Select essays in Anglo-American legal history

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ANGLO-AMERICAN LEGAL HISTORY

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PREFACE

DE QUINCEY, in one of his Letters to a Young Man whose Education has been Neglected, quotes Dr. Johnson's pronouncement upon French literature (and it was the kindest thing he had to say about it), that "he valued it chiefly for this reason: that it had a book upon every subject." Even so much as this could hardly be claimed for our own literature in English. To this day it has no complete book upon the history of its own law. The attempts of Blackstone, Crabb, and Reeves are of a past epoch. The progress of a century of historical thought has fixed a great gulf between us and them. To-day, this branch of our literature dates virtually from Mr. Justice Holmes' "The Common Law" and Sir Frederick Pollock's and Professor Maitland's "History"—the first writers in this field (as Hallam says of Montaigne among French classical writers) "whom a gentleman is ashamed not to have read."

The present state of our knowledge of the history of our law may be likened to an unfinished building, whose foundations have been laid and whose frame and beams have been erected. The roof, the walls, the floors, the furnishings and decoration, are yet lacking. Its scope and internal plan, its architecture and its relation of parts, can be already plainly seen. But it cannot yet be inhabited; and many kinds of workmen must labor longer upon it. These foundations are the volumes of Sir Frederick Pollock and Professor Maitland,—resting upon the still deeper Germanic caissons of Professor Heinrich Brunner and his co-workers. This frame and these cross-beams are, on the one hand, the few larger monographs, from Mr. Justice. Holmes' "The Common Law." and Professor Bigelow's "Anglo-Norman Procedure,"
of thirty years ago, to the Selden Society's source-books and Mr. Holdsworth's recent first volume; and, on the other hand, the more numerous essays and chapters of the authors represented in these present volumes. But, until now, most of these lesser structural members of the framework have lain scattered about upon the ground, here and there,—ready for use, and yet not fully serviceable because not easily accessible and not assembled in their relations to each other and to the whole. It is the purpose of these volumes to assemble and make accessible these valuable parts of the structure of our legal history.

The season is ripe for this work. It is probable that another generation will pass before the final elaboration of the structure can be attempted. Until the Year Books are entirely re-edited and printed, most of the work will be of a limited and topical scope. It is now time for our profession to take account of past progress,—to put together and to possess in mastery that which has been so far achieved; following the dictate of Goethe: "My maxim in the study of Nature is this: Hold fast what is certain, and keep a watch on what is uncertain."

The times demand, too, of our profession, more cultivation of the taste for history. A counter-balance against the hasty pressure for reform, and against an over-absorption in the narrow experience of the present, is to be sought in the solid influence of history. A true conservatism, and an intelligent progress, must alike be based on historical knowledge,—a knowledge not remaining in the possession of a few scholars, but penetrating abroad into the general consciousness of the profession.

For student and for practitioner alike, we believe that these historical essays will be a welcome enlargement of the horizon of our law. "It is the historians who are my true men," says the genial Montaigne, "for they are pleasant and easy; wherein immediately man in general (the knowledge of whom I hunt after) appears more lively and entire than anywhere besides." And his ingenuous reason for best liking Plutarch and Seneca is a reason which (we confess) has seemed to us likely to commend these present composite.vol-
umes to that class of our expected readers who are already immersed in practice; for those ancient writers, he says, "have this great convenience (suited to my humour) that the knowledge I there seek is discoursed in several pieces, not requiring any great trouble of reading long, of which I am incapable; 'tis no great undertaking to take one of them in hand, and I give over to them at pleasure, for they have no necessary chain or dependence upon one another."

To the profession, then, and to all its members, whether in school or out of it, we commend this Collection, in the hope that it may bring into general knowledge the main part of the historical achievements which are not yet contained in independent volumes, and that it may help to stimulate a deeper and wider knowledge of the present meaning of our law as seen in the light of its past. Sooner or later the number of those who themselves take an efficient part in historical legal research will have to be, and will be, much increased. But that day will the sooner come to pass if meantime the number of those can be increased who will read and appreciate what has already been done, and will thus give support and encouragement for such research. Science expands with culture, and, in Matthew Arnold's phrase, "Culture is reading, — but reading with a purpose to guide it, and with system. He does a good work who does anything to help this; indeed, it is the one essential service now to be rendered to education."

In giving account of our labors in the preparation of this Collection, it is our first duty, on behalf of our profession, to thank those authors and publishers who have so freely allowed the reprinting of these essays and chapters. From the leaders of the historical vanguard (so to speak) — of whom Professor Brunner of Berlin, the lamented Professor Maitland of Cambridge, Sir F. Pollock of Oxford, Mr. Justice Holmes of Washington, Professor Ames of Harvard, and Professor Bigelow of Boston, are representative — this consent has been especially welcome.

We must, secondly, express our regret that the limitations of scope and space have forced the omission of many essays
which merited reprinting. All matters of public law, for example — including the history of constitutional law and of municipal corporations — have been left aside; perhaps a later series may be made to include them. Furthermore, in several essays and monographs, the narrow range of details, the lengthy marshalling of the historical evidence, or the impossibility of separating usable parts, has made them ineligible; though a reference-list of such authorities has been appended in the proper places.

A main motive for the Collection was to rescue, from scattered series of periodicals or general treatises on present law, and to assemble in one convenient form, those essays or chapters which are of permanent value and would otherwise fail of the constant and wide perusal which they deserve. Hence the plan did not propose to include any extracts from works devoted entirely and professedly to the history of any part of the law,—such acknowledged masterpieces, for example, as Sir F. Pollock’s and Professor Maitland’s History of English Law, or Mr. Digby’s History of the Law of Real Property, or Mr. Justice Holmes’ The Common Law. But, in several instances, exceptions to this plan were allowed. The impelling reason was the Committee’s desire to give a certain symmetry to some topics and periods which would otherwise have been imperfectly represented. The present volumes may therefore, it is hoped, serve to illumine in outline the legal history of the last six centuries, and thus to supplement the great treatise of Sir F. Pollock and Professor Maitland,—at least provisionally and until by the completion of the larger undertakings of Mr. Holdsworth and others the same period shall have been more adequately covered.

A more detailed explanation of the Committee’s preparatory labors, and of the motives leading to its appointment, will be found in the Proceedings of the Association of American Law Schools for 1905 and 1906, published with the Proceedings of the American Bar Association for those years.

All of the material here collected has been already published elsewhere as essays, articles, or chapters,—with the