December 1945

Orrin Kip McMurray: His Work in the School of Jurisprudence

Alexander M. Kidd

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38ZN4J

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Orrin Kip McMurray: His Work in the School of Jurisprudence

Alexander M. Kidd*

The nineteenth century was an epoch of grand generalizations. Great thinkers formulated universal laws for science and for society. The twentieth century thus far is a period of scepticism. Intensive investigation has demolished the breath-taking, sweeping generalizations of the nineteenth century, and has revealed to us patterns so bewildering in complexity that we are groping in the attempt to figure out what next.

There was much, however, of value in the nineteenth century, its literature, its science, its art, the range of its survey, the leisure to think. In our era of specialization each one finds his narrow field of work so demanding that there is little time to look on the world as a whole, to reflect and to enjoy the fruits of civilization.

McMurray belonged both to the nineteenth and to the twentieth centuries. Widely read in the world’s literature, his favorites were the Victorian novelists and essayists. Under their influence he made the law speak “the language of the scholar and gentleman.” With his wife, a brilliant singer, he enjoyed to the full the musical life of the community. He knew the classics of the law and intimately the law of his own state. Twice he had gone through the reports of the supreme court of California page by page. Today, a lawyer must perforce content himself with the headnotes and a careful reading of the cases in which he is particularly interested. The law, however, is not to be found in the books alone. It is made up in part of the personalities of the lawyers and judges. McMurray knew them and the history and traditions of the bench and bar. This heritage of the nineteenth century he brought to the changed conditions of the twentieth century.

*Professor of Law, University of California.
His appreciation of the past did not blind him to the cruelties it tolerated and to its inadequacy for the solution of present day problems. A real lawyer knows that he is dealing with no theoretical abstract science but with an institution that should respond to the call in each human being for justice. It cannot be put off by mystic forms.

"Conceding the truth of the subtle connection between institutions and external forms, it may well be doubted whether the twentieth century man is much affected by the 'mysterious dignity' of the courts. He has no particular reverence for the wig and gown, which he regards rather as anachronisms than as solemn symbols. Respect for the law must find a wider basis upon which to rest than is afforded by a reverence for mere external incidents or even for the abstract conception of a set of forms absolutely moulding and determining human conduct." Orrin K. McMurray: Procedural Reform (1919) 7 CALIF. L. REV. 147, 160.

The fusion of the best in the past with an understanding of the needs of the present have made some of McMurray's utterances prophetic.

"It has been sufficiently difficult for legislators, from the farm or factory, or even from the legal profession, to answer the questions which every legislator must ask himself under the general American constitutional system before he can conscientiously or intelligently determine whether or not proposed legislation will stand the test of constitutionality. Little wonder that social legislation in spite of the force of public opinion has been more delayed in the United States than elsewhere; little wonder that property, which Burke calls the 'sluggish, inert and timid' principle in government, should have been unduly represented at the expense of ability, which he terms the 'vigorous and active principle.' It is, accordingly, not surprising that, while nations which we are accustomed to regard as unprogressive, such as Russia or Servia, many years since adopted legislation with respect to employer's liability, it is only within the last few years that the states of our Union have undertaken to pass such laws. The possibility of the enactment of such laws has, it is true, been discussed for many years in legal and other periodicals. But some of those best informed upon the subject of constitutional law believed that the police power of the state would not protect such legislation. Their prophecies have in most cases been disproved. Nevertheless the question remains, how long was the legislation delayed by the fear of the inability to legislate? Much criticism, in large part unjust, has been directed towards the courts, because they have destroyed legislation as conflicting with constitutional provisions. The evil done by the
courts in this respect is as naught compared with the inertia and political apathy that has resulted from the fear that this or that suggested statute might prove unconstitutional. When students of government and constitutional law and leaders of public opinion hesitate even to propose improvements in existing law because of possible doubt as to their validity, such improvements must come, if they come at all, from the less competent and less law respecting portion of the community.\textsuperscript{1} Orrin K. McMurray: \textit{Some Tendencies in Constitution Making} (1914) 2 CALIF. L. REV. 203, 218.

"Had the bill of rights been omitted from the federal constitution, it is not probable that any of the particular rights guaranteed by these amendments would have been, in any marked degree, violated by legislators, public officials or courts." (1914) 2 CALIF. L. REV. 203, 211.

"To the habit of American lawyers and judges in the past to give more attention to literal interpretation than do the English lawyers or judges,—to read statutes, as Mr. Chesterton says, with an 'unspiritual spirit,'—is, perhaps, in part due to the constant reference to the higher written law. An elaborate written scheme leaves little to the legal or political imagination,—just as important a quality with the lawyer or public man as the poetical or scientific imagination with the poet or the scientist." Orrin K. McMurray: \textit{Some Tendencies in Constitution Making} (1914) 2 CALIF. L. REV. 203, 222.

As he said of his colleague, the late Professor Costigan, it might be said of him.

"His ceaseless activity in the library and study but above all in the class-room has thus borne a part in the task of transforming our jurisprudence from one of medieval concepts resting in large part upon mere precedent and authority to one which more nearly responds to the social needs of modern civilization." Orrin K. McMurray: \textit{George Purcell Costigan, Jr.} (1935) 24 CALIF. L. REV. 1.

As teacher in the School of Jurisprudence for thirty-eight years, during twelve of which he was Dean, he made his own the ideal for the School expressed by its founder, William Carey Jones, that it "shall be a vital source of power and shall contribute more largely and effectively than any other American law school ever has done to the advancement of law in this country." Orrin K. McMurray: \textit{William Carey Jones} (1924) 12 CALIF. L. REV. 338, 343.