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INTERPRETATIONS OF LEGAL HISTORY

BY

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THE JURIST'S EXPLANATION OF LEGAL DEVELOPMENT IN ENGLAND AND ELSEWHERE

JAMES RUSSELL LOWELL, in one of his letters to Stedman, the poet, remarks: "I think one of the greatest pleasures is to come across a poem that one can honestly like; it's like finding a new flower. If, at the same time," Lowell adds, "one can please the author by telling him so, all the better." These words are as applicable to a piece of juristic writing as they are to a poem. Although they are very different from each other in many ways, both these forms of literature possess at least one marked feature in common. By virtue of its own particular qualities of style and matter, every book on jurisprudential thought, no less than every poem, has the power within itself to give the reader either pleasure or displeasure; it has the faculty of making the reader like it or dislike it. In the present volume of the *Cambridge Studies in English Legal History* the reader comes across a new work on jurisprudence, a history and criticism of certain aspects of juristic thought in England and in other countries; and, whether the reader be lawyer, historian, or philosopher, he will find that this book gives him one of his greatest pleasures, that it calls forth his honest liking, and that, indeed, it is a source of his enlightenment and intellectual stimulus. In Lowell's apt phrasing, the reading of *Interpretations of Legal History* is "like finding a new flower." Such a pleasure comes but rarely to the one who studies the literature of legal history and jurisprudence; and "if, at the same time, one can please the author by telling him so, all the better."

The author of this remarkable book in which, on request, he has embodied his recent Cambridge lectures on the juristic and philosophical explanation of the epochs, processes, and ends of legal development, needs no presentation to the learned reader. The Dean of the Law Faculty and the Carter Professor of

Jurisprudence in Harvard University has long been recognized as one of the foremost jurisprudential thinkers of our time. Dr Pound's oral teaching of the history and principles of Jurisprudence has given learning and inspiration to many of the younger generation of lawyers in our common law jurisdictions; while his writings on jurisprudential subjects have spread his teaching far and wide throughout the world. Many of his essays, covering a wide range of subject-matter, have been published in the legal, philosophical, and historical periodicals of America and Europe. Let us omit all Dr Pound's writings on botany, legal education, and the history and principles of common law and equity: let us name only a few of his scattered papers dealing particularly with juristic thought. Let these few be the following: "Theories of Law," "Legal Rights," "A Theory of Social Interests," "Executive Justice," "Juristic Science and Law," "Law in Books and Law in Action," "The Limits of Effective Legal Action," "Spurious Interpretation," "Mechanical Jurisprudence," "The End of Law as developed in Legal Rules and Doctrines." The learned reader will not need to be reminded that this short list of titles might be greatly extended. Nor will he forget that within recent months three longer writings in the author's chosen fields of research and thought have appeared—the monograph on criminal justice in American municipalities, *The Spirit of the Common Law*, and *An Introduction to the Philosophy of Law*.

In his present volume Dr Pound deals with a vast and complex subject-matter in that lucid and forceful manner familiar to the reader of his other writings and to the listener at his spoken lectures and addresses. His main theme is the juristic and philosophical interpretation of the history and principles of legal systems; and over that theme he throws the spell of his accurate and extensive learning in law, history, science, philosophy, and literature. By his skill in the handling of the materials and by the force of his alert active mind he gives liveliness and vigour to a subject which, in other hands, might well be dull. Though he treats of the past as well as of the present, he so breathes the spirit of social needs and human justice into the past that to us, who read, it is the living present. Nothing seems

dead; nothing seems past. We have the feeling of being present when the Sun God hands the code, ready made, to Hammurabi. If we ask ourselves why the past ages of the law are thus visualized and made present to our gaze, not only in this book but also in Dr Pound's other writings, we shall find one special reason to be his enthusiasm in the cause of justice. This is the key-note. Always looking upon enthusiasm as one of the greatest of powers, Madame de Staël says in *Corinne* that she recognizes only two really distinct classes of men—those who possess the capacity for enthusiasm and those who despise it. It is Dr Pound's capacity for enthusiasm which transforms the past into the present, giving it life and vigour.

