HENRY SUMNER MAINE

# ANCIENT LAW

ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS

WITH AN INTRODUCTION BY
THEODORE W. DWIGHT, LL. D.,

FREDERIC WILLIAM MAITLAND

# ENGLISH LAW AND THE RENAISSANCE

(THE REDE LECTURE FOR 1901)

CHINA SOCIAL SCIENCES PUBLISHING HOUSE
CHENGCHENG BOOKS LTD.

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# PREFACE

TO

## THE FIFTH EDITION.

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While further reflection and research have not led the Author of this work to alter his views on most of the matters of which it treats, he has convinced himself that the opinions expressed in the First Chapter on the difficult and still obscure subject of the origin of Customary Law require correction and modification. He has attempted to supply a part of the necessary corrections and modifications in a volume called "Village Communities in the East and West".

H. S. M

London, *December*, 1873.

# PREFACE

TO

# THE THIRD EDITION.

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The Second and Third Editions of this work have been substantially reprints of the First. Some few errors have, however, been corrected.

It is necessary to remind the reader that the First Edition was published in 1861. The course of events since that period in Russia and in Northern America has taken away much of its application to existing facts from the language employed by the writer on the subject of serfage in Russia, of the Russian village-communities, and of negro-slavery in the United States. It may perhaps be interesting to the reader to observe the bearing of the changes which have taken place on the argument of that part of the work.

H. S. M.

Calcutta, *November*, 1865.

# PREFACE

TO

## THE FIRST EDITION.

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The chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in Ancient Law, and to point out the relation of those ideas to modern thought. Much of the inquiry attempted could not have been prosecuted with the slightest hope of a useful result if there had not existed a body of law, like that of the Romans, bearing in its earliest portions the traces of the most remote antiquity, and supplying from its later rules the staple of the civil institutions by which modern society is even now controlled. The necessity of taking the Roman Law as a typical system has compelled the Author to draw from it what may appear a disproportionate number of his illustrations; but it has not been his intention to write a treatise on Roman Jurisprudence, and he has as much as possible avoided all

discussions which might give that appearance to his work. The space allotted in the Third and Fourth Chapters to certain philosophical theories of the Roman Jurisconsults has been appropriated to them for two reasons. In the first place, those theories appear to the Author to have had a much wider and more permanent influence on the thought and action of the world than is usually supposed. Secondly, they are believed to be the ultimate source of most of the views which have been prevalent, till quite recently, on the subjects treated of in this volume. It was impossible for the Author to proceed far with his undertaking, without stating his opinion on the origin, meaning, and value of those speculations.

H. S. M.

LONDON, *January* 1861.

# INTRODUCTION.

The work of Professor Maine on "Ancient Law" is almost the only one in the English language in which general jurisprudence is regarded from the historical point of view. The text books prepared by lawyers both in England and this country, have only aimed to present a view of legal history, so far as it was necessary for practical purposes. The professed treatises on the "History of the English Law," such as those of Reeves and Crabbe, make no claim to philosophical deductions, and while the former is especially accurate and reliable, it is written in a manner altogether dry and uninteresting. Mr. Maine's work is vitalized throughout by the true spirit of philosophy. It is not, however, a philosophy which bases itself on an inspection of the present condition of society. It is founded on facts derived from the most patient and thorough historical investigation. It is to be hoped

that he, or some other equally competent person, will do that for the English common law, which has already been done in so masterly a manner for "ancient law." It is a remarkable fact that many of the early books of the common law are nearly inaccessible to the student. Some of them are in manuscript, hidden away in legal libraries. Those which are printed are composed in a language now obsolete, and with abbreviations which the general scholar does not easily understand. Mr. Wallace, of Philadelphia, in his learned work on the English Reporters has pointed out that the Parliament of England could do no more important work, than to reproduce in an accessible and intelligible form, these antique works which illustrate the early common law. He has truly said, that no philosophical knowledge of the law can ever be had without reference to its origin and history. Has not the time arrived when the materials for a comprehensive view of the common law should be furnished to the scholars of England?

