NEW YORK LAW SCHOOL

NYLS Law Review

Volume 3
Issue 3 *NEW YORK LAW FORUM, VOLUME III, JULY, 1957, NUMBER 3*

Article 6

July 1957

BOOK REVIEWS

BOOK REVIEWS

THE LION AND THE THRONE. By Catherine Drinker Bowen. Boston, Massachusetts. Atlantic—Little Brown, 1957. Pp. 652. $6.00.

THIS masterful biography of Sir Edward Coke is a work which lawyers should be urged to read, and with as much devotion as for their hallowed law reports. It is indeed unfortunate that the lawyer, although trained and polished in his profession, is seldom educated by law schools in the history and culture of the period covered by this book. We have here not merely a biography of Coke, but a thorough and exciting historical narrative of the turbulent times of Elizabeth, James I and Charles I. There can be little doubt as to the importance of this period in the development of the Anglo Saxon judicial system and its concomitant, freedom.

Before there is any discussion of its substance, a comment must be made on an extraordinary aspect of this work. In its last 100 pages, Mrs. Bowen has supplied us with Chapter Notes, Acknowledgments, Sources and Method, Bibliography, Source References and an Index. There is much more to this effort than a fluid style and facile pen; this is the product of research and scholarship.

Lawyers are notorious in their demands for authority and source to support stated propositions. This necessary authentication in a legal brief can not be considered mere surplusage in an historical narrative since it enables the serious reader to separate the author's opinion, theory and imagination from fact and expert findings. We have in this book copious footnotes and sources, and the quality of these sources leaves little to be desired.

The book is of particular interest to lawyers, however, because it is a biography of one of the leading figures in the development of our common law system. The professional problems of lawyers, especially of those involved in the political arena, seem never to change, and the stormy career of Coke in the legislative and judicial branches of government could well serve as a guide to today's perplexed attorneys engaged in similar situations.

Prior to the focal point of the book, Mrs. Bowen presents a fascinating account of the pre-legal and legal education of Lord Coke. We see his training in Latin, French and Greek in grammar school, a necessity because pleadings were then written in Latin and court reports in law French (itself a mixture of three languages). We follow Coke to Trinity's Great Gate where, notwithstanding the contemporary suspicion of mathematical sciences, Coke concentrated upon that product of mental discipline, logic. His legal training at the Inner Temple gives us a fine picture of a system quite alien to the contemporary American lawyer.

It is when Edward Coke no longer appears as junior counsel under Plowden and Popham, however, but alone and against the masters of the trade, such as Thomas Egerton, that the main point of this book is made.

Coke's triumph can be said to be his expansion of the role of the common law and the courts, in the concept of sovereignty, and Mrs. Bowen carefully delineates Coke's place in this struggle for status. One of the principal questions in England of that day was the position of its courts. Were English courts partners in sovereignty with the Crown and Parliament or were they merely tools of one or both? In various positions connected with the English Court system, Coke proceeded to forge an answer to this question.

As Attorney General he made it plain that even conspirators and enemies of the crown could be dealt with only by being brought to a trial based on evidence not adduced by torture and that they could be punished only after a trial on the merits

of the case. In support of this doctrine, the book presents through discussions of the Lopez, Gerard and Essex cases.

As Chief Justice of England, Coke again proceeded to define more clearly the status of the English courts of his day. While in this position he was faced with two formidable antagonists, James I, a monarch who believed that the king was the fountainhead of all justice, and Sir Francis Bacon, a brilliant but opportunistic lawyer, who curried the favor of James for personal gain and the post of Chief Justice for himself.

Into this struggle between James and Bacon on the one hand and Coke on the other moved an elderly Church of England rector, one Edmund Peacham who in the past had made intemperate remarks against the king. James, old fears of rebellion stirring within him, wished Peacham tried for high treason. Bacon, seeing an opportunity here to embarrass Coke, agreed with the King's viewpoint. Ostensibly at James' request, Bacon visited the four judges of King's Bench in an effort to solicit an opinion in advance as to Peacham's guilt. From Coke whom he approached first he received an instantaneous answer which he knew would be forthcoming; ". . . particular and auricular taking of opinion was not according to the custom of the realm." The other judges were reluctant to give an opinion and waited to follow Coke's lead. For Coke this was indeed a dilemma. True, he and the other judges had sworn to "counsel the king in his need", but this obviously he felt was an encroachment on the judiciary. Bacon of course had advised the king that the judge's oath "to counsel" could be construed as an obligation to prejudge a case.