The framework of the book is so designed as to permit a survey of thought from earlier to later times. In the words of Lord Morley, "a survey of this kind shows us in a clear and definite manner the various lines of road along which thinkers have travelled, and the point to which the subject has been brought in our own time. We are able to contrast methods and to compare their fruits. People always understand their own speculative position the better, the more clearly they are acquainted with the other positions which have been taken in the same matter." This is Dr Pound's method. He summarizes the work of the various schools of juridical thought from antiquity to our own time. He appraises the results attained by each one of these schools, and he criticizes these results from the standpoint of one whose scholarly gaze surveys the whole field of history and theory. He marks the permanent gains of each movement of legal thought; he suggests the ways in which these contributions to jurisprudential science may be fruitfully applied to social needs by the legislatures and courts of today. But Dr Pound does more than this. His book is not merely a history and a criticism of thought in regard to the processes and ends of legal growth; it is, at the same time, an expression of certain aspects of his own original thinking about law and legal history. From several points of view the most valuable feature of the book is the author's own theory as to the modes of legal progress and his own high conception of the part that the jurist should play in the making of law. The book is not only narrative

and critical; it is also constructive. The wise student will reflect long upon the teaching of the master; and, whether he be convinced or not, his thoughts will never run fully in their old grooves.

Owing to its extensive survey of legal history and of juristic and philosophical thought in regard to legal history, Dr Pound's volume holds its own special place in this series of *Cambridge Studies in English Legal History*. In the design of the series, English legal history, viewed as the history of the law of England and of the many regions outside England which have inherited or adopted their legal institutions from England, forms a constituent, a vital, part of the history of Western civilization. Throughout all the stages of this evolution of English law as a world-system the relations with other legal systems have been close; and, from the days of Bracton to our own time, the ideas of English jurists as to the nature of law and the processes and ends of legal development have been intimately connected with the broader aspects of Western thought. One of the reasons why one prizes Dr Pound's book is that it shows us clearly these inter-relations between the ideas of English and the ideas of foreign jurists. The history of the speculations of English jurists is an integral part of the history of English law; but, in order that it may be properly understood, the history of English ideas in regard to law must be set out in its wider environment of European movements in philosophical and jurisprudential thought. As is natural to the jurist who inherits the traditions of the common law of England and America, Dr Pound devotes special attention to the history and principles of this system. But the jurist cannot restrict his study to one legal system alone; he must be familiar with many bodies of law and with the several stages of their history. He must possess a basis of comparison, a foundation for his conclusions as to the more general aspects of law and of the forces and principles which underlie the growth, spread, and decay of law. Dr Pound's learning in Germanic and Roman Law, his knowledge of the modern systems formed in large measure of these two legal elements, and his familiarity with Eastern law and primitive custom, have fitted him in a very special way for the difficult task of viewing

our Anglo-American jurisprudence in its wider environment of Western development. He deals with the law and the juristic thought of England and America and with their history; but he sees and explains the connections with the world of law and of theory outside England and outside America. It is the breadth of view in *Interpretations of Legal History* which makes this book particularly valuable as a contribution to studies concerned with the history of English law in its world-wide aspects.

