THE HISTORY

OF

ENGLISH LAW

BEFORE THE TIME OF EDWARD I

BY

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AND

FREDERIC WILLIAM MAITLAND

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IN this edition the first chapter, by Prof. Maitland, is new. In Book II., c. ii. § 12, on 'Corporations and Churches' (formerly 'Fictitious Persons'), and c. iii. § 8, on 'The Borough,' have been recast. There are no other important alterations: but we have to thank our learned critics, and especially Dr Brunner of Berlin, for various observations by which we have endeavoured to profit. We have thought it convenient to note the paging of the first edition in the margin.

F. P.
F. W. M.

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PREFACE TO FIRST EDITION.

THE present work has filled much of our time and thoughts for some years. We send it forth, however, well knowing that in many parts of our field we have accomplished, at most, a preliminary exploration. Oftentimes our business has been rather to quarry and hew for some builder of the future than to leave a finished building. But we have endeavoured to make sure, so far as our will and power can go, that when his day comes he shall have facts and not fictions to build with. How near we may have come to fulfilling our purpose is not for us to judge. The only merit we claim is that we have given scholars the means of verifying our work throughout.

We are indebted to many learned friends for more or less frequent help, and must specially mention the unfailing care and attention of Mr R. T. Wright, the Secretary of the University Press.

Portions of the book have appeared, in the same words or in substance, in the *Contemporary Review*, the *English Historical Review* and the *Harvard Law Review*, to whose editors and proprietors we offer our acknowledgments and thanks.

F. P.
F. W. M.

Note. It is proper for me to add for myself that, although the book was planned in common and has been revised by both of us, by far the greater share of the execution belongs to Mr Maitland, both as to the actual writing and as to the detailed research which was constantly required.

F. P.

21 *Feb.* 1895.

LIST OF ABBREVIATIONS.

A.-S.	= Anglo-Saxon.
Bl. Com.	= Blackstone's Commentaries.
Co.	= Coke.
Co. Lit.	= Coke upon Littleton.
D. B.	= Domesday Book.
D. G. R.	= Deutsches Genossenschaftsrecht
D. R. G.	= Deutsche Rechtsgeschichte[1].
E. H. R.	= English Historical Review.
Fitz. Abr.	= Fitzherbert's Abridgement.
Fitz. Nat. Brev.	= Fitzherbert's Natura Brevium.
Harv. L. R.	= Harvard Law Review.
Lit.	= Littleton's Tenures.
L. Q. R.	= Law Quarterly Review.
Mon. Germ.	= Monumenta Germaniae.
P. C.	= Pleas of the Crown.
P. Q. W.	= Placita de Quo Warranto.
Reg. Brev.	= Registrum Brevium.
Rep.	= Coke's Reports.
R. H.	= Hundred Rolls.
Rot. Cart.	= Charter Rolls.
Rot. Cl.	= Close Rolls.
Rot. Parl.	= Parliament Rolls.
Rot. Pat.	= Patent Rolls.
Sec. Inst.	= Coke's Second Institute.
Sel. Chart.	= Stubbs's Select Charters.
X.	= Decretales Gregorii IX.
Y. B.	= Year Book.

[1] The second edition of Schröder's D. R. G. is referred to.

LIST OF TEXTS USED[1].

[R = Rolls Series. Rec. Com. = Record Commission. Seld. = Selden Society. Camd. = Camden Society. Surt. = Surtees Society.]

Collections of ancient laws and documents.

Die Gesetze der Angelsachsen, ed. F. Liebermann, in progress.
Die Gesetze der Angelsachsen, ed. Reinhold Schmid, 2nd ed., Leipzig, 1858.
Ancient Laws and Institutes of England, 8vo. ed. (Rec. Com.).
Councils and Ecclesiastical Documents, ed. Haddan and Stubbs, vol. iii. Oxford, 1871.
Quadripartitus, ed. F. Liebermann, Halle, 1892.
Consiliatio Cnuti, ed. F. Liebermann, Halle, 1893.
Leges Edwardi Confessoris, ed. F. Liebermann, Halle, 1894.
Instituta Cnuti, ed. F. Liebermann, Transactions of Royal Hist. Soc. N.S. vol. vii. p. 77.

Codex Diplomaticus Ævi Saxonici, ed. J. M. Kemble (Eng. Hist. Soc.).
Diplomatarium Anglicum Ævi Saxonici, ed. B. Thorpe, London, 1865.
Cartularium Saxonicum, ed. W. de G. Birch, 1885 ff.

Placita Anglo-Normannica, ed. M. M. Bigelow, London, 1879.

Select Charters, ed. W. Stubbs, Oxford, 1881.
Chartes des Libertés Anglaises, ed. Ch. Bémont, Paris, 1892.

Statutes of the Realm, vol. i. (Rec. Com.), 1800.

Judicial Records.

Rolls of the King's Court, Ric. I. (Pipe Roll Soc.).
Rotuli Curiae Regis temp. Ric. I. et Joh., ed. Palgrave (Rec. Com.).
Placitorum Abbreviatio (Rec. Com.).
Select Pleas of the Crown, 1200–1225 (Seld.).
Select Civil Pleas, 1200–1203 (Seld.).
Pleas of the Crown for the County of Gloucester, 1221, ed. Maitland, London, 1884.
Bracton's Note Book, ed. Maitland, Cambridge, 1887.
Three Assize Rolls for the County of Northumberland (Surt.).
Placita de Quo Warranto (Rec. Com.).
Somersetshire Assize Rolls (Somers. Record Soc.).

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[1] For texts relating to Normandy see below, vol. i. pp. 64–5; and for texts relating to the English boroughs, see below, vol. i. pp. 642–3.

Select Cases from Coroners' Rolls (Seld.).
Rotuli Parliamentorum, vol. i. (official edition).
Memoranda de Parliamento, 1305 (R).

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The Court Baron (Seld.).
Durham Halmote Rolls (Surt.).
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Pipe Rolls of Henry II. (Pipe Roll Soc.).
Red Book of the Exchequer (R).
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Rotuli Literarum Clausarum, 1204–1227 (Rec. Com.).
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Fines, sive Pedes Finium, 1195–1215, ed. Hunter (Rec. Com.).
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Rotuli Hundredorum, Hen. III. et Edw. I. (Rec. Com.).
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Documents illustrative of English History, ed. Cole (Rec. Com.).
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Foedera, Conventiones etc , ed. 1816 (Rec. Com.).
Prynne, Records, i.e. An exact Chronological Vindication...of the King's Supreme Ecclesiastical Jurisdiction, etc., London, 1655.