Mr. Maine's work may be said to consist of two parts; the first part, embracing four chapters, contains the philosophy of legal history. No more accurate and profound generalization was probably ever made in jurisprudence, than that which sums up the agencies of legal progress: Fiction, Equity, and Legislation. Its truth strikes the attention of one versed only in the English common law. The first two agencies, especially, accomplished all the

early advancement in that system of jurisprudence It is through them that public opinion gradually modified the law. Without them, the English nation would have remained stationary, or have been driven to a revolution. Sometimes fiction affects the law without consciousness on the part of the judge. Instances of this are given by Mr. Maine. At other times, the judiciary cover their intent to alter the law with a thin and transparent veil of fiction. When the English Parliament had passed the Statute of Entailments, by which the nobility expected to secure their landed possessions to their families, the judges, who did not sympathize with the legislature, eluded its effect by a fictitious legal proceeding, called a common recovery. It came to be a rule that no express words could be used in creating an entailment, which would prevent its destruction by this pretended action.

It was an early complaint, that by the growth of Equity, the "heart of the common law was eaten out." An excellent illustration of its workings is derived from the law of trusts. The ancient common law made the validity of a conveyance depend upon a visible act. The owner gave the intended purchaser a clod of earth, or other symbol of possession. The ownership thus created admitted of no qualification. The *visible* owner was to all intents and purposes the *actual* proprietor. On this simple conception, Equity grafted the notion of 'uses." An owner of land could transfer it to an

indifferent person by a visible symbol, and charge the transferree to hold it for the use of another. The "conscience" of the transferree was said to be affected by this transaction, and he was equitably bound to perform the trust imposed upon him. This obligation could only be enforced in a Court of Chancery, the presiding judge being an ecclesiastic. That Court was supposed to proceed upon those principles which affect the moral sense. In all the old law Abridgments, Chancery law is found under the title "Conscience." Chief Justice Fortescue, in the reign of Henry VI., A. D. 1453, derives Equity from the two words *con-scio*, which he explains to mean the case where men have the same knowledge as God possesses, that is, they know His will as nearly as possible by reason. He further remarks that a man may have a claim at common law, when by "conscience" he would be condemned. In another case, occurring in the year 1474, the Chancellor said that a case before him must be determined according to the *law of nature* in the Chancery.*

When this principle came to be fully established, rights were recognized in one court, which were denied in the other. Thus in the case under contemplation, the transferree of the land was said to have the *legal title*, and the owner of the "*use*"

* Year Book, 13 Ed. IV. fol. 9, case 5. This is an earlier recognition of the duty of modern Courts of Equity to follow the Roman 'law of nature" than any noticed by Mr. Maine

an *equitable* interest, and the Court of Chancery substantially protected him in the enjoyment of the rights of ownership. He could, in general, insist on having the legal title made over to him by a formal conveyance. This doctrine was soon seized upon to create other modifications of property. For example, no owner of land could, by the common law, dispose of it by will, except in certain localities where a custom permitting a will prevailed. An evasion of this rule of law could be made through uses. If a man wished to make a will, he transferred his land to another to hold to his use. This person was in conscience bound to hold it for the grantor, who was said to have a "use." He could make a will of the use, and the devisee could then, by a resort to Chancery, compel the grantee to give him a deed of the land. If the grantor died without making a will, the "use" descended to his heir, who could in like manner exact a deed from the grantee. For many years, men were in the constant practice of evading in Equity the legal rule that an owner of land could not make a will. Every intelligent person knew of this double rule, but no steps were taken to remove the anomaly. Even Parliament passed special statutes facilitating the exercise by the king of the power to make a will in accordance with this device.

The time came when the fact was recognized that the difference between law and equity upon this and other points connected with uses was a mere

form. The third agency indicated by Mr. Maine then interferes. Legislation corrects the anomaly He who has the use, is declared to be the owner of the land, and a statute is passed conferring the power to make wills.

When the statute of uses is brought before the courts, a narrow construction is adopted. It is decided that certain uses shall not be turned into legal ownership. Chancery seizes upon these rejected uses, and upholds them as trusts, fastening itself on the "conscience" of the legal owner. These trusts had become in certain cases purely formal, when after three centuries, the legislature of New York carries out the principle of the original statute, and declares that by no device shall there be a mere formal trust in land.

This topic might be pursued to an indefinite length, and many similar instances summoned from English legal history. Mr. Maine deserves the credit of being the first to give body and form to the principle, which every student of law perceives as soon as it is stated to him.