To some extent Coke yielded to pressure agreeing to "counsel" the king, but it was a small triumph since his opinion was that Peacham was not guilty. In the Peacham matter, Bacon was forced to admit that Coke had prevailed.

It remained for a later contest between the two for Bacon to obtain a measure of revenge. Here, although Coke went down to defeat, he unwittingly made a marked contribution to our legal system, the classification and fortification of the jurisdiction of the Court of Equity.

In 1616, Chief Justice Coke and an old adversary, Thomas Egerton, now Baron Ellesmere, the Lord Chancellor, engaged in a dispute as to equity's power to restrain the execution of a common law judgment obtained through the fraud of plaintiff. Annoyed by this encroachment of equity on the common law courts, Coke had the swindler-plaintiff swear out a writ of praemunire, an obsolete writ originally intended to prevent ecclesiastics from interfering with civil justice, against the Chancellor. James was called upon to resolve this conflict and turned to his advisor Bacon for advice. Sir Francis maintained that equity was not interfering with the judgment but was merely restraining the person which it had a right to do. This, together with Coke's defeat in his attempt to prevent equity from requiring specific performance of contracts to convey realty, solidified equity's jurisdiction and enabled it thereafter to become a great and independent aspect of the Anglo-Saxon judicial system.

Coke's battle for freedom went on even after he left the bench. He was one of the "twelve ambassadors" for whom James ordered chairs to be set up at Whitehall where he carried on his constitutional struggle against the early tyranny of Charles I, together with Cotton, Eliot, Wentworth and Pym.

Even in 1634 as he lay dying of old age and the consequences of an accident at eighty years of age, Charles I, fearful of the power of this champion of liberty, ordered his study ransacked and seized all his papers and manuscripts including all four parts of the Institutes.

Mrs. Bowen in *The Lion and the Throne* has given us a brilliant picture of the

man, the champion of liberty and the symbol of the common law; in all, a truly remarkable book.

MILTON A. SILVERMAN
PROFESSOR OF LAW
NEW YORK LAW SCHOOL

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS. Copyright Law Symposium No. 8. New York, Columbia University Press, 1957. Pp. xiv, 146. $3.50.

To stimulate the interest of law students in copyright law, the American Society of Composers, Authors and Publishers invites them each year to an essay writing contest, called, in honor of the Society's first General Counsel, "Nathan Burkan Memorial Competition". This volume records the eighth annual contest, in which Maurice B. Stiefel and Nathan Newbury III won first prizes; William G. Wells and Stephen E. Strom honorable mention.

Under the heading *Piracy in High Places,* Mr. Stiefel, of George Washington University, examines the copyright status of government publications. "No copyright shall subsist . . . in . . . any publication of the United States Government . . ." states section 8 of the Copyright Law of 1947,[1] and, from this seemingly plain formulation, a host of vexatious problems arises. Does the term "government publication" extend to post cards, order blanks, tax forms? Does it include papers drafted by an official in the line of duty? May the government, with impunity, use the copyrighted work of an individual? How does it protect its own publications from piracy? May a copyright be granted for a recompilation of government materials?

The overall picture, drawn from decisions, articles, and treatises, reveals a serious weakness on the part of the individual copyright holder. He cannot sue the government in case of encroachment; the Court of Claims Act[2] serves as a barrier which, so far, courts have failed to crack. Yet in the parallel event of a patent violation, the owner does have access to the courts. Mr. Stiefel attacks this disparity as unfair, and in conflict with the Constitution which, in Art. I sec. 8, gives equal guarantees to inventors and authors. He suggests that, in the absence of judicial action, corrective statutes should be passed.

The other prize winning essay, by Harvard student Nathan Newbury, deals with *Protection of Comic Strips.* Grown from television, motion pictures, comic books and newspaper cartoons, comic strips today form an autonomous medium of entertainment. Their popularity centers around their names and symbols, and principally around the characters they portary. Mr. Newbury shows that registration of trade-marks, under the Lanham Act[3] would apply to names and symbols and that, apart from disputes over the nature of an infringement, their protection is hardly in doubt. A problem of far greater magnitude is the safeguarding of the character of the strip. Here, the Lanham Act does not help, because its trade-mark provisions merely protect the identity of a product, not the product itself.