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Bracton and Azo (Seld.).
Britton, ed. F. M. Nichols, Oxford, 1865.
Fleta, seu Commentarius Iuris Anglicani, ed. 1685.
Glanvill, Tractatus de Legibus, ed. 1604.
Hengham, Summae, printed at the end of Selden's ed. of Fortescue, De Laudibus.
The Mirror of Justices (Seld.).

Law reports.

Year Books of 20–1, 21–2, 30–1, 32–3, 33–5 Edward I. (R).

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Abingdon, Chronicon Monasterii de (R).
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Burton, Annales de, in Annales Monastici, vol. i. (R).
Cambrensis. See Giraldus.
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Cotton, Bartholomaei de, Historia Anglicana (R).
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Dunstaplia, Annales Prioratus de, in Annales Monastici, vol. iii. (R).
Durham, Symeon of, The Historical Works of (R).
Eadmeri, Historia Novorum (R).
Edward I. and Edward II., Chronicles of (R).
Eveshamensis, Chronicon Abbatiae (R).
Flores Historiarum (R).
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Giraldus Cambrensis, The Works of (R).
Gloucester, Metrical Chronicle of Robert of (R).
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" " Historia Anglorum (R).
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Grosseteste, Letters of Bishop (R).

Lanfranci Opera, ed. Giles, Oxford, 1844.
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Saresberiensis, Joannis, Opera, ed. Giles, Oxford, 1848.

Cartularies.

Bath, Two Chartularies (Somerset Record Soc. 1893).
Battle, Cartulary (Camd.).
Brinkburn, Cartulary (Surt.).
Burton, Cartulary (Salt Society, 1884).
Gloucester, History and Cartulary (R).
Guisborough, Cartulary (Surt.).
Malmesbury, Register (R).
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Ramsey, Cartulary (R).
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Worcester, Register (Camd.).

Round, Ancient Charters (Pipe Roll Soc.).
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ADDITIONS AND CORRECTIONS.

p. 33, last lines. As to the *burh-geat* (not *burh-geat-setl*) see W. H. Stevenson, E. H. R. xii. 489; Maitland, Township and Borough, 209.

p. 118. Dr Liebermann has withdrawn the suggestion that Vacarius was the author of the tract on Lombard law. See E. H. R. vol. xiii. p. 297. The Summa de Matrimonio has been printed in L. Q. R. xiii. 133, 270.

p. 556, note 1. Add a reference to J. H. Round, The Hundred and the Geld, E. H. R. x. 732.

p. 663. As causes of municipal expenditure we ought to have mentioned the many presents, of a more or less voluntary kind, made by the burgesses to kings, magnates, sheriffs and their underlings. For these see the Records of Leicester, ed. Bateson, *passim*.

INTRODUCTION.

In the First of the two Books into which our work is divided we have endeavoured to draw a slight sketch, which becomes somewhat fuller as time goes on, of the general outlines of that part of English legal history which lies on the other side of the accession of Edward I. In the Second Book we have tried to set forth at some length the doctrines and rules of English law which prevailed in the days of Glanvill and the days of Bracton, or, in other words, under Henry II., his sons and grandson. The chapters of our First Book are allotted to various periods of history, those of the Second to various branches of law. In a short Introduction we hope to explain why we have been guilty of what may be regarded as certain offences, more especially certain offences of omission.

It has been usual for writers commencing the exposition of any particular system of law to undertake, to a greater or less extent, philosophical discussion of the nature of laws in general, and definition of the most general notions of jurisprudence. We purposely refrain from any such undertaking. The philosophical analysis and definition of law belongs, in our judgment, neither to the historical nor to the dogmatic science of law, but to the theoretical part of politics. A philosopher who is duly willing to learn from lawyers the things of their own art is full as likely to handle the topic with good effect as a lawyer, even if that lawyer is acquainted with philosophy, and has used all due diligence in consulting philosophers. The matter of legal science is not an ideal result of ethical or political analysis; it is the actual result of facts of human nature and history. Common knowledge assures us that in every tolerably settled community there are rules by which men are expected to order

their conduct. Some of these rules are not expressed in any authentic form, nor declared with authority by any person or body distinct from the community at large, nor enforced by any power constituted for that purpose. Others are declared by some person or body having permanently, or for the time being, public authority for that purpose, and, when so declared, are conceived as binding the members of the community in a special manner. In civilized states there are officers charged with the duty and furnished with the means of enforcing them. Of the former kind are the common rules of morals and manners, in so far as they do not coincide with rules of law. We shall find that in England, as elsewhere, and in times which must be called recent as compared with the known history of ancient civilization, many things were left to the rule of social custom, if not to private caprice or uncontrolled private force, which are now, as a matter of course, regulated by legislation, and controlled by courts of justice. By gradual steps, as singularly alike in the main in different lands and periods, at the corresponding stages of advance, as they have differed in detail, public authority has drawn to itself more and more causes and matters out of the domain of mere usage and morals; and, where several forms of public authority have been in competition (as notably, in the history of Christendom, the Church has striven with secular princes and rulers to enlarge her jurisdiction at their expense), we find that some one form has generally prevailed, and reigns without serious rivalry. Thus, in every civilized Commonwealth we expect to find courts of justice open to common resort, where judges and magistrates appointed in a regular course by the supreme governors of the Commonwealth, or, at least, with their allowance and authority, declare and administer those rules of which the State professes to compel the observance. Moreover, we expect to find regularly appointed means of putting in force the judgments and orders of the courts, and of overcoming resistance to them, at need, by the use of all or any part of the physical power at the disposal of the State. Lastly, we expect to find not only that the citizen may use the means of redress provided and allowed by public justice, but that he may not use others. Save in cases particularly excepted, the man who takes the law into his own hands puts himself in the wrong, and offends the community. "The law is open, and there are deputies; let

them implead one another." Such are for the citizen, the lawyer, and the historian, the practical elements of law. When a man is acquainted with the rules which the judges of the land will apply to any subject of dispute between citizens, or to any act complained of as an offence against the common weal, and is further acquainted with the manner in which the decision of the competent court can be enforced, he must be said to know the law to that extent. He may or may not have opinions upon the metaphysical analysis of laws or legal duty in general, or the place of the topic in hand in a scientific arrangement of legal ideas. Law, such as we know it in the conduct of life, is matter of fact; not a thing which can be seen or handled, but a thing perceived in many ways of practical experience. Commonly there is no difficulty in recognizing it by its accustomed signs and works. In the exceptional cases where difficulties are found, it is not known that metaphysical definition has ever been of much avail.

