THE PART OF THE ARCHIVIST IN THE WRITING OF AMERICAN LEGAL HISTORY[1]

AS EARLY as 1899 Paul Samuel Reinsch stated that "when American legal history comes to be studied more thoroughly, it will perhaps be found that no country presents, in the short space of three centuries, such a variety of interesting phenomena," and added, with regard to the court records, that "a publication of characteristic records of this kind is a desideratum not only for legal history, but for the study of the general economic and social development."[2] A few years later Herbert Osgood, for the historians, lamented that "the subject of the introduction of English law into the colonies, which is also the history of the origin of American law, is one which demands investigation. Until the work shall be done by some competent hand, one is forced to deal in generalities."[3] These statements were all made at the beginning of the present century, and have been echoed many times since by Holmes, Pound, Philbrick, Goebel and many others.[4] The value of American legal records has been recognized and the necessity of examining and reproducing them appreciated, yet save for a niggardly use by a scattering of historians and the publication within recent years of a handful of the records,[5] precious little has been done with them.

With so many doing service to the value of legal records, a fair question to ask is, what do these records contain? The answer to such a question becomes comprehensible only when one realizes the part the courts played in the life of the people. No one reading newspaper headlines today would deny for a second the social and economic significance of the courts in our own times. Certainly their records bulk large in the estimation of those students of contemporary society, the sociologists. Yet the story of the courts in America has been the story of the constant diminution of their powers by the relega-

[1] Paper read at a luncheon conference of the Society of American Archivists at Philadelphia, Wednesday, December 29, 1937.

[2] P. S. Reinsch, "English Common Law in the Early American Colonies," *Select Essays in Anglo-American Legal History* (Boston, 1907), I, 367, 371.

[3] Herbert Osgood, *The American Colonies in the Seventeenth Century* (New York, 1904), III, 14.

[4] See especially F. S. Philbrick, "Possibilities of American Legal History," *The Law Library Journal*, XXVII (1934), 191-213.

[5] For a bibliography of colonial court records published down to 1930 see R. B. Morris, *Studies in the History of American Law* (New York, 1930), 265-273.

tion of their authority to commissions, bureaus and administrative agencies. In the earliest colonial period no institution transcended the local county court in the importance of its intimate contact with the lives of the people. It was one of the two institutions they first established as being most essential to adjustment in the new land. The church was the other. But whereas the church was a subtle influence, giving the colonists the spiritual strength to face disheartening odds and only occasionally moving against them individually—usually to prevent immorality, with an admonition made somewhat substantial by the threat of excommunication—the courts constantly touched their lives with reality in the form of process, such as writs, subpoenas and orders, enforced by constables and sheriffs, supported with the more effective sanctions of the whipping post, fines and imprisonment.

The colonists did not arrive on these shores with an outlined scheme of government giving to each agency of government, such as the court and the executive, its allocated sphere of activity. They arrived generally without even books to help them, except the Bible. Their souls had to be saved, to be sure; hence the Bible, however limited the room on transatlantic vessels might have been, but in the unending combat with the wilderness which they faced, an axe or a hammer or a frying pan was more useful than an abridgment of the statutes or copies of Lambarde or Dalton. They arrived with but a vague and rapidly dimming memory of the way things had been done in England and a sense of some of the things they wanted changed. Because these early colonists were drawn from the mass of the common people of England, and because as such they had all rendered service in the local courts of England—the leet, baronial, county and borough courts and the quarter sessions—the court loomed large in their memories. But, because there was considerable jurisdictional confusion in the way those courts were functioning in England, and because in their memories the colonists were particularly vague as to detail, the courts they first established in America were compounded of all the English local courts just mentioned and in a broad way combined their powers.[6] This gave them an extremely comprehensive jurisdiction to begin with. In addition, although the

[6] For a careful discussion of the confusion resulting from this fact, further complicated by the religious background of the settlers in Massachusetts, see Julius Goebel, Jr., "King's Law and Local Custom in Seventeenth Century New England," *Columbia Law Review*, XXXI (1931), 416-448.

courts were originally established for the usual general purposes of providing a procedure for the orderly determination of disputes and for maintaining the peace, once they were in existence and functioning, the tendency with governors and legislatures was to turn to them with any new regulation they wanted enforced.