To the one accustomed to think in terms of insularity—to regard the evolution of English legal rules and legal theories as the sole and exclusive creation of the people in a small sea-girt isle, a creation unconnected with the legal world outside and beyond—Dr Pound's survey will come indeed as a revelation. If the student of English law sincerely desires to view his subject, both historically and theoretically, in its wider aspects, he will learn many lessons from this book—from the vastness of its scope, its historical and philosophical range, its penetration to fields of legal life and thought in different ages, its co-ordination of separate but related lines of legal growth and theory. There is just as truly a world-wide commerce in juristic ideas as there is a world-wide commerce in the goods produced by economic industry; and this commerce in the concepts of jurisprudence, this diffusion of the modes and results of thinking about the history and the purposes of law, knows no frontiers of land or sea. It is commerce borne from age to age and from region to region by many forms of conveyance. The world-wide movement of men and of books means the world-wide movement of thought. By such processes throughout the centuries many of the legal ideas of today, in England and in other civilized countries, have their origin with the civilians and canonists and theologians of the middle age and the philosophers and jurists of ancient Greece and Rome; the intellectual commerce of history has brought the juridical ideas of ancient and medieval times to our modern shores. The speculations of a Kant and a Hegel about right and justice, speculations passing from book to book and from teacher to teacher, influence and even determine the nature of legislation, judicial decisions, and legal theories in scattered regions of the world where the very

names of the philosophers are unknown. Throughout her history England has been on certain of the trade routes of this carriage of jurisprudential ideas to and fro among the legal regions of the world. English law and English thinking about law possess indeed certain individual characteristics of their own; but those very characteristics are blended of many diverse elements derived from various sources. They are not purely indigenous, purely racial, purely insular. There are features of English jurisprudential thought which are truly insular; but, at the same time, there are other features which are just as truly the common heritage of England and of all the other regions of the West. Even recent English schools of legal science—the analytical and the historical schools, for example—are intimately related to the ideas of Continental scholars. Austin and Maine are but representatives of aspects of European thought. The commerce in juridical ideas has known no frontiers.

Such are some of the broader reflections which are induced by the reading of Dr Pound's inspiring volume. But the book embodies also certain other definite teachings. Thus, we find that many aspects of English legal history are illumined for us by the light of juristic interpretation: we catch new glimpses of processes of legal growth from the time of the Anglo-Saxons down through the epochs of Glanvill, Bracton, Coke, Mansfield, and Eldon to our own day. Particularly instructive, also, are the references to the common law as it has spread to America; and there is here a rich field for the juristic comparison of the common law in its old and in its new homes. The influence of philosophical speculation upon the growth of English law in the several periods of its history also stands out clearly: we can see that Aristotle and Kant and Hegel have affected not only the law itself, but also the attitude of the jurist toward the law. Another special feature of the book is the author's criticism of the English analytical and historical schools of jurisprudence. The views of these schools have so firmly entrenched themselves in the English mind that Dr Pound's acute and reasoned criticism—a criticism both destructive and constructive—will be read with far more than ordinary interest. The whole volume, in fact, lifts the mind out of some of its beaten tracks and places

it in newer paths. In the final chapter—"An Engineering Interpretation"—the author's own theory of legal history finds its fuller and more definite statement: and the one who accepts Dr Pound's teaching as to the processes of legal development and the ends of law will find himself regarding in a new light certain of the methods and the dogmas of the analytical and historical schools. Dr Pound's enlightened conception of the jurist's office is, again, one of the valuable contributions which he makes to juridical science. To him the jurist is—or at least ought to be—a creative and moulding force in legal progress.

The whole of Dr Pound's book is, in fact, a summoning of jurists to take their proper place of leadership in the work of adapting old law and creating new law to meet the ever-changing needs of social justice. The deadening effect of one of the teachings of the historical school of jurists—the teaching that law may be found, but not made—has too long kept jurists in their cloistered retreats. If they hearken to the lesson taught by Dr Pound, that law is made and re-made by men, and if they agree with him as to the nature of the jurist's function, they will take their own part in the legal life of society; they will apply their learning and their juristic statesmanship, consciously and continuously, to the reform of the law by influencing legislation and judicature and the other processes of law-making. Released from the fetters forged by the genius of Savigny, the legal historian will approach his materials with greater freedom of mind and more enlightened appreciation of the value of his studies. He will have his eye upon the present as well as upon the past; he will be able to make his histories of legal growth actual factors in the shaping of the law to meet present social needs. The study of legal history serves more than one purpose. If it has its uses in training and informing the mind, it has its uses also in guiding the activities of courts and legislatures. Legal history has a social function to fulfil. The historian of law is himself—or, rather, he may make of himself, if he will—a true statesman.

