

**THE HISTORY OF  
CONSPIRACY AND ABUSE  
OF LEGAL PROCEDURE**

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The History of Conspiracy and Abuse of Legal Procedure by Percy Henry Winfield

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OF LEGAL PROCEDURE

BY

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## CAMBRIDGE STUDIES IN ENGLISH LEGAL HISTORY

THIS series of studies has been designed as an agency for furthering scientific investigation in regard to the development of the laws of England and thus for advancing the knowledge of one of the most important aspects of British and world history. At the beginning of the work of carrying out this design it is fitting that a few words should be said about the nature of the studies, their general scope, their purpose, and the functions which they should fulfil in the life of the present day.

Two kinds of studies will be included in the series: monographs and editions of texts. Dr Winfield's illuminating study, *The History of Conspiracy and Abuse of Legal Procedure*, a work which consolidates the results of years of painstaking, skilful and learned research, is published in the present volume as the first of the monographs. This study may be taken as an indication of the general character of the monographs which are to follow. It is intended that most of the monographs shall be studies, based on original researches in manuscript and printed materials, of some special period or of some special topic; but at the same time it is hoped that certain of the studies will trace, on more general lines, broader aspects of legal evolution. Some of the monographs will embody, in appendices, select texts which explain or illustrate certain of the subject-matters dealt with by the authors. The second group of studies will consist of editions of legal-historical texts which have not been published hitherto, or which have not as yet been published in a form consonant with modern critical standards. In each one of this second group of volumes there will be explanatory notes and an introduction of some length dealing with the nature of the texts and their significance in the development of the law. While the studies thus embrace two kinds or groups of publications—monographs and editions of texts—it is not thought to be necessary or even desirable to mark off the

two kinds one from the other and to characterize each one of them by a distinctive title as a separate series. Both of the groups are of the nature of studies; and they will both be published as one series under the general heading of *Cambridge Studies in English Legal History*. No undertaking can be given in advance as to the time of publication of the successive volumes in the series; but it is hoped that two volumes may be published in the course of every year.

While the separate volumes will deal with particular subject-matters, the general scope of the series as a whole will be as broad and extensive as the history of English law itself. The point of view which has been adopted in planning the series is that English law has a place in world history and not merely in insular history. The whole course of the development of historical science during the last hundred years has prepared the way for the taking of this world view-point in respect to the origin, growth, and diffusion of English law. The 18th century produced historical works of high merit and permanent value; and individual thinkers of the time, such as Leibnitz, Vico, Turgot, Herder, and Burke, made bold and fruitful contributions towards the philosophic interpretation of history as the life of humanity, ever evolving and progressing throughout the centuries by processes of growth, decay and revival, every age linked to every other. But there were several causes which impeded the growth of history as a science, chief among them being the failure of the *Aufklärung* to grasp the historical significance of religion and the middle ages, the lack of the critical faculty in dealing with the testimony and value of authorities, the almost entire absence of teaching, and the restrictions which were placed on access to historical materials and on liberty to publish results. The 19th century—the “age of the Second Renaissance,” as Mr Gooch so appositely describes it in his *History and Historians in the Nineteenth Century*—brought about a sweeping change in all the conditions essential to the growth of historical science. Liberty of thought and expression, the judicial attitude of mind, and insight into the different ages of the past led to the growth of history as an independent science which gives light and guidance to all the other social



sciences. In divers ways Niebuhr led the way in the placing of history upon this scientific basis; and many other historians gained inspiration from his methods and writings. In all civilized countries the new science took root and flourished. The result has been that all ages of history, all peoples, all aspects of life have been subjected to an exacting critical examination. The survey of the historian now embraces the world; and he can trace, in many of its fundamental outlines and in considerable wealth of detail, the evolution of civilization throughout all the ages.

This general progress in historical studies during the 19th and 20th centuries has included law within its scope. The legal systems of the world—in antiquity, in the middle ages and in modern times—have all been subjected to the examination of scholars trained in scientific methods of research. These studies are still in progress. Much still remains to be done; and the doing of it will take generations. But already it is possible to see certain of the main lines and characteristics of universal legal history. It is slowly coming to the consciousness of scholars that a continuous process of evolution throughout the centuries connects the laws of antiquity with those of medieval and modern times.