It may be well to guard ourselves on one or two points. We have said that law may be taken for every purpose, save that of strictly philosophical inquiry, to be the sum of the rules administered by courts of justice. We have not said that it must be, or that it always is, a sum of uniform and consistent rules (as uniform and consistent, that is, as human fallibility and the inherent difficulties of human affairs permit) administered under one and the same system. This would, perhaps, be the statement of an ideal which the modern history of law tends to realize rather than of a result yet fully accomplished in any nation. Certainly it would not be correct as regards the state of English legal institutions, not only in modern but in quite recent times. Different and more or less conflicting systems of law, different and more or less competing systems of jurisdiction, in one and the same region, are compatible with a high state of civilization, with a strong government, and with an administration of justice well enough liked and sufficiently understood by those who are concerned.

Another point on which confusion is natural and may be dangerous is the relation of law to morality. Legal rules are not merely that part of the moral rules existing in a given society which the State thinks proper to enforce. It is easily recognized that there are, and must be, rules of morality beyond the commandments of law; no less is it true, though

less commonly recognized, that there are and must be rules of law beyond or outside the direct precepts of morality. There are many things for which it is needful or highly convenient to have a fixed rule, and comparatively or even wholly indifferent what that rule shall be. When, indeed, the rule is fixed by custom or law, then morality approves and enjoins obedience to it. But the rule itself is not a moral rule. In England men drive on the left-hand side of the road, in the United States and nearly all parts of the Continent of Europe on the right. Morality has nothing to say to this, except that those who use the roads ought to know and observe the rule, whatever it be, prescribed by the law of the country. Many cases, again, occur, where the legal rule does not profess to fulfil anything like perfect justice, but where certainty is of more importance than perfection, and an imperfect rule is therefore useful and acceptable. Nay, more, there are cases where the law, for reasons of general policy, not only makes persons chargeable without proof of moral blame, but will not admit proof to the contrary. Thus, by the law of England, the possessor of a dangerous animal is liable for any mischief it may do, notwithstanding that he may have used the utmost caution for its safe keeping. Thus, in our modern law, a master has to answer for the acts and defaults of a servant occupied about his business, however careful he may have been in choosing and instructing the servant. Thus, again, there are cases where an obviously wrongful act has brought loss upon innocent persons, and no redress can be obtained from the primary wrong-doer. In such cases it has to be decided which of those innocent persons shall bear the loss. A typical example is the sale of stolen goods to one who buys them in good faith. The fraudulent seller is commonly out of reach, or, if within reach, of no means to make restitution. Either the true owner must lose his goods, or the purchaser must lose his money. This question, simple enough as to the facts, is on the very border-line of legal policy. Some systems of law favour the first owner, some the purchaser, and in our English law itself the result may be one way or the other, according to conditions quite independent of the actual honesty or prudence of the parties. In the dealings of modern commerce, questions which are reducible to the same principle arise in various ways which may be complicated to an indefinite extent. Evidently there

must be some law for such cases; yet no law can be made which will not seem unjust to the loser. Compensation at the public expense would, perhaps, be absolutely just, and it might be practicable in a world of absolutely truthful and prudent people. But in such a world frauds would not be committed on individuals any more than on the State.

Another point worth mention is that the notion of law does not include of necessity the existence of a distinct profession of lawyers, whether as judges or as advocates. There can not well be a science of law without such a profession; but justice can be administered according to settled rules by persons taken from the general body of citizens for the occasion, or in a small community even by the whole body of qualified citizens; and under the most advanced legal systems a man may generally conduct his own cause in person, if so minded. In Athens, at the time of Pericles, and even of Demosthenes, there was a great deal of law, but no class of persons answering to our judges or counsellors. The Attic orator was not a lawyer in the modern sense. Again, the Icelandic sagas exhibit a state of society provided with law quite definite as far as it goes, and even minutely technical on some points, and yet without any professed lawyers. The law is administered by general assemblies of freemen, though the court which is to try a particular cause is selected by elaborate rules. There are old men who have the reputation of being learned in the law; sometimes the opinion of such a man is accepted as conclusive; but they hold no defined office or official qualification. In England, as we shall see hereafter, there was no definite legal profession till more than a century after the Norman Conquest. In short, the presence of law is marked by the administration of justice in some regular course of time, place, and manner, and on the footing of some recognized general principles. These conditions appear to be sufficient, as they are necessary. But if we suppose an Eastern despot to sit in the gate and deal with every case according to the impression of the moment, recognizing no rule at all, we may say that he is doing some sort of justice, but we can not say that he is doing judgment according to law. Probably no prince or ruler in historical times ever really took upon himself to do right according to his mere will and pleasure. There are always points of accepted faith which even the strongest of

despots dares not offend, points of custom which he dares not disregard.

At the same time the conscious separation of law from morals and religion has been a gradual process, and it has largely gone hand in hand with the marking off of special conditions of men to attend to religious and to legal affairs, and the development, through their special studies, of jurisprudence and theology as distinct sciences. If there be any primitive theory of the nature of law, it seems to be that laws are the utterance of some divine or heroic person who reveals, or declares as revealed to him, that which is absolutely right. The desire to refer institutions to a deified or canonized legislator is shown in England, as late as the fourteenth century, by the attribution to King Alfred of everything supposed to be specially national and excellent. In the extant Brahmanical recensions of early Hindu law this desire is satisfied with deliberate and excessive minuteness. Wherever and whenever such notions prevail, the distinction between legal and moral duty can at best be imperfectly realized. During the age of which we are to speak in this book a grand attempt was being made to reduce morality to legal forms. In the system of the medieval Church the whole of 'external' moral duty is included in the law of God and of Holy Church. Morality becomes a thing of arguments and judgments, of positive rules and exceptions, and even of legislative declaration by the authority supreme on earth in matters of faith and morals. Many things on which Protestants are accustomed to spend their astonishment and indignation are merely the necessary consequences of this theory. We shall often have to observe that the wide and flexible jurisdiction of the spiritual power was of great service in the middle ages, both in supplementing the justice of secular courts, and in stimulating them by its formidable competition to improve their doctrine and practice; but a discussion of the Church's penitential system will not be expected of us.