The Abbé Gratry, distinguished as the "Vico of the nineteenth century," deserves to be kept in remembrance: his *La Morale et la Loi de l'Histoire* is a valuable contribution to the

philosophy of history. "Humanity hitherto passive now begins," says Gratry, "with full knowledge and entire freedom, to take into its hands the management of the affairs of the world; it enters into its age of manhood." In such an age legal traditions, unduly fostered and strengthened by the application of the tenets of Savigny and his school of historical jurists, need to be re-examined in the light of the newer social facts and forces of our day. Juristic thought has long been tending, in fact, in this direction. Maitland himself taught the doctrine that the historical spirit is not hostile to reform, that history is studied in order that progress may be made, in order that the past may not paralyse the present. The same ideas are taught by other legal historians. Even the question as to whether the judge is to be bound by precedents is being raised. "*Stare decisis*, as an absolute dogma," writes Dr Wigmore in his *Problems of Law*, "has seemed to me an unreal fetich....We possess all the detriment of uncertainty, which *stare decisis* was supposed to avoid, and also all the detriment of ancient law-lumber, which *stare decisis* concededly involves—the government of the living by the dead, as Herbert Spencer has called it." The newer school of jurists—jurists, too, who are masters of legal history—takes over and adopts the saying of Thomas Jefferson that "the earth belongs in usufruct to the living;...the dead have neither rights nor power over it." Such ideas are already affecting legislation. From certain points of view the English Law of Property Act, 1922, is conceived in the spirit of these ideas: it is an effort to be free of part of the "ancient law-lumber."

If an introduction has been written, when none was needed, may not the stimulus of Dr Pound's book be the cause and the justification?

H. D. H.

September 5, 1922

AUTHOR'S PREFACE

THESE lectures are printed as they were delivered at Trinity College, Cambridge, in Lent Term, 1922, with addition of some notes partly by way of illustration and partly to assist any who may be interested in pursuing the subject more deeply.

A complete history of the science of law in the last century would treat of the survival of eighteenth-century philosophy of law in some phases of Continental thinking and in American constitutional law and of the rise of a neo-Rousseauist theory on the basis thereof; of the different movements in the nineteenth-century metaphysical school; of the rise of the social philosophical school on its philosophical side and of the philosophical and juristic pedigrees of the neo-scholasticism and the revived natural law of the present century. It would trace the beginnings in nineteenth-century thought of the psychological and logical movements in recent philosophy of law. It would trace the relation of eighteenth-century natural law, as it survived in the nineteenth century, and of the metaphysical-historical jurisprudence of the latter century to juristic economic realism and to what might be called orthodox socialist jurisprudence. On another side it would identify the elements that went to make up the analytical school, would show the influence of that school on the one hand upon English historical jurisprudence and on the other hand upon the earlier sociological jurisprudence, and would show its connection with the social utilitarianism of today. On still another side it would trace the philosophical and juristic pedigree of the mechanical sociological jurisprudence of the nineteenth century and show how, following the progress of the social sciences, the sociological jurisprudence of today developed from that narrow and at first sight unpromising beginning. But the chief thread of this story would be the rise, the hegemony and the downfall of the historical

school. Such a history would show how the natural-law thinking of the seventeenth and eighteenth centuries had already split into two channels in the latter part of the eighteenth century and split still further into three and ultimately four or five in the nineteenth century. It would show how these smaller streams of juristic thought began to converge at the end of that century and have been gathering more and more into two main channels in the present century. But it would show also, when the historian looked back over the whole course, that during the last century on the whole the historical school represented the main stream. A history of the rise and the decay of the historical school founded by Savigny would not be the whole of the history of juristic thought in the nineteenth century. But it would be the core and the largest part of such a history. The schools of today have arisen out of the dissolution of Savigny's school almost as definitely as the schools of the last century grew out of the dissolution of the law-of-nature school. Its influence on the law and the legal thinking of today is as palpable as the influence of the law-of-nature school on the law and the legal thinking of the first half of the nineteenth century.

