Historical Jurisprudence;

An Introduction into the Systematic Study of the Development of Law.

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Part 1: The Foundations of Law
Chapter 1: The Law of Babylonia
Section 1 History & Sources; Page 12:

The law of Babylonia has had an immense effect upon that of nearly all the countries of Europe ... . The literature of Babylon has perished; but the element of culture which has endured was greater than the literature. That element is law, an organized intelligible system of rights & duties enforced by the State. ... The great work of the nation was the production of a system of law, necessary to the extended commercial activity of the city ... . The complex Babylonian civilization, which produced a commercial law in advance of any other ancient system, – certainly far more advanced than the law of Egypt, the only nation of antiquity which could be compared with Babylon, – was ... the product of ... its relations to the other countries of the world.

Pages 17 & 18 : Section 2, Judicial Process

The exercise of judicial functions, at least in matters of commercial law, seems to have been in the hands of the hierarchy. The reasons for this may have been in part those which, in the mediaeval period of European history, threw the control of legal procedure largely into the hands of the ecclesiastics. In Babylon, the custom of documentary evidence in almost all transactions ... & the wide extent to which written contracts were employed, made the notarial & judicial functions of the priests very extensive. But the part taken in business transactions by the priesthood was appropriate for another reason, which perhaps had more influence in the time of the early law, before the purely commercial side had been developed. This was the part which was connected with contractual oaths, which at first were numerous. The contracting parties were obliged in their contracts to swear by the principal god of the country, & by the reigning prince, that they would abide by the conditions of the contract ..."

Page 20: Case Example:

In connection with the report of this case ... The witnesses were more than mere witnesses; they seem to have been a sort of jury. It was they who adjudged the property to the legal owner. They served much the same purpose as that served by the jury in the earlier form of English procedure, where they were witnesses and jury as well.

Section 6 – Contracts.
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The Babylonian Law developed to the fullest extent the idea of a Contract. Almost any possible business transaction was reduced to the form of a contract & was executed with the same formalities – i.e., with witnesses, notary, & signature. Thus the points as to deeds, sales, mortgages, loans, & banking are in no respect different in form from the matter of hiring, rent & leases, partnership, testaments, & domestic relations, including adoption. Transactions so very different could be reduced ti the same principle, or brought under the one head, only by a highly abstract conception of contract itself. From forms of contract ... we pass to the relations of master and servant, leases, & future delivery of goods.

Sub-scetion A. Master & Servant. ... a man might well make a contract with another whom he hired for a year, or whom he contracted to serve for a year. ... example ... In connection with this

contract, it should be noted that Ubarru was regarded as a free agent, hiring himself out. But since he enters into a relation to his master in which he is temporarily in the condition of a slave, he has a representative, or guardian, Samas-taiaru, who protects his interests. This seems to have been customary.

... In the case of a slave the name of the slave's father is never given. The slave is not regarded or spoken of as a man, but as a thing, and is reckoned in the same way as cattle. The actual point of this contract is the transfer of the right to a man's services. Such a transaction is but a part of the whole Babylonian system, whereby every credit or right was passed from one to another by means of contracts. ...

The law was very strict as to the beginning & termination of these contracts. ... If the servant did not appear, he could be arrested & brought to his master, as he was his master's man. ...

This species of ... temporary slavery was of great importance & very customary in Old Babylon. It was retained to some extent in New Babylon; but, probably on account of the greater number of actual slaves, its importance rapidly diminished.