The litigious nature of the colonists also played a part in giving the court an exaggerated social significance. The colonists were extremely sensitive and very willing to prosecute the slightest reflection on either their character or title to property. This quirk in colonial nature may be explained by the fact that a man could be his own lawyer and so risk only the costs of suit in litigation, or it may be explained merely in terms of entertainment value. There was a basic monotony in the struggle with nature, especially amid the moral regulations of the day, which found some release in the excitement of court day. The meeting of court was quite a social occasion. The result of all these factors was an institution which in its scope permeated the entire warp and woof of colonial life in a manner difficult to realize today.

There was literally no phase of human life which was not within the province of the court's activity, from the most intimate relations between husband and wife, to the most tenuous relations between a tenant and the incompetent heirs of an absentee landlord. The court not only regulated the lives of the people from the cradle to the grave, but endeavored to prevent the birth of some, with its moral regulations, and materially affected others after death in the disposition of decedents' estates.

The court of course performed its primary service of providing a place where litigants could bring suit. The diversity of these cases is limited only by the differences human beings are capable of. It would be impossible to indicate in this paper the scope of human activity covered by the cases tried on the civil side. They included matters having to do with land disputes, contracts and commercial damages, and differences on these matters were intensified by the very unsettled conditions of early colonial society.[7] Nor shall I attempt to discuss the important criminal activities of the court[8] or to

[7] No extensive study of this material has been made, but for a limited discussion in the fields of land law, women's rights and torts see R. B. Morris, *op. cit.* See also C. M. Andrews, "The Influence of Colonial Conditions as Illustrated in the Connecticut Intestacy Law," *Select Essays,* I, 431-463; and G. E. Howard, *History of Matrimonial Institutions* (Chicago, 1904), vol. II of which deals with the colonial period.

[8] See A. P. Scott, *Criminal Law in Colonial Virginia* (Chicago, 1930); H. W. K.

indicate the great variety of offenses it discouraged by punishing, from the pleasurable crimes of swearing, smoking in the streets, drinking to excess or striking one's parents, to the more serious crimes of murder and burglary.

However, in addition to these matters being determined on either the civil or criminal side, the court in the earliest days regulated midwifery and provided for the registration of births. It then provided for the education of the children, and, likewise, the conditions under which they should be indentured as servants. It extended its protection to include others who were unable to protect themselves —illegitimate children, the poor, the insane, Negroes and Indians. It provided a means for the orderly distribution of unoccupied lands by registering claims and regulating landmarks, and then maintained men in their tenures with its process. The court also protected chattels by providing for the registration of brands. The court built highways, bridges and dikes and regulated fences and ferries. At times it even supervised the church, providing for buildings, ministers and the collection of tithes. It assessed and collected taxes. It welcomed some into citizenship by offering a procedure for naturalization, and it cast others outside the body politic, by declaring them outlaws, who could be shot down on sight as creatures of the wild.

Seventeenth century economic regulation would, in the scope and minuteness of its control, make those who support contemporary regulatory legislation seem like rugged individualists. A man's basic activities such as hunting, fishing and whaling were all regulated. The kinds of bread which bakers might bake were stipulated, the size and weight of the loaves fixed, as well as the manner in which they were to be marked and the price at which they were to be sold. The leather to be exported or used for manufacturing purposes within the colony was inspected and stamped, and to use uninspected leather was a punishable offense. The wood to be used for staves and drums was all prescribed. Flour, tobacco, hemp and meat to be exported were regulated as to quality and method of packing. All of these regulations were supervised by the county court. Finally, for those who succumbed to this economy, the court fixed a place of burial and guaranteed its inviolability.[9]

Fitzroy, "The Punishment of Crime in Colonial Pennsylvania," *Pennsylvania Magazine of History and Biography*, LX (1936), 242-269.