Only a small part of the lesser task is within the scope of the present lectures. They do not essay even a history of the historical jurisprudence of the nineteenth century. They have to do with one aspect thereof only, namely, the way in which the historical school understood legal history and the relation of its interpretations to the purposes of the time. Moreover the design is not to tell a bit of juristic history as such but to consider the modes of thought of the historical school and its derivatives as an element in the legal science of today, to appraise their value for present purposes, and to look into the possibilities of other interpretations which the nineteenth-century historical school rejected or ignored. Yet one cannot do these things without treating the nineteenth-century interpretations of legal history as part of the history of juristic thought in that century and in their relations to all the currents in which it ran.

My chief obligation is to Senator Benedetto Croce. His writings which were of special use to me are cited in the notes.

In addition I had the privilege of talking with him about the subject while the lectures were writing. I must also express my grateful appreciation of the hospitality and courtesy of the teachers of law at Cambridge and of the Master and Fellows of Trinity College, which made my brief stay with that company of scholars something always to be remembered.

R. P.

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I

LAW AND HISTORY

LAW must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of change no less than principles of stability. Accordingly the chief problem to which legal thinkers have addressed themselves has been how to reconcile the idea of a fixed body of law, affording no scope for individual wilfulness, with the idea of change and growth and making of new law; how to unify the theory of law with the theory of making law and to unify the system of legal justice with the facts of administration of justice by magistrates.

For, put more concretely, the problem of compromise between the need of stability and the need of change becomes in one aspect a problem of adjustment between rule and discretion, between administering justice according to settled rule, or at most by rigid deduction from narrowly fixed premises, and administration of justice according to the more or less trained intuition of experienced magistrates. In one way or another almost all of the vexed questions of the science of law prove to be phases of this same problem. In the last century the great battles of the analytical and the historical jurists were waged over the question of the nature of law—whether the traditional

or the imperative element of legal systems was to be taken as the type of law—and over the related questions as to the nature of law-making—whether law is found by judges and jurists or is made to order by conscious law-givers—and as to the basis of the law's authority—whether it lies in reason and science or in command and sovereign will. But the whole significance of these questions lies in their bearing upon the problem of adjustment between or reconciliation of rule and discretion, or, as it is ultimately, the problem of stability and change—of the general security and the individual human life. And so it is with the philosophical problems of jurisprudence and with the most debated practical problems of law. When we discuss the relation of law and morals or the distinction between law and equity, or the respective provinces of court and jury, or the advisability of fixed rules or of wide judicial power in procedure, or the much-debated question as to judicial sentence or administrative individualization in the treatment of criminals, at bottom we have to do with forms of the same fundamental problem[1].

Attempts to unify or to reconcile stability and change, to make the legal order appear something fixed and settled and beyond question, while at the same time allowing adaptation to the pressure of infinite and variable human desires, have proceeded along three main lines—authority, philosophy, and history. The Greek and Roman world relied upon authority and later upon philosophy. The modern world has relied successively upon authority, upon philosophy and upon history —roughly speaking, upon authority from the twelfth century to the sixteenth, upon philosophy during the seventeenth and eighteenth centuries, and upon history during the nineteenth century. But none of these disappear when the next comes into favour. In the reign of philosophy we get a philosophical authority alongside of and overshadowing authority as such. In the reign of history we find a historical authority and a historical philosophy alongside of intrinsic authority and philosophical authority and overshadowing both.

[1] I have developed this proposition in detail in a paper entitled "Theories of Law," 22 *Yale Law Journal*, 114.