We have spoken but briefly of the law which prevailed in England before the coming of the Normans, and therefore we ought perhaps to say here that in our opinion it was in the main pure Germanic law. Question has been made at various times as to how much of ancient British custom survived the conquest of Britain by successive invaders, and became in-

corporated in English law. We are unable to assign any definite share to this Celtic element. The supposed proofs of its existence have, so far as we are aware, no surer foundation than coincidence. Now the mere coincidence of particulars in early bodies of law proves nothing beyond the resemblance of all institutions in certain stages. There are, again, many points of real organic connexion between Celtic and English law even if there has been no borrowing from the Welshman on the Englishman's part. If there be a true affinity, it may well go back to a common stock of Aryan tradition antecedent to the distinction of race and tongue between German and Celt. And if in a given case we find that an institution or custom which is both Welsh and English is at the same time Scandinavian, Greek, Roman, Slavonic or Hindu, we may be reasonably assured that there is nothing more specific in the matter. Or, if there be a true case of survival, it may go back to an origin as little Celtic or even Aryan as it is Germanic. Some local usages, it is quite possible, may be relics of a prehistoric society and of an antiquity now immeasurable, saved by their obscurity through the days of Celt, Saxon and Norman alike. There is no better protection against the stronger hand; bracken and lichens are untouched by the storm that uproots oak and beech. But this is of no avail to the Celtic enthusiast, or rather of worse than none. Those who claim a Celtic origin for English laws ought to do one of two things: prove by distinct historical evidence that particular Celtic institutions were adopted by the English invaders, or point out similar features in Welsh and English law which can not be matched either in the laws of continental Germany or in those of other Aryan nations. Neither of these things, to the best of our knowledge, has ever been effectually done. Indeed the test last named would be hardly a safe one. The earliest documents of Welsh law known to exist are in their present form so much later than the bulk of our Anglo-Saxon documents that, if a case of specific borrowing could be made out on the face of them, we should need further assurance that the borrowing was not the other way. The favourite method of partisans in this kind is, as has been said, to enumerate coincidences. And by that method our English medieval law could with little ado be proved to be Greek, Slavonic, Semitic, or, for aught one knows, Chinese. We can not say that no element derived from the Celtic

inhabitants of Britain exists in it, for there is no means of proving so general a negative. But there seems to be no proof nor evidence of the existence of that element in any such appreciable measure as would oblige us to take account of it in such a work as the present. Again, there is the possibility that Celtic details, assimilated in Gaul by French law during its growth, passed into England at the Norman Conquest. But it is not for us to discuss this possibility. On the other hand, no one can doubt that the English law stated and defined in the series of dooms which stretches from Æthelbirht to Cnut finds nearer kinsfolk in the law that prevailed in Saxony and Norway and on the Lombard plain than those that it finds among the Welsh or Irish.

Coming to the solid ground of known history, we find that our laws have been formed in the main from a stock of Teutonic customs, with some additions of matter, and considerable additions or modifications of form received directly or indirectly from the Roman system. Both the Germanic and the Romanic elements have been constituted or reinforced at different times and from different sources, and we have thus a large range of possibilities to which, in the absence of direct proof, we must attend carefully in every case before committing ourselves to a decision.

Taking first the Germanic material of our laws, we begin with the customs and institutions brought in by the English conquest of Britain, or rather by the series of conquests which led to the formation of the English kingdom. This is the prime stock; but it by no means accounts for the whole of the Germanic elements. A distinct Scandinavian strain came in with the Danish invasions and was secured by the short period of Danish sovereignty. A third of England, a populous and wealthy third, became known as the Danelaw. To some extent, but probably to no great extent, the Norman law and practice of William the Conqueror may have included similar matter. The main importance of the Norman contribution, however, was in other kinds. Much Anglo-Norman law is Germanic without being either Anglo-Saxon or Norse. Indeed of recent years it has become the fashion upon the Continent to speak of Anglo-Norman law as a daughter of Frankish law. The Frankish monarchy, the nearest approach to a civilized power that existed in Western Europe since the barbarian invasions, was in many

things a pattern for its neighbours and for the states and principalities that rose out of its ruins. That we received from the Normans a contribution of Frankish ideas and customs is indubitable. It was, indeed, hardly foreign to us, being of kindred stock, and still not widely removed from the common root of Germanic tradition. We must not omit, however, to count it as a distinct variation. Neither must we forget that English princes had already been following in some measure the same models that the Dukes of the Normans copied. From the time of Charles the Great onward, the rulers of both Mercia and Wessex were in intimate relations with the Frankish kings.

Now each of these Germanic strains, the purely Anglo-Saxon, the Scandinavian, the Frankish, has had its champions. To decide between them is often a difficult, and sometimes in our opinion an impossible task. A mere 'method of agreement' is, as already said, full of dangers, and such is the imperfection of our record that we can seldom use a 'method of differences' in any convincing fashion. Even for the sake of these somewhat remote and obscure problems, the first thing needful seems to be that we should have a fairly full statement of the English law of the Angevin time. Before we speculate about hypothetical causes, we ought to know as accurately as possible the effect that has to be accounted for. The speculation we must leave for the more part to those who can devote their time to a close study of Anglo-Saxon, Scandinavian and Frankish law. The English law of the Angevin age is for the present our principal theme, though we have sometimes glanced at earlier and at later times also.

As to the Roman, or more properly Romanic, element in our English law, this also is a matter which requires careful distinction. It has been maintained at various times, and sometimes with great ingenuity, that Roman institutions persisted after Britain was abandoned by the Roman power, and survived the Teutonic invasions in such force as to contribute in material quantity to the formation of our laws. But there is no real evidence of this. Whether the invaders may not have learnt something in the arts of peace and war from those whom they were conquering, something of strategy, architecture, agriculture, is not here the question. We speak of law, and within the sphere of law everything that is Roman or Romanized can

be accounted for by later importation. We know that the language and the religion of Rome were effaced. Roman Christianity had to make a fresh conquest of the English kingdom almost as if the British Church had never existed. The remnant of that Church stood aloof, and it would seem that Augustine did not think it entitled to much conciliation, either by its merits or by its importance[1]. It is difficult to believe that civil institutions remained continuous in a country where the discontinuity of ecclesiastical affairs is so pointedly marked, and in an age when the Church was far more stable and compact than any civil institution whatever. And, in point of fact, there is no trace of the laws and jurisprudence of imperial Rome, as distinct from the precepts and traditions of the Roman Church, in the earliest Anglo-Saxon documents. Whatever is Roman in them is ecclesiastical. The danger of arguing in these matters from a mere enumeration of coincidences has already been pointed out with reference to the attempt, in our opinion a substantially similar one, to attribute English law to a Celtic origin. This inroad of the Roman ecclesiastical tradition, in other words, of the system which in course of time was organized as the Canon Law, was the first and by no means the least important of the Roman invasions, if we may so call them, of our Germanic polity. We need not doubt the statement that English princes began to collect their customary laws in writing after the Roman example made known to them by Augustine and his successors[2].

Somewhat later the intercourse of English princes with the Frankish court brought in a fresh accession of continental learning and continental forms, in the hands of clerks indeed, but applicable to secular affairs. In this way the Roman materials assimilated or imitated by the Franks easily found their way into England at a second remove. Many, perhaps most, of the facts that have been alleged to show the per-

[1] The story that Augustine offended the Welsh bishops by not rising to receive them may be accepted as symbolically if not literally true.

