THE OXFORD HISTORY OF THE LAWS OF ENGLAND, VOLUME VI: 1483-1558 by SIR JOHN BAKER, Oxford University Press, 2003, 964 pp (£125.00) ISBN 0-19-825817-8

There can be no-one better than Professor Sir John Baker to present the early Tudor period as one of the first volumes appearing in an enterprise of almost Victorian grandeur. One notes Baker's unconventional decision to begin at the opening of Richard III's reign rather than that of Henry VII: a tribute, as Sir John observes, to the importance of the statute 1 Richard III c 1, which gave uses a first recognition in the law of real property. The subsequent turbulent story of uses, culminating in the landmark legislation of 1536-40, is only one aspect of major legal changes during this period. A surge of creative activity developed actions on the case and actions of *assumpsit* in order to widen the competence and effectiveness of the common law. In an age often portrayed as one of 'Tudor despotism', there was a growing reference in actions to Magna Carta, and a notable growth in the employment of the writ of *habeas corpus*, emphasising that even an arbitrary and cruel monarch like Henry VIII was not exempt from the constraints of the law. Prerogative courts such as Star Chamber and Requests were staffed by common lawyers who made sure that their work complemented rather than contradicted or threatened the competence of the Benches.

Baker emphasises the importance of changes in procedure and methodology, even although England failed to undergo any major restructuring in theory or doctrine, in contrast to many newly-emerging legal systems in mainland Europe. He reminds us that the 'Reception' of Roman law elsewhere was much less systematic or novel than has often been asserted, but even so, English law was undoubtedly less influenced by humanist learning. The precocious development of English law in the Inns of Court and the ingenuity of its practitioners made it unnecessary for the English legal system to absorb much more of the form and assumptions of Roman law than might be gleaned from the work of Bracton. This may have been just as well, since humanist learning could be far from enlightened, and may have inspired such malevolent antiquarianism as the introduction of a form of punitive slavery in 1547, or the horrible punishment of boiling alive for poisoning in 1531—both, fortunately, were failed experiments. Baker points out (p 512) that when in 1536 civil lawyers in the Admiralty lost their foothold in criminal legislation, England was saved from the last possibility of lawful torture other than by specific order of the royal Council—uniquely among contemporary legal systems. He is also notably cool towards the late medieval Church courts and their sometimes 'bone-headed' masters the bishops (cf p 538).

Richard Helmholz's separate volume of the History[1] deals with the canon law of England, but as Sir John himself observes (p 252), it is surprising

[1] R Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, The Oxford History of the Laws of England, Volume 1 (Oxford University Press, 2004), reviewed by Dr Robert Ombres OP at (2004) 7 Ecc LJ 485.

how small was the overall effect on the law of the most momentous legal change of all, Henry VIII's break with the Roman papacy and parliamentary enactments of Royal Supremacy over the English and Welsh Church in 1534-6 and 1559. Even English canon law was less affected by the Reformation than might have been expected, particularly because the wholesale reform drafted in 1552-53 failed to gain statutory recognition. A wider explanation of this apparent paradox lies in the convenient fiction promoted in the Henrician Supremacy legislation: it merely recognised an existing truth temporarily hidden from view by papal usurpation and misrepresentation. Continuity was the watchword in the legal forms of what was in fact a profound religious revolution— symbolised by the disappearance of the mitred abbots in the dissolution of the monasteries, which meant that for the first time the upper house of Parliament had a majority of temporal peers, and became generally known as the House of Lords.

That is not to say that this volume holds little of interest to the ecclesiastical lawyer or historian. Well before Martin Luther's revolution, a feature of early Tudor common law and equity was its encroachment on ecclesiastical law, especially under that ambiguously pious monarch Henry VII. Now began the great assault on the church courts' near-monopoly of jurisdiction over defamation, thanks to a growing number of actions on the case; now also benefit of clergy began to be more carefully defined for the benefit of literate laymen, and rights of sanctuary were increasingly curtailed (being virtually strangled out of existence by legislation in 1540). The 1530s represented a major victory of common law and parliamentary statute over ecclesiastical law. It is perhaps surprising that the Statute of Wills of 1540 left will jurisdiction in the hands of the church courts, particularly in view of Parliament's novel intervention in personal morality represented by the statutory penalties introduced for buggery in 1534. That landmark legislation may have been part of the propaganda assault on the monasteries: their dissolution also caused a huge upheaval in land ownership, which spawned not only administrative bodies to cope with the short-term effects, principally the Court of Augmentations, but further expedients to cope with a rash of cases over title, such as the courts' use of actions of ejectment in lease disputes.

The literature of early Tudor legal education, much still in manuscript, holds many riches for the social historian. Lawyers were undecided as to whether abortion was a felonious homicide or a misdemeanour (p 555). There were interesting influences from fashionable Tudor 'commonwealth' theory on discussion of death by misadventure and manslaughter (p 561): the former might arise from a lawful activity for the common profit, like shooting at the archery butts (for national defence), while the latter could not, as when a victim was accidentally killed by a stone thrown over a house. A society where more and more people had spare cash to buy luxuries gradually rejected legal doctrines which maintained for instance that a diamond had no value at the common law, so stealing one was not a felony (p 565). Male-centred prejudice and ignorance produced the remarkable doctrine that no

accusation of rape could lie in a case where a woman conceived a child, since it was believed that this could not occur without the woman's consent (p 563). Altogether, this volume is a formidable work of erudition, though it shows little mercy for readers who cannot distinguish a jeofail from a gaol delivery or who have not learned that a fine is levied and a common recovery suffered. Its footnotes attest not merely to profound learning, but to the physical stamina needed to acquire an intimate knowledge of the common law records of the realm. Aficionados of the Public Record Office will understand why the officer in charge of the Plea Rolls of the Court of Common Pleas was known as the Clerk of Hell.

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