volumes is a contribution to the literature, the volumes together do little to illuminate the direction of legal history in Canada except to underline what limited use has been made of legal collections. Even the Friedland book, while acknowledged to be a fine piece of research, is from the hoary tradition of "famous trials," and is a long way from the economic and social analysis of the law that has been anticipated by some archivists. Perhaps in Canadian legal history there remains too much law and not enough history.