[2] According to Bede (ii. 5) Æthelbirht of Kent set dooms in writing 'iuxta exempla Romanorum.' It is of course quite possible that a few of the more learned among the clergy may at times have studied some books of Roman Law. St Aldhelm (ob. 709) speaks as if he had done so in a letter printed by Wharton, Anglia Sacra, vol. ii. p. 6, and by Jaffé, Monumenta Moguntina, 32. On this see Savigny, Geschichte des römischen Rechts, c. 6, § 135.

sistence of Roman institutions in Britain are really of this kind. Such are for example the forms and phrases of the Latin charters or land-books that we find in the *Codex Diplomaticus.* A difficult question indeed is raised by these continental materials on their own ground, namely, what proportion of Germanic and Franco-Gallic usages is of Roman origin, and how far those parts that are Roman are to be ascribed to a continuous life of Roman institutions and habits in the outlying provinces of the empire, more especially in Gaul. Merovingian Gaul has been, and for a long time to come is likely to be, the battle-field of scholars, some of whom can see little that is Roman, some little that is Germanic. Interesting as these problems are, they do not fall within our present scope.

A further importation of more sudden and masterful fashion came with the Norman Conquest. Not only had the Normans learnt a Romance tongue, but the dukes of Normandy had adopted the official machinery of Frankish or French government, including of course whatever Roman elements had been taken up by the Franks. Here, again, a remoter field of inquiry lies open, on which we do not adventure ourselves. It is enough to say, at present, that institutions which have now-a-days the most homely and English appearance may nevertheless be ultimately connected, through the customs of Normandy, with the system of government elaborated in the latter centuries of the Roman Empire. The fact that this kind of Romanic influence operated chiefly in matters of procedure does not make it the less important, for procedure is the life of ancient law. But this, it need hardly be remarked, is a very different matter from a continuous persistence of unadulterated Roman elements. It may be possible to trace a chain of slender but unbroken links from the court of our William or Henry to that of Diocletian or Constantine. Such a chain, however, is by no means strengthened by the fact that Papinian was once at York, as it would in no way be weakened if that fact could be discredited.

Soon after the Norman Conquest a new and a different wave of Roman influence began to flow. The first ripple of it reached our shore when Lanfranc the lawyer of Pavia became the Conqueror's trusted adviser. In the middle of the next century it was streaming outwards from Bologna in full flood. Hitherto we have been speaking of a survival of Roman law in institutions

and habits and customs; what we have now before us is of another kind, a scholarly revival of the classical Roman law that is to be found in Justinian's books. Of this we have spoken at some length in various parts of our work. For about a century—let us say between 1150 and 1250—this tide was shaping and modifying our English law; and we have tried to keep before the eyes of our readers the question—to our mind one of the central questions of English history—why the rapid and, to a first glance, overwhelming flow of Romanic learning was followed in this country by an equally rapid ebb.

At a later time yet other Roman elements began to make their way into our system through the equity administered by the chancellor. But of these we shall not speak in this book, for we shall not here bring down the story of our law beyond the time when Edward I. began his memorable reforms. Our reason for stopping at that moment we can give in a few words. So continuous has been our English legal life during the last six centuries, that the law of the later middle ages has never been forgotten among us. It has never passed utterly outside the cognizance of our courts and our practising lawyers. We have never had to disinter and reconstruct it in that laborious and tentative manner in which German historians of the present day have disinterred and reconstructed the law of medieval Germany. It has never been obliterated by a wholesale 'reception' of Roman law. Blackstone, in order that he might expound the working law of his own day in an intelligible fashion, was forced at every turn to take back his readers to the middle ages, and even now, after all our reforms, our courts are still from time to time compelled to construe statutes of Edward I.'s day, and, were Parliament to repeal some of those statutes and provide no substitute, the whole edifice of our land law would fall down with a crash. Therefore a tradition, which is in the main a sound and truthful tradition, has been maintained about so much of English legal history as lies on this side of the reign of Edward I. We may find it in Blackstone; we may find it in Reeves; we may find many portions of it in various practical text-books. We are beginning to discover that it is not all true; at many points it has of late been corrected. Its besetting sin is that of antedating the emergence of modern ideas. That is a fault into which every professional tradition is

wont to fall. But in the main it is truthful. To this must be added that as regards the materials for this part of our history we stand very much where Blackstone stood. This we write to our shame. The first and indispensable preliminary to a better legal history than we have of the later middle ages is a new, a complete, a tolerable edition of the Year Books. They should be our glory, for no other country has anything like them: they are our disgrace, for no other country would have so neglected them.

On the other hand, as regards the materials which come from a slightly earlier time, we do not stand nearly where Blackstone stood. The twelfth and thirteenth centuries have been fortunate in our own age. Very many and some of the best and most authentic of the texts on which we have relied in the following pages were absolutely unknown to Blackstone and to Reeves. To the antiquaries of the seventeenth century high praise is due; even the eighteenth produced, as it were out of due time, one master of records, the diligent Madox; but at least half of the materials that we have used as sources of first-hand knowledge have been published for the first time since 1800, by the Record Commissioners, or in the Rolls Series, or by some learned society, the Camden or the Surtees, the Pipe Roll or the Selden. Even while our pages have been in the press Dr Liebermann has been restoring to us the law-books of the twelfth century. Again, in many particular fields of old English law—villeinage, for example, and trial by jury and many another—so much excellent and very new work has been done by men who are still living, by Germans, Frenchmen, Russians as well as Englishmen and Americans, and so much of it lies scattered in monographs and journals—we should be ungrateful indeed did we not name the Harvard Law Review—that the time seemed to have come when an endeavour to restate the law of the Angevin age might prosper, and at any rate ought to be made.

One of our hopes has been that we might take some part in the work of bringing the English law of the thirteenth century into line with the French and German law of the same age. That is the time when French law is becoming clear in Les Olim, in Beaumanoir's lucid pages, in the so-called Establishments of St Louis, in the Norman custumal and in many other books. It is also the classical age of German law, the age of the

Sachsenspiegel. We have been trying to do for English law what has within late years been done for French and German law by a host of scholars. We have often had before our minds the question why it is that systems which in the thirteenth century were so near of kin had such different fates before them. The answer to that question is assuredly not to be given by any hasty talk about national character. The first step towards an answer must be a careful statement of each system by itself. We must know in isolation the things that are to be compared before we compare them. A small share in this preliminary labour we have tried to take. Englishmen should abandon their traditional belief that from all time the continental nations have been ruled by 'the civil law,' they should learn how slowly the renovated Roman doctrine worked its way into the jurisprudence of the parliament of Paris, how long deferred was 'the practical reception' of Roman law in Germany, how exceedingly like our common law once was to a French *coutume.* This will give them an intenser interest in their own history. What is more, in the works of French and German medievalists they will now-a-days find many an invaluable hint for the solution of specifically English problems.