[9] For examples of the laws of one colony during the seventeenth century providing for the regulation outlined here see *Charter to William Penn and the Laws of the*

I have indicated but roughly the scope of the activity of this most important colonial institution, the county court. However, the very term "institution" is an abstraction, and what we mean by the court as an institution is the officials who functioned in the courts and the law they administered, and its significance depends upon the part that it played in the lives of the mass of the people. To describe the impact of such an institution in its varied aspects on all the people would require volumes and would necessarily result in a treatment as impersonal and abstract as the word itself. Since an institution achieves reality only as it touches lives, the intimate part the court played in the lives of the colonists may perhaps best be illustrated by describing the part of the court in the life of one of them for a limited period.

For this purpose I have chosen the life of Richard Crosby as he voluntarily or involuntarily entered the court at Chester during the years between 1683 and 1697.[10] Richard Crosby was not one of the leading citizens of the town, nor was he an indentured servant. He was a farmer, an average colonist, who had left England to seek in the new world the opportunities denied him at home. Chester was a small village a few miles up the Delaware, temporarily the first city of the new province since Penn had disembarked there in 1682 to be feudally recognized in his grant. The court before which Richard Crosby appeared consisted of farmers like himself, who, without benefit of legal learning, solved as best they could the multifarious problems arising as an increasing migration of Europeans, all land hungry, attempted settlement in a country without established institutions and inhabited by a primitive and unfriendly people. In the chaos of this situation the court was the sole arm of the state, the sole force on the side of order.

Crosby's name first appeared in the records in October, 1683, when he was appointed to collect a levy for the building of a new courthouse. He was to collect the assessment for Providence, a small settlement a few miles to the west of Chester, whose inhabitants, conscious of their isolation, had just petitioned the court for a highway. In the same year Crosby first appeared before the court in the case

Province of Pennsylvania (Harrisburg, 1879), *passim.* Similar regulatory laws existed and to a degree were enforced by the courts in the other colonies.

[10] For a detailed examination of the part the court played in the life of Richard Crosby see H. W. K. Fitzroy, "Richard Crosby Goes to Court, 1683-1697: Some Realities of Colonial Litigation," in *Pennsylvania Magazine of History and Biography*, LXII (1938), 12-19.

Crosby *v.* Andrews. We do not know the facts in this case, but it dragged on for a number of years until Andrews fled the jurisdiction and Crosby secured, on an original judgment of £18, lands that had been assessed thirteen years before for £60. This was one way of acquiring an estate in the new land.

In 1686 Crosby served as a juror, sitting on three civil cases and one criminal prosecution. The civil cases all involved questions having to do with the title to land. The criminal prosecution was for hog stealing, for which the prisoners were sentenced to pay the owner forty shillings as restitution and "recieve twelve stripes apeece well laide on their backs." Later in the same year pigs again entered Crosby's life when he was fined for "keeping an unlawful fence to the damage of John Martin in his swine."[11] People were establishing themselves along the new road to Providence, and the court was active settling the frictional problems following on the increase in population. The next year a new road connected Crosby's lands with the King's Highway, and he was made a supervisor of the highways. The swing west was coming fast indeed.

Four more times during the period Richard Crosby turned to the court to settle differences with his neighbors, three times as plaintiff in actions of debt and once as the defendant. His name appeared three times on the dockets for the purpose of securing title to land: as the grantor of a mortgage on lands in Chester, as attorney to acknowledge a deed, and, finally, as the grantee of a deed for eighty acres of land. Slowly but surely, before us in the records, the estate and holdings of Richard Crosby were being increased.