Part 2: The Development of Jurisprudence
Chapter 7, Early Roman Law
Section 1 – Historical Introduction
Pages 188 - 189

The prominence of Roman Law among the Legal Systems of ancient & modern times was due not merely to the genius of the Latin race, but also to the relation in which that race stood to the rest of the world. By origin it was one of the Aryan family of nations. It inherited the customs & traditions which have left their mark upon the institutions of India as well as those of England. But it stood in such to the highest Western civilization as to gain therefrom all the best which this had to offer. The law of the race had its birth in that fertile & diversified country which lies to the west of Apennines. The races which occupied that favored tract were within easy communication of the great Phoenician State of Carthage. Thence they could obtain those juristic principles which had been slowly elaborated in the East. The decaying fortunes of Babylon & Egypt in no wise hindered the transmission of the laws of those nations. The commercial customs which had been known on the banks of the Euphrates from an immemorial antiquity became, through the Phoenicians, the commercial law of the whole known world. Of many of these Rome was, through Carthage, possessed from the earliest period. ... every aid in the field of jurisprudence which was to be gained from other nations was received by the Romans, & by them turned to account.

Chapter 9: The Law of early Rome
Page 251

It was not until after three hundred years that the monarchial spirit of the new government was fully revealed, & the republican forms completely swept away. ...

The emperor became the final court of appeal.

Chapter 10: The Law of the Christian Empire.
Section 3: Influence of Christianity
Page 274

... Following the commands of the Apostle, the Christians held aloof from the civil tribunals. Their differences were generally settled by the ecclesiastical authorities, & the parties to the litigation felt in conscience bound to accept the decision of the bishop. ...

The conversion of Constantine, & the subsequent change in the relations between the imperial government & the church, had far greater effect upon the Church than upon the Empire. ... the legal system was but little affected by all this, however greatly the ecclesiastical system was disturbed. ...

The Church's government was closely modeled upon that of the Empire, & the system became rigid & its operation mechanical. The Church ... was converted into the established religion of the Empire, & thus succumbed to the power of the Roman Law.

Page 457 The importance of the Norman Conquest ...
Page 459

Among the changes introduced in the administration of justice was the separation of the ecclesiastical & secular jurisdictions. The bishops were no longer to sit with the ealdormen in the hundred court, they were to hold their own ecclesiastical courts, & to be governed by the canons of the Church. This was an important departure from the former ecclesiastical law system of England. After the foundation of Christianity among the Saxons, & when the first enthusiasm had abated, the English Church had become comparatively isolated & out of touch with the ecclesiastical movements of Western Europe. ... it was not until the time of the Conquest that the Roman Cannon Law, as distinct from local laws & cannons, began to be generally received.

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The system became an instrument of oppression. The nobles grasped the opportunity for extortion. They drew all the important cases to their courts, that they might obtain large fees. They neglected the small matters so intimately connected with the vitality of the everyday life of the people. Therefore the substantial justice which in the Anglo-Saxon period was brought to the door of the humblest citizen passed away. The court system was the object of loud complaints.

... The refinements of procedure introduced into the royal courts were unknown in the popular tribunals. The Norman Lawyers introduced a system of formal pleading, & the Crown favored this practice. The importance of the compurgators declined ... . The authority of the king as the fountain of all justice was constantly emphasized by interference with the customary courts. ... subinfudiation was forbidden ... the jurisdiction of the local courts was transferred to royal control.

In this manner was accomplished the transition from the Saxon through the Norman to the Angevin period of the judicial system of England.

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In the earliest form of the jury, the jurymen were the equivalent of what were later regarded as witnesses, & were selected from the neighbors & those most likely to be acquainted with the facts of the case. They were chosen by the court & not as were the compurgators, selected by the parties to the suit ... "

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The principle provision of Magna Charta ...

... the kings inferior officers were not permitted to hold pleas of the crown or to try any criminal charge, lest forfeitures might unjustly accrue to the royal exchequer. The king was to appoint only men learned in the law. He was not to deny, delay or sell justice to anyone. ... no freeman should be taken or imprisoned or dis-seized or outlawed or exiled or in any way destroyed, save by the lawful judgement of his peers or the law of the land. This provision ... has become the foundation of the right of trial by jury & habeas corpus ..."

Judicial science ... is not without error.

In this way, the importance & meaning of certain phrases in Magna Charta have been settled because the legal institutions which have grown out of them have assumed a permanent place in English law.