We have left to Constitutional History the field that she has appropriated. An exact delimitation of the province of law that should be called constitutional must always be difficult, except perhaps in such modern states as have written constitutions. If we turn to the middle ages we shall find the task impossible, and we see as a matter of fact that the historians of our constitution are always enlarging their boundaries. Though primarily interested in such parts of the law as are indubitably constitutional, they are always discovering that in order to explain these they are compelled to explain other parts also. They can not write about the growth of parliament without writing about the law of land tenure; 'the liberty of the subject' can only be manifested in a discourse on civil and criminal procedure. It may be enough therefore if, without any attempt to establish a scientific frontier, we protest that we have kept clear of the territory over which they exercise an effective dominion. Our reason for so doing is plain. We have no wish to say over again what the Bishop of Oxford has admirably said, no hope of being able to say with any truth what he has left unsaid. Besides, for a long time past, ever

since the days of Selden and Prynne, many Englishmen have been keenly interested in the history of parliament and of taxation and of all that directly concerns the government of the realm. If we could persuade a few of them to take a similar interest in the history of ownership, possession, contract, agency, trust, legal proof and so forth, and if we could bring the history of these, or of some of these, matters within a measurable distance of that degree of accuracy and completion which constitutional history has attained in the hands of Dr Stubbs, we should have achieved an unlooked-for success. At the same time, we shall now and again discuss some problems with which he and his predecessors have busied themselves, for we think that those who have endeavoured to explore the private law of the middle ages may occasionally see even in political events some clue which escapes eyes that are trained to look only or chiefly at public affairs.

The constitutional is not the only department of medieval law that we have left on one side. We have said very little of purely ecclesiastical matters. Here again we have been compelled to draw but a rude boundary. It seemed to us that a history of English law which said nothing of marriage, last wills, the fate of an intestate's goods, the punishment of criminous clerks, or which merely said that all these affairs were governed by the law and courts of the church, would be an exceedingly fragmentary book. On the other hand, we have not felt called upon to speak of the legal constitution of the ecclesiastical hierarchy, the election and consecration of bishops, the ordination of clerks, the power of provincial councils and so forth, and we have but now and then alluded to the penitential system. What is still the sphere of ecclesiastical law we have avoided; into what was once its sphere we could not but make incursions.

At other points, again, our course has been shaped by a desire to avoid what we should regard as vain repetition. When the ground that we traverse has lately been occupied by a Holmes, Thayer, Ames or Bigelow, by a Brunner, Liebermann or Vinogradoff, we pass over it rapidly; we should have dwelt much longer in the domain of criminal law if Sir James Stephen had not recently laboured in it. And then we have at times devoted several pages to the elucidation of some question, perhaps intrinsically of small importance, which seemed to us

difficult and unexplored and worthy of patient discussion, for such is the interdependence of all legal rules that the solution of some vital problem may occasionally be found in what looks at first sight like a technical trifle.

We have thought less of symmetry than of the advancement of knowledge. The time for an artistically balanced picture of English medieval law will come: it has not come yet.

BOOK I

SKETCH OF EARLY ENGLISH LEGAL HISTORY.

CHAPTER I.

THE DARK AGE IN LEGAL HISTORY.

The difficulty of beginning.

SUCH is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web. The oldest utterance of English law that has come down to us has Greek words in it: words such as *bishop, priest* and *deacon*[1]. If we would search out the origins of Roman law, we must study Babylon: this at least was the opinion of the great Romanist of our own day[2]. A statute of limitations must be set; but it must be arbitrary. The web must be rent; but, as we rend it, we may watch the whence and whither of a few of the severed and ravelling threads which have been making a pattern too large for any man's eye.

Proposed retrospect.

To speak more modestly, we may, before we settle to our task, look round for a moment at the world in which our English legal history has its beginnings. We may recall to memory a few main facts and dates which, though they are easily ascertained, are not often put together in one English book, and we may perchance arrange them in a useful order if we make mile-stones of the centuries[3].

[1] Æthelb. 1.

[2] Ihering, Vorgeschichte der Indoeuropäer; *see especially the editor's* preface.

[3] The following summary has been compiled by the aid of Karlowa, Römische Rechtsgeschichte, 1885—Krüger, Geschichte der Quellen des römischen Rechts, 1888—Conrat, Geschichte der Quellen des römischen Rechts im früheren Mittelalter, 1889—Maassen, Geschichte der Quellen des canonischen Rechts, 1870—Löning, Geschichte des deutschen Kirchenrechts, 1878—Sohm, Kirchenrecht, 1892—Hinschius, System des katholischen Kirchenrechts, 1869 ff.—A. Tardif, Histoire des sources du droit canonique, 1887—Brunner, Deutsche Rechtsgeschichte, 1887—Schröder, Lehrbuch der deutschen Rechtsgeschichte, ed. 2, 1894—Esmein, Cours d'histoire du droit français, ed. 2, 1895—Viollet, Histoire du droit civil français, 1893.

The classical age of Roman law.

By the year 200 Roman jurisprudence had reached its zenith. Papinian was slain in 212[1], Ulpian in 228[2]. Ulpian's pupil Modestinus may be accounted the last of the great lawyers[3]. All too soon they became classical; their successors were looking backwards, not forwards. Of the work that had been done it were folly here to speak, but the law of a little town had become ecumenical law, law alike for cultured Greece and for wild Britain. And yet, though it had assimilated new matter and new ideas, it had always preserved its tough identity. In the year 200 six centuries and a half of definite legal history, if we measure only from the Twelve Tables, were consciously summed up in the living and growing body of the law.

The beginnings of ecclesiastical law.

Dangers lay ahead. We notice one in a humble quarter. Certain religious societies, congregations (*ecclesiae*) of non-conformists, have been developing law, internal law, with ominous rapidity. We have called it law, and law it was going to be, but as yet it was, if the phrase be tolerable, unlawful law, for these societies had an illegal, a criminal purpose. Spasmodically the imperial law was enforced against them; at other times the utmost that they could hope for from the state was that in the guise of 'benefit and burial societies' they would obtain some protection for their communal property[4]. But internally they were developing what was to be a system of constitutional and governmental law, which would endow the overseer (*episcopus*) of every congregation with manifold powers. Also they were developing a system of punitive law, for the offender might be excluded from all participation in religious rites, if not from worldly intercourse with the faithful[5]. Moreover, these various communities were becoming united by bonds that were too close to be federal. In particular, that one of them which had its seat in the capital city of the empire was winning a preeminence for itself and its overseer[6]. Long indeed would it be before

[1] Krüger, op. cit. 198; Karlowa, op. cit. i. 736.