Unfortunately the records reveal the character of Richard Crosby as having been not without blemish. He was of the frontier, and the rough strength so essential to conquest of the wilderness could likewise cause trouble. Here the court stood as ready to do justice to Richard Crosby as by him. Twice he was fined for being drunk and abusing the magistracy. At another time he challenged the Swedes at cudgels and accused them of taking part with the Indians against the English. Later, in one evening, he claimed that he and his son possessed magical powers, abused the magistrates, and outraged his host by suggesting that his host's mother had "drunk herself blind," and that his wife was a member of the world's oldest profession. For all of these offenses Crosby was fined.

[11] This was in violation of a law of the province. See *Charter and Laws, supra*, 15.

Richard Crosby made his last appearance, in the records we have under consideration, in 1697. At that time he was presented for having called the grand jury "perjured rogues" and for saying that "if either sherif or clarke came to gather the country levie of him he would be the death of him." This was a small thin voice of Richard Crosby's on the Pennsylvania frontier of 1697, but it was the same voice, augmented and amplified, which successfully demanded the democratic Pennsylvania state constitution of 1776, and which unsuccessfully resisted the federal forces in the Whiskey Rebellion of 1794.

Over a period of fourteen years Richard Crosby's name appeared fifty-one times in the records and in that period the court touched his life twenty-six times to protect him in his property, to exact services from him or to hold him to the standards of good behavior. Richard Crosby was typical of the people before the court and his life fairly illustrates the part the court played in the lives of the colonists.

The thing to be marveled at is that social and economic historians have made so little use of the records of so vital an institution and records so rich in social detail. So distinguished a writer as the author of *Provincial Society*[12] presumes to give his volume such a title, without apparently having even superficially examined the records of this organization which, as we have just demonstrated, most intimately and most constantly touched the lives of the mass of the people. The excuse cannot be given that the courts touched only the seamy side of colonial life. Even if it were so it would be no reason for neglect. But the people before the court were not all Jukes; there were a surprising number of Edwards', as one might expect considering the scope of the court's activities. Yet time and again, even in so admirable a work as the *Dictionary of American Biography*, one reads sketches of the lives of lawyers and judges, without reference to the evidence of a most revealing part of their lives, the record of their activity before the courts. We know practically nothing of the manner in which the courts functioned during the Revolution, though in many jurisdictions two systems of courts were operating, presenting a fascinating opportunity for contrast. Although the independent action of the separate state courts in the absence of any

[12] J. T. Adams, *Provincial Society, 1690-1763* (New York, 1927). In a critical essay on the authorities under the caption "Law and Legal Institutions," some of the better known monographs are mentioned, but there is little evidence in the volume that even these secondary sources were very much relied on.

federal judiciary is commonly given as one of the reasons for the breakdown of the Confederation, we know very little of what was actually being done in the courts. Likewise, the activities of the courts during the period of our third constitutional experiment, the Confederacy, is a void in our legal history.[13]

Perhaps these records have not been utilized because historians, not being initiated into the closely guarded secrets of the law, have hesitated to examine the evidences of a mystery. While Maitland was quite right in holding that the history of the law must be written by lawyers,[14] there is much of a significant but untechnical nature which is to be gleaned by anyone willing to search. Neither Andrews nor Sioussat is a trained lawyer, yet each has made expert use of legal records.[15] An action on contract might reveal a highly technical and peculiar form of bill of lading, truncated perhaps and in extreme variance with all such previous forms, especially significant to the legal historian writing a history of commercial paper, but the same case might also reveal that the goods were shipped by steamboat on a certain date, on a canal, the kind of goods in transit and their price, all of which would not be without significance to the economic historian. So, in the accumulated criminal cases of a people is written the history of their status, their morality, their religion, and every tendency toward improvement or degradation.

If the value of these records has been recognized, why have they not been used? If there have been voices calling in the wilderness, why have they not been heeded? If the tradition of writing a history of the people, inaugurated in America by McMaster and perpetuated by writers like Bruce and Wertenbaker,[16] is sound, why have these records touching so closely the lives of the people been ignored?

