

ANCIENT LAW:

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

By HENRY SUMNER MAINE,

MEMBER OF THE SUPREME COUNCIL OF INDIA:
FORMERLY READER ON JURISPRUDENCE AND THE CIVIL LAW AT THE MIDDLE TEMPLE,
AND REGIUS PROFESSOR OF THE CIVIL LAW IN THE UNIVERSITY OF CAMBRIDGE.

WITH AN

INTRODUCTION BY THEODORE W. DWIGHT, LL. D.,
PROFESSOR OF MUNICIPAL LAW, COLUMBIA COLLEGE, NEW YORK.

FIRST AMERICAN—FROM SECOND LONDON EDITION.

NEW YORK:
CHARLES SCRIBNER, 124 GRAND STREET.
1864.

HS

D.

tractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist ; from her coming of age to her marriage all the relations she may form are relations of contract. So too the status of the Son under Power has no true place in the law of modern European societies. If any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives its legal validity. The apparent exceptions are exceptions of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their capacities and incapacities regulated by the Law of Persons. But why? The reason is differently expressed in the conventional language of different systems, but in substance it is stated to the same effect by all. The great majority of Jurists are constant to the principle that the classes of persons just mentioned are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests ; in other words, that they are wanting in the first essential of an engagement by Contract.

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were

derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.

CHAPTER VI.

THE EARLY HISTORY OF TESTAMENTARY SUCCESSION.

If an attempt were made to demonstrate in England the superiority of the historical method of investigation to the modes of inquiry concerning Jurisprudence which are in fashion among us, no department of Law would better serve as an example than Testaments or Wills. Its capabilities-it owes to its great length and great continuity. At the beginning of its history we find ourselves in the very infancy of the social state, surrounded by conceptions which it requires some effort of mind to realise in their ancient form ; while here, at the other extremity of its line of progress, we are in the midst of legal notions which are nothing more than those same conceptions disguised by the phraseology and by the habits of thought which belong to modern times, and exhibiting therefore a difficulty of another kind, the difficulty of believing that ideas which form part of our every-day mental stock can really stand in need of analysis and examination. The growth