

THE
LAW QUARTERLY
REVIEW.

EDITED BY

SIR FREDERICK POLLOCK, BART., M.A., LL.D.

CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD.

VOL. XII.

PER
K
12
.A93674
v.12

LONDON:

STEVENS AND SONS, LIMITED, 119 & 120 CHANCERY LANE.

AGENT FOR UNITED STATES OF AMERICA, THE BOSTON BOOK CO., BOSTON.

AGENT FOR CANADA, THE CARSWELL CO., LIMITED, TORONTO.

OXFORD: AT THE CLARENDON PRESS.

1896.

WYCLIF ON ENGLISH AND ROMAN LAW.

ANY passage in a mediæval book which compares or contrasts the system of the civilians with our own English law should be treasured. Such a passage there is in Wyclif's *De officio regis*, a tract that was published by the Wyclif Society in 1887. The heresiarch is not a writer whose arguments are easily followed, for they are always taking unexpected turns, or at all events turns which will be unexpected by those who are not familiar (and I, for one, am not) with the theology and politics of the time. In this tract, for example, he is concerned to belittle the civilians. Apparently the quarrel that is really near his heart is the quarrel with the canonists. He wants to see a world and a church that have little law other than the law of God laid down in the Holy Scriptures, of which law neither civilians nor canonists but theologians are the custodians and interpreters. One of his reasons for praising, somewhat faintly, the law of England is that there is not very much of it.

'Et hinc leges regni Anglie excellunt leges imperiales, cum sint pauce respectu earum, quia supra pauca principia relinquunt residuum epikerie sapientum ¹.'

English law has but few principles, and much is left to the *ἐπιείκεια* of the wise.

Wyclif, however, has a feud with the bishops who have been fostering the study of 'the civil law' in the universities. Thus they have been withdrawing men and means from theology. Of the two, the clergy of England had better read English than Roman law. But, says Wyclif, some will argue that there is more subtle reasoning and more justice in Roman civilianship (*civilitate Romana*); also that it must needs be studied if the canon law is to be understood; also that it is necessary for the decision of causes according to 'the law of arms.' Now it must be confessed that there is much of reason in this *civilitas Romana*. Also that it has produced great statesmen.

'Sed non credo quod plus viget in Romana civilitate subtilitas racionis sive iusticia quam in civilitate Anglicana, et cum sit per se notum quod quecumque lingua, Latina, Greca vel alia, sit imperitins clerimonie vel racioni, cum racio sit ante linguam, patet quod

¹ *De officio regis*, p. 56.

non pocius est homo clericus sive philosophus in quantum est doctor civilitatis Romane quam in quantum est iusticiarius iuris Anglicani¹.

This is an early assertion of the right of the common lawyer, the justice of the law of England, to take his place beside the doctors of the civil law as a clerk and philosopher, or, as we should say, a learned and a liberally educated man. Wyclif goes on to argue that the canon law in its purity (that is, the canon law as he would like to see it) can be studied without the aid of the civil law; also that the true 'law of arms' lies in the Bible.

Elsewhere he is arguing for the disendowment of the civilians and canonists at the universities:—

'Unde videtur quod si rex Anglie non permetteret canonistas vel civilistas ad hoc sustentari de suis elemosinis vel patrimonio crucifixi ut studeant tales leges (hoc enim non sustinet de lege propria cui rationabiliter plus faveret) non dubium quin clerus foret utilior sibi et ad ecclesiasticam promocionem humilior ex noticia civilitatis proprie quam ex noticia civilitatis duplicis aliene².'

It would be better for the clergy to learn the civil system of their own country than the 'doubly alien' system of imperial and papal Rome. Still, he adds, something should be known of this foreign matter, in order that men may understand that in old times the pope was subject to the emperor. A historical study of the civil and canon law will teach them how baseless are the pretensions of modern popes.

In attacking the papalists Wyclif had been making common cause with the imperialists of the continent. But he seems to think it necessary that he should dissociate himself from them lest he should be taken to allow the emperor some superiority over the king of England. The imperial theory, the theory of a world-wide monarchy, is attractive and once was useful. But the emperors have forfeited their claims by their folly in endowing 'their bishop' (that is, the pope) contrary to Christ's religion and in allowing the clergy to usurp imperial rights. The empire no longer 'lives imperially as it ought to live.' So England will have none of it, nor of its laws. Therefore, once more, it is a scandal that our bishops should be licensing and encouraging the clergy to study the *ius civile*³, which in tracts that are addressed to the vulgar in the vulgar tongue becomes 'paynymes lawe' and 'hethene mennys lawe.'

There are not wanting some other signs that in the second half of the fourteenth century 'the civil law' (thanks to such legally-minded prelates as Bateman) was looking up in the world. Wyclif's

¹ De officio regis, p. 193.

² Ib., p. 237.

³ Ib., p. 250.

De officio regis is ascribed by its editors to the year 1379 or thereabouts. A few years afterwards, in the case of the lords appellant, we hear the famous declaration of the peers that this realm never has been and shall not be governed by the civil law. They were at the moment engaged in setting up a 'law of parliament' (which, it is to be feared, meant law or lawlessness improvised for the purpose of vengeance) not only above the civil but above the common law¹. However the mere fact that some one had proposed that 'appeals' in Parliament should be conducted according to the civil law, that is, according to the system of procedure which the civilians and canonists had jointly elaborated, shows that this procedure was gaining ground, and we know that it was becoming the procedure of the nascent court of equity. Wyclif's protest in favour of English law is therefore of some interest. He was quarrelling with the clergy and was concerned to keep the laity, including the king, nobles, and common lawyers on his side.

F. W. MAITLAND.

¹ Rolls of Parliament, iii. 236, 244.

We have received, too late to be mentioned in its proper context, an interesting paper entitled 'The Relation of the Law School to the University,' read by Mr. Ernest W. Huffcut, of Cornell University, at the annual meeting of the American Bar Association. It deals with questions of detail that would hardly arise here in the same form, but assumes as beyond question the necessity of some co-ordination and co-operation of academic and technical training.