[13] Some light was thrown on this problem in a paper entitled, "State Courts and the Confederate Constitution," read by J. G. de Roulhac Hamilton at a joint meeting of the American Historical Association and the Southern Historical Association at Philadelphia, December 29, 1937. The paper was necessarily preoccupied with the courts in the maintenance of civil rights during war time.

[14] *The Collected Papers of Frederic William Maitland*, ed. by H. A. L. Fisher (Cambridge, 1911), I, 493: "a thorough training in modern law is almost indispensable for anyone who wishes to do good work on legal history."

[15] See C. M. Andrews, *loc. cit.*; and also St. George L. Sioussat, "The English Statutes in Maryland," *Johns Hopkins University Studies in Historical and Political Science*, XXI, nos. 11-12.

[16] T. J. Wertenbaker, *The First Americans*, vol. II of *A History of American Life*, ed. by A. M. Schlesinger and D. R. Fox, makes considerable use of court records, especially those of the county court. P. A. Bruce, *Institutional History of Virginia in the Seventeenth Century* (New York, 1910), in the chapters on legal administration places much reliance on the actual court records.

Perhaps an examination of the history of the writing of English legal history will provide us an answer.

Maitland in 1888, in an essay entitled, "Why the History of English Law Is Not Written,"[17] grieved that the overwhelming mass of records, even in the earliest centuries of the writing of English law, made the writing of a history of the English law almost impossible. In keeping with his expressed grievance Maitland and his collaborator closed their *History of the Common Law of England* with the year 1272, the first year of the reign of Edward I.[18] Yet in 1926, less than forty years later, the ninth volume of Holdsworth's monumental *History of the Common Law*, describing the development of English law through the last century, made its appearance. What had transpired, what developments had taken place with regard to English legal records to make possible in 1926 what had been called impossible in 1888?

The answer to our question is acknowledged by every writer of English legal history who has emerged since Maitland, as a debt to the work of the English archivists. The beginnings of their activity were directly responsible for Maitland's grievance as to the period after 1272, the publications of the Records Commission between 1830 and 1840, under the careful eyes of Palgrave and Hardy,[19] followed by the Rolls series in 1858 and the volumes of the Historical Manuscripts Commission in 1887. Here were edited and released for the convenient use of students a great mass of material formerly scattered over the kingdom, hidden in the attics and cellars of public buildings and the muniment rooms of private residences, in places where no one could have hoped to have had access to them—cartularies, chronicles, yearbooks, King's Council and early chancery proceedings, records of fines and pipe, patent, close, hundred and manorial rolls. Since then the publication of records has been continued by the English Historical Society, the Camden Society and, above all, the Selden Society. Within recent years the county historical societies have added whole series of volumes of records of the local courts, especially the quarter sessions.[20] On top of this there has

[17] *Collected Papers*, I, 480.

[18] There had been many writers in the English law from Glanvill to Blackstone, but they had been very limited in their use of source and had perforce not produced their work under the critical historical method of the second half of the nineteenth century. See W. S. Holdsworth, *The Historians of Anglo-American Law* (New York, 1928).

[19] There were apparently many volumes of manuscripts prepared at this time that have not yet been published. Maitland, *Collected Papers*, II, 9.

[20] Note especially *Staffordshire Historical Collections: Quarter Sessions, 1598-1602;*

been an increased activity on the part of the Records' Office, with improvements made in the direction of greater accessibility of the records. There has also been a steady flow of manuscripts towards a few of the great public libraries, especially those of the British Museum, Lincoln's Inn, and Cambridge and Oxford universities.

English legal history could be written because the English archivists gathered together the legal records and made them available to the scholars. From these records came not only the history of the English law but the impressive institutional histories of the Webbs,[21] and the social histories of Dorothy George and Eleanor Trotter.[22] What Maitland only vaguely realized in 1888 was that the history of English law would not be written by one man or two men, but by literally hundreds of men whose researches in 1926 could be synthesized by a Holdsworth.