[2] Krüger, op. cit. 215; Karlowa, op. cit. i. 741.

[3] Krüger, op. cit. 226; Karlowa, op. cit. i. 752.

[4] Löning, op. cit. i. 195 ff.; Sohm, op. cit. 75. Löning asserts that in the intervals between the outbursts of persecution the Christian communities were legally recognized as *collegia tenuiorum*, capable of holding property. Sohm denies this.

[5] Excommunication gradually assumes its boycotting traits. The clergy were prohibited, while as yet the laity were not, from holding converse with the offender. Loning, op. cit. i. 264; Hinschius, op. cit. iv. 704.

[6] Sohm, op. cit. 378 ff.; Löning, op. cit. i. 423 ff.

this overseer of a non-conformist congregation would, in the person of his successor, place his heel upon the neck of the prostrate Augustus by virtue of God-made law. This was not to be foreseen; but already a merely human jurisprudence was losing its interest. The intellectual force which some years earlier might have taken a side in the debate between Sabinians and Proculians now invented or refuted a christological heresy. Ulpian's priesthood[1] was not priestly enough[2].

Cent. III. Decline of Roman law.

The decline was rapid. Long before the year 300 jurisprudence, the one science of the Romans, was stricken with sterility[3]; it was sharing the fate of art[4]. Its eyes were turned backwards to the departed great. The constitutions of the emperors now appeared as the only active source of law. They were a disordered mass, to be collected rather than digested. Collections of them were being unofficially made: the *Codex Gregorianus,* the *Codex Hermogenianus.* These have perished; they were made, some say, in the Orient[5]. The shifting eastward of the imperial centre and the tendency of the world to fall into two halves were not for the good of the West. Under one title and another, as *coloni, laeti, gentiles,* large bodies of untamed Germans were taking up their abode within the limit of the empire[6]. The Roman armies were becoming barbarous hosts. Constantine owed his crown to an Alamannian king[7].

Cent. IV. Church and State.

It is on a changed world that we look in the year 400. After one last flare of persecution (303), Christianity became a lawful religion (313). In a few years it, or rather one species of it, had become the only lawful religion. The 'confessor' of yesterday was the persecutor of to-day. Heathenry, it is true, died hard in the West; but already about 350 a pagan sacrifice was by the letter of the law a capital crime[8]. Before the end of

[1] Dig. 1. 1. 1.

[2] The moot question (Krüger, op. cit. 203; Karlowa, op. cit. i. 739) whether the Tertullian who is the apologist of Christian sectaries is the Tertullian from whose works a few extracts appear in the Digest may serve as a mnemonic link between two ages.

[3] Krüger, op. cit. 260; Karlowa, op. cit. i. 932.

[4] Gregorovius, History of Rome (transl. Hamilton), i. 85.

[5] Krüger, op. cit. 277 ff.; Karlowa, op. cit. i. 941 ff. It is thought that the original edition of the Gregorianus was made about A.D. 295, that of the Hermogenianus between 314 and 324. But these dates are uncertain. For their remains see Corpus Iuris Anteiustiniani.

[6] Brunner, op. cit. i. 32-39. [7] Ibid. 38. [8] Löning, op. cit. i. 44.

the century cruel statutes were being made against heretics of all sorts and kinds[1]. No sooner was the new faith lawful, than the state was compelled to take part in the multifarious quarrels of the Christians. Hardly had Constantine issued the edict of tolerance, than he was summoning the bishops to Arles (314), even from remote Britain, that they might, if this were possible, make peace in the church of Africa[2]. In the history of law, as well as in the history of dogma, the fourth century is the century of ecclesiastical councils. Into the debates of the spiritual parliaments of the empire[3] go whatever juristic ability, and whatever power of organization are left among mankind. The new supernatural jurisprudence was finding another mode of utterance; the bishop of Rome was becoming a legislator, perhaps a more important legislator than the emperor[4]. In 380 Theodosius himself commanded that all the peoples which owned his sway should follow, not merely the religion that Christ had delivered to the world, but the religion that St Peter had delivered to the Romans[5]. For a disciplinary jurisdiction over clergy and laity the state now left a large room wherein the bishops ruled[6]. As arbitrators in purely secular disputes they were active; it is even probable that for a short while under Constantine one litigant might force his adversary unwillingly to seek the episcopal tribunal[7]. It was necessary for the state to protest that criminal jurisdiction was still in its hands[8]. Soon the church was demanding, and in the West it might successfully demand, independence of the state and even a dominance over the state: the church may command and the state must obey[9]. If from one point of view we see this as a triumph of anarchy, from another it appears as a

[1] Löning, op. cit. i. 97–98, reckons 68 statutes from 57 years (380–438).

[2] Hefele, Conciliengeschichte, i. 201. For the presence of the British bishops, see Haddan and Stubbs, Councils, i. 7.

[3] Sohm, op. cit. 443: 'Das ökumenische Koncil, die Reichssynode...bedeutet ein geistliches Parlament des Kaisertums.'

[4] Sohm, op. cit. 418. If a precise date may be fixed in a very gradual process, we may perhaps see the first exercise of legislative power in the decretal (A.D. 385) of Pope Siricius.

[5] Cod. Theod. 16. 1. 2.

[6] Löning, op. cit. i. 262 ff.; Hinschius, op. cit. iv. 788 ff.

[7] Löning, op. cit. i. 293; Karlowa, op. cit. i. 966. This depends on the genuineness of Constit. Sirmond. 1.

[8] Löning, op. cit. i. 305; Hinschius, op. cit. iv. 794.

[9] Loning, op. cit. i. 64–94.

triumph of law, of jurisprudence. Theology itself must become jurisprudence, albeit jurisprudence of a supernatural sort, in order that it may rule the world.

Cent. V. The Theodosian Code.