The author analyzes various other sources from which relief could be drawn. The principle of "reverse passing off"—nobody should, without proper compensation, reap the fruits of someone else's labor—seems most promisory.[4] Courts, however, have been reluctant to extend it to the literary and artistic field, feeling that the special requirements of the Federal Copyright Law, notably the limited duration of the copyright,

[1] 17 U. S. C. sec. 1 ff. (1952).
[2] Ch. 646, 62 Stat. 940 (1948); 28 U. S. C. sec. 1491 (1952).
[3] Ch. 540, 60 Stat. 427 (1946); 15 U. S. C. sec. 105 (1952).
[4] International News Service v. Associated Press, 248 U. S. 215; 39 Sup. Ct. 68; 63 L. Ed. 211 (1918).

militate against such generalization.[5] Protection under statutory law is hampered by the fact that comic strips usually appear without copyright notice attached, and by the widely current opinion that not the character, but the plot and expression are shielded by copyright.[6] To remedy the perplexities and obscurities of the situation, the author proposes proper amendment of the copyright statute.

Mr. Wells (University of Illinois) discusses: *The Universal Copyright Convention and the United States.* His summary, fittingly subtitled: *A Study in Conflict and Compromise,* shows our copyright relations influenced by hesitation and standoffishness. The Copyright Act of 1790 restricted the grant of copyrights to citizens and residents.[7]

The Chase Act of 1891 admitted foreign works to American copyright, if the copies, deposited with the Library of Congress, were printed within the United States.[8] This "manufacturing clause" reduced the intended benefits to almost nil and, in spite of subsequent modifications, effectively blocked international cooperation in the copyright field. The United States joined fifteen Latin American countries in the Buenos Aires Convention of 1910,[9] but kept aloof from the Berne Union which, conceived in 1886, grew into a major international covenant. Mr. Wells demonstrates the inconsistencies and inequities which resulted from the existence of two divergent, non-reciprocal protective systems. The aftermath of World War II and the devoted efforts of UNESCO brought about the long due change, climaxed in 1954 by America's adherence to the Universal Copyright Convention.[10] It did not cure all ills; copyright protection is still neither uniform nor world-wide, but a decisive step in the right direction has been taken. Presenting this stage by stage development, the author sketches an interesting part of our legal, political and economic history.

In *Depreciation and Income Aspects of Copyright under the Internal Revenue Code of 1954,* Mr. Strom, of the University of Missouri, explores the impact of tax laws on the holding of copyright. The most frequently encountered questions are:

May the cost of securing or renewing a copyright be deducted as business expense or as depreciation in value? Is transfer of copyright to be considered a sale, or may, under certain conditions, the rules on capital gains be invoked? Does the tax picture change through involvement of a non-resident alien author? Mr. Strom gives an intelligible survey of the pertinent regulations and judicial opinions. His findings will be of definite help to tax consultants, and they are marked by an equally good understanding of copyright problems.

Each paper deals with a different phase of copyright law, but common to them all are: diligence in preparation; soundness of analysis; comprehensiveness and clarity of presentation. They are a constructive, creditable contribution to their field and will be read with profit by lawyers and subject specialists. They are especially recommended to law schools, where they will serve as an example of fine student writing, and as a challenge to emulate them.

RUDOLF H. HEIMANSON
ASSOCIATE LIBRARIAN AND
ASSOCIATE PROFESSOR OF LEGAL
BIBLIOGRAPHY, NEW YORK LAW SCHOOL

[5] Cf. National Comics Publications v. Fawcett Publications, 191 F. 2d 594 (2d Cir. 1951).

[6] Cf. Warner Bros. Pictures v. Columbia Broadcasting System, 216 F. 2d 945 (9th Cir. 1954).

[7] Ch. 15, 1 Stat. 124 (1790).

[8] Ch. 565, 26 Stat. 1106 (1891).

[9] 17 U. S. C. sec. 9 (supp. '54).

[10] 17 U. S. C. sec. 9 (supp. '55).