If, then, American legal history is to be written, if social and economic historians are to have the use of these valuable records, the archivists must first prepare the way by collecting the records and making them available. The problem in America is concededly more difficult.[23] Instead of dealing with a single jurisdiction and records never more than a few hundred miles distant, as was the case in the writing of English legal history, the historian of American law must deal with forty-nine jurisdictions and records which are scattered over thousands of miles. The task therefore of the American archivist becomes so much the greater.

The accumulation of materials in these jurisdictions is overwhelming and will become increasingly so, but the archivist must not be awed by this fact. With the task of discovery so admirably performed by the federal government during these years of depression, the archivist's function remains, first, to take the necessary precautions for the preservation and safeguarding of the records, and then to

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Northants Record Society Publications, Quarter Sessions Records, 1630-1658; and *Lincoln Record Society Quarter Sessions Minutes, 1674-1695.*

[21] Beatrice and Sidney Webb, *English Local Government from Revolution to the Municipal Corporations Act: The Parish and the County* (London, 1906); *The Manor and the Borough* (London, 1908).

[22] Dorothy George, *London Life in the Eighteenth Century* (London, 1930). Eleanor Trotter, *Seventeenth Century Life in the County Parish* (Cambridge, 1919).

[23] Professor James echoes Maitland's early lament. Eldon R. James, "Some Difficulties in the Way of a History of American Law," *Illinois Law Review,* XXIII (1929), 683: "While a person might in one lifetime conceivably master the sources, so that he could deal adequately with the legal history of one state, he would find it a most difficult, if, indeed, not an impossible task to go farther than this."

provide for the needs of historians and others who will use the records. Technological improvements have developed at a thrilling rate during the past few years, so that mechanical ingenuity is solving many of these problems for the archivist. The only oversight has been a machine to determine what shall be saved. No slavish antiquarianism is the solution of this problem. The fault in the past has been not that mice and fire and water and neglect permitted so few records to survive, but that the wrong records survived. An intelligent reduction of the amount of these rapidly accumulating records can be made. Let the archivist consult, in the case of legal records for example, with the lawyers, the judges and the legal historians, and great masses of duplicate materials, of routine records without historic value, can be disposed of. The archivist in any case will be damned, but let him develop a philosophy which will condition him to accept it.

A beginning is concededly being made to make these legal records available, but only the merest beginning. Records are being centralized, some of the more interesting are being printed,[24] more are being microfilmed.[25] Even more important at the moment, reports on the materials in local archives are being made at least enumerating the records which have survived to date.[26]

The writing of monographs from this mass of legal records has begun. The number of workers will steadily increase and more and more information will be withdrawn and checked against that which has already been done. At long last the synthesist, the Holdsworth, of American legal history will appear, and a history of American law will be written. In hundreds of early monographs will be short paragraphs, usually inserted between tributes to graduate professors and the author's spouse, acknowledging the courtesy of the archivists who made the material available. That will be the archivist's

[24] Note the publications of the Littleton-Griswold Committee of the American Historical Association; *Proceedings of the Maryland Court of Appeals*, ed. by C. T. Bond and *Select Cases of the Mayor's Court of New York City, 1674-1784*, ed. by R. B. Morris. See too the four volumes of *Transactions of the Supreme Court of the Territory of Michigan*, 1805-1824, ed. by W. W. Blume, published by the University of Michigan upon the Cook Endowment Fund, and *Records of the Court of Common Right of New Jersey*, ed. by P. W. Edsall, published by the American Legal History Society.

[25] The scope of this activity was outlined in a paper read before the Society of American Archivists at Providence in December, 1936, by J. P. Boyd.

[26] These reports are now being made under the direction of Dr. Luther H. Evans, of the Historical Records Survey, and it is hoped that eventually over three thousand of these reports, for each county in the nation, will appear in either printed or mimeographed form.

reward. It seems a meager reward and it is, but the archivist may rest secure that without him the writing of American legal history and the release of valuable historical materials in the court records becomes an impossibility.

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