The scientific study of the laws of the Babylonians, Egyptians, Hebrews, Greeks, Romans and other peoples of antiquity has been facilitated by the recent discovery of codes and other legal sources; and already a vast literature deals with the laws of those ancient communities. Hitherto these studies have been concerned for the most part with the development and characteristics of the separate systems and with a comparison of the several systems one with another. The continuity in ancient legal history has not as yet received the attention it deserves. But scholars have already perceived that the historical relations of the several ancient peoples led, by processes of conquest and the diffusion of civilization, to the spread of laws and to the incorporation of their elements in other systems. Ihering, the great Romanist, held the view that, if we would search for the origins of Roman law, we must go back to Babylon; and we have learned, since Ihering wrote the *Vorgeschichte der Indoeuropäer*, that the Baby-

lonian Code of Hammurabi remained in force even through the Persian, Greek and Parthian conquests and that it survived to influence Syro-Roman law and the later Mahommedan law in Mesopotamia. These and many other results of recent researches shew the way to the future study of the ancient law from the point of view of evolution and continuity. Only by such methods of study shall we understand the nature of the ancient foundations of medieval and modern law in the several parts of the world which owe their civilization to Eastern as well as to Western peoples. The passing of the world from ancient to medieval times meant indeed no break in legal tradition, for the legal systems of the middle ages were based in large measure on the evolution in antiquity. Chief among the ingredients of western European law in the middle ages were Germanic and Roman elements derived from the age of antiquity: but there were also embodied in medieval laws Hellenic and other strains which came out of the ancient world and which were in origin neither Germanic nor Roman. The transformation of these ancient elements and the introduction of newer features by the processes of political, ecclesiastical, economic, and social growth laid in the medieval age the foundations of the modern systems of law in the western European countries and in the communities throughout the world which have derived their civilization from Europe.

For the last century trained legal historians—Eichhorn, Savigny, Ihering, Mitteis, Brunner, Gierke, Karlowa, Esmein, Viollet, Brissaud, Pertile, Hinojosa, and many others—have been engaged in telling parts of this long story of the law's evolution throughout the ages. The historians of English law have made their own contribution to the story. The study of English legal history during the last half-century, characterized by the work of the great masters like Maitland and Ames, is indeed one of the important aspects of the vaster movement in historical, more particularly in legal-historical studies, which has marked the last hundred years. The literature of English legal history produced by this small but eminent group of scholars shews not only familiarity with the researches of legal historians in other countries, but also a grasp of the place of English law in

world history. The lessons which they have taught should not be forgotten by the present generation. The present is an age when the vision of men, scholars no less than statesmen and traders, is directed not solely to individual countries; it is directed in ever-increasing degree to the world at large. This same vision should inspire and guide the work of those who are charged with the task of investigating the history of the English law. That vision is no less than this: that English law is a world-system, a system related in many ways throughout its evolution to other bodies of law and extended in the course of centuries far beyond the confines of England to many other regions. Many of its roots go back to the Germanic customs of the Continent and the North in the age of antiquity; while others reach to the Norman law and through Norman law to the *Lex Salica*. Fundamentally Germanic in its origins and in its earlier development, the English law owes something also to Roman and Canon legal influences in the middle ages; while, through the growth and spread of those systems or by other processes of evolution, it may also owe more than we now suspect to Greek and other bodies of ancient and medieval law. The well-known origin of certain elements of English and of European maritime law in the ancient sea customs of the Greeks points the way to other researches of a similar kind. Nor even in modern times has English law been free from the subtle influences of foreign law and of foreign juridical thought: factors such as these have counted in legal growth far more than is oft-times imagined.

But these historical links between English law and the legal world outside England have not all been due to the process of importation. Exportation has also played a rôle of profound significance. The spread of English law beyond the confines of the homeland began in the age before the Norman Conquest; and before the middle ages were past it had established itself in Wales and in parts of Ireland and Scotland, and it may have left its influence upon the legal institutions of the King's lost provinces in France. In modern times it has spread to America, the dominions, the colonies, and India. In the course of this long process of diffusion throughout the world the English law has met in its new environments not only native customs, but