The second part of his book is equally striking. It contains an account of the origin and progress of leading rules in legal science. In its method, it is in direct antagonism to the loose declamatory style in which many discourse of legal principles. The work throughout has a high and cheerful tone. It maintains the steady progress of mankind in jurisprudence from an age of formalities and cere

monies to an era of simplicity and symmetrical levelopment. It asserts the continuity of the human race, and we are permitted to feel nearly every link of the chain which binds the men of our day to the nations of the remotest antiquity.

The chapters on conveyances, wills, and contracts have an especial value, and will serve to dispel many erroneous views concerning transactions which make up a large part of the business of human life.

In the hope of facilitating the use of this book in law schools and colleges, the writer has prepared an abstract of its contents. He only vouches for its general accuracy. The special qualifications and limitations of the principal propositions must, of course, be sought in the body of the work. It is confidently believed that this treatise is worthy of the careful study of all young men who desire to make the law an honorable pursuit, and not a mere trade or calling. It may also be warmly commended to the general scholar, who cannot fail to derive instruction and stimulation from its weighty and earnest words.

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## I.

The earliest notion of law is not an enunciation of a principle, but a judgment in a particular case. When pronounced, in the early ages, by a king, it was assumed to be the result of a direct divine

inspiration. Afterward came the notion of a custom which a judgment affirms, or punishes its breach. In the outset, however, the only authoritative statement of right and wrong is a judicial sentence rendered after the facts have occurred. It does not presuppose a law to have been violated, but is breathed for the first time by a higher power into the judge's mind at the moment of adjudication.

When aristocracies succeeded to the power of the kings, they became depositaries and administrators of law, without claiming direct inspiration for each sentence. They monopolize the knowledge of law. *Customary* law now exists, which is assumed to be precisely known to the privileged order or caste. This is the era of true unwritten law. Before the invention of writing, this was the only expedient by which there could be an approximation to an accurate preservation of the customs of a race or tribe.

Next we arrive at the era of the Codes, of which the Twelve Tables are best known. Everywhere law graven on tablets takes the place of usages announced by the oligarchy. This movement was not due to any notion of the superiority of codification, but to the fact that writing was a better depositary of law than the memory of individuals. The importance of the codes can not be denied. They afforded protection against the frauds of the oligarchy and the debasement of the national institutions. A great mark of distinction between the

Romans and the Hindoos consists in the fact that the Romans had a code early in their history, while customs were wholesome, and before that usage which was reasonable had generated that which was unreasonable.

As soon as a code is produced, there is no longer a spontaneous development of law. Hereafter, investigations must be confined to progressive races of men. With these, social necessities and social opinion are always more or less in advance of law, Law is stable; society is progressive. How shall this gulf be narrowed which has a perpetual tendency to re-open?

There are three agencies with which law is brought into harmony with society—Legal Fiction, Equity, and Legislation. Their historic order follows this arrangement. (1) By Legal Fiction is meant an assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, the letter remaining unchanged, but its operation being modified. This is a rude device absolutely necessary in the early stages of society; but fictions have had their day. (2) The next instrumentality by which law is adapted to social wants is called *Equity*. This is a body of rules existing by the side of the original law, founded on distinct principles, and claiming incidentally to supersede the civil law by virtue of a superior sanctity in its principles. This doctrine of Equity is found in the Roman law, and in the English law under the direction of the

Court of Chancery. It differs on the one hand from fiction, for its interference with the law is open and avowed, and on the other from legislation, for it does not lay claim to authority on the prerogative of any external person or body, but rests only on the special nature of its principles. (3) Next in order is Legislation. This derives its authority from an external body or person. It is not necessarily governed by any principle. The external body may legislate in the wantonness of caprice, or its action may be dictated by some principles of equity. In either case, its binding power depends solely upon its external authority.

In the youth and infancy of a nation it is a rare thing for legislation to be called into action for the general reform of private law. Its development must depend on the first two agencies which have been described.

Having thus stated the difference between these terms, the method in which they act upon positive law may now be noticed. This will be best disclosed by illustrations.

(1) *Fiction.* A striking instance of fiction is found in the case law of England. When a case is about to be decided under the common law, the assumption on the argument is that its decision will call only for the application of principles and distinctions which have long since been allowed It is assumed that there is a rule of law which will govern the question now litigated, and which may be dis-