Among the gigantic events of the fifth century the issue of a statute-book seems small. Nevertheless, through the turmoil we see two statute-books, that of Theodosius II. and that of Euric the West Goth. The Theodosian Code was an official collection of imperial statutes beginning with those of Constantine I. It was issued in 438 with the consent of Valentinian III. who was reigning in the West. No perfect copy of it has reached us[1]. This by itself would tell a sad tale; but we remember how rapidly the empire was being torn in shreds. Already Britain was abandoned (407). We may doubt whether the statute-book of Theodosius ever reached our shores until it had been edited by Jacques Godefroi[2]. Indeed we may say that the fall of a loose stone in Britain brought the crumbling edifice to the ground[3]. Already before this code was published the hordes of Alans, Vandals and Sueves had swept across Gaul and Spain; already the Vandals were in Africa. Already Rome had been sacked by the West Goths; they were founding a kingdom in southern Gaul and were soon to have a statute-book of their own. Gaiseric was not far off, nor Attila. Also let us remember that this Theodosian Code was by no means well designed if it was to perpetuate the memory of Roman civil science in that stormy age. It was no 'code' in our modern sense of that term. It was only a more or less methodic collection of modern statutes. Also it contained many things that the barbarians had better not have read; bloody laws against heretics, for example.

Laws of Euric.

We turn from it to the first monument of Germanic law that has come down to us. It consists of some fragments of what must have been a large law-book published by Euric for his West Goths, perhaps between 470 and 475[4]. Euric was a conquering king; he ruled Spain and a large part of southern Gaul; he had cast off, so it is said, even the pretence of ruling

[1] Krüger, op. cit. 285 ff.; Karlowa, op. cit. i. 944.

[2] The Breviary of Alaric is a different matter.

[3] Bury, History of the Later Roman Empire, 142: 'And thus we may say that it was the loss or abandonment of Britain in 407 that led to the further loss of Spain and Africa.'

[4] Zeumer, Leges Visigothorum Antiquiores, 1894; Brunner, op. cit. i. 320; Schröder, op. cit. 230.

in the emperor's name. Nevertheless, his laws are not nearly so barbarous as our curiosity might wish them to be. These West Goths who had wandered across Europe were veneered by Roman civilization. It did them little good. Their later law-books, that of Reckessuinth (652–672), that of Erwig (682), that of Egica (687–701) are said to be verbose and futile imitations of Roman codes. But Euric's laws are sufficient to remind us that the order of date among these *Leges Barbarorum* is very different from the order of barbarity. Scandinavian laws that are not written until the thirteenth century will often give us what is more archaic than anything that comes from the Gaul of the fifth or the Britain of the seventh. And, on the other hand, the mention of Goths in Spain should remind us of those wondrous folk-wanderings and of their strange influence upon the legal map of Europe. The Saxon of England has a close cousin in the Lombard of Italy, and modern critics profess that they can see a specially near kinship between Spanish and Icelandic law[1].

Cent. VI. The century of Justinian.

In legal history the sixth century is the century of Justinian. But, in the west of Europe this age appears as his, only if we take into account what was then a remote future. How powerless he was to legislate for many of the lands and races whence he drew his grandiose titles—*Alamannicus, Gothicus, Francicus* and the rest—we shall see if we inquire who else had been publishing laws. The barbarians had been writing down their customs. The barbarian kings had been issuing law-books for their Roman subjects. Books of ecclesiastical law, of conciliar and papal law, were being compiled[2].

The *Lex Salica.*

The discovery of fragments of the laws of Euric the West Goth has deprived the *Lex Salica* of its claim to be the oldest extant statement of Germanic custom. But if not the oldest, it is still very old; also it is rude and primitive[3]. It comes to us from the march between the fifth and the sixth centuries;

[1] Ficker, Untersuchungen zur Erbenfolge, 1891–5; Ficker, Ueber nähere Verwandtschaft zwischen gothisch-spanischem und norwegisch-isländischem Recht (Mittheilungen des Instituts für österreichische Geschichtsforschung, 1888, ii. 456 ff.). These attempts to reconstruct the genealogy of the various Germanic systems are very interesting, if hazardous.

[2] For a map of Europe at the time of Justinian's legislation see Hodgkin, Italy and her Invaders, vol. iv. p. 1.

[3] Brunner, op. cit. i. 292 ff.; Schröder, op. cit. 226 ff.; Esmein, op. cit. 102 ff.; Dahn, Die Könige der Germanen, vii. (2) 50 ff.; Hessels and Kern, Lex Salica, The ten texts, 1880.

almost certainly from the victorious reign of Chlodwig (486–511). An attempt to fix its date more closely brings out one of its interesting traits. There is nothing distinctively heathen in it; but (and this makes it unique[1]) there is nothing distinctively Christian. If the Sicambrian has already bowed his neck to the catholic yoke, he is not yet actively destroying by his laws what he had formerly adored[2]. On the other hand, his kingdom seems to stretch south of the Loire, and he has looked for suggestions to the laws of the West Goths. The *Lex Salica,* though written in Latin, is very free from the Roman taint. It contains in the so-called Malberg glosses many old Frankish words, some of which, owing to mistranscription, are puzzles for the philological science of our own day. Like the other Germanic folk-laws, it consists largely of a tariff of offences and atonements; but a few precious chapters, every word of which has been a cause of learned strife, lift the curtain for a moment and allow us to watch the Frank as he litigates. We see more clearly here than elsewhere the formalism, the sacramental symbolism of ancient legal procedure. We have no more instructive document; and let us remember that, by virtue of the Norman Conquest, the *Lex Salica* is one of the ancestors of English law.

The *Lex Ribuaria* and *Lex Burgundionum.*

Whether in the days when Justinian was legislating, the Western or Ripuarian Franks had written law may not be certain; but it is thought that the main part of the *Lex Ribuaria* is older than 596[3]. Though there are notable variations, it is in part a modernized edition of the *Salica,* showing the influence of the clergy and of Roman law. On the other hand, there seems little doubt that the core of the *Lex Burgundionum* was issued by King Gundobad (474–516) in the last years of the fifth century[4].

The *Lex Romana Burgundionum.*

Burgundians and West Goths were scattered among Roman provincials. They were East Germans; they had long been Christians, though addicted to the heresy of Arius. They could

[1] However, there are some curious relics of heathenry in the *Lex Frisionum*: Brunner, op. cit. i. 342.

[2] Greg. Turon. ii. 22 (ed. Omont, p. 60): 'Mitis depone colla, Sicamber; adora quod incendisti, incende quod adorasti.'

[3] Brunner, op. cit. i. 303 ff.; Schröder, op. cit. 229; Esmein, op. cit. 107. Edited by Sohm in M. G.

[4] Brunner, op. cit. i. 332 ff.; Schröder, op. cit. 234; Esmein, op. cit. 108. Edited by v. Salis in M. G.

say that they had Roman authority for their occupation of Roman soil. Aquitania Secunda had been made over to the West Goths; the Burgundians vanquished by Aetius had been deported to Savoy[1]. In their seizure of lands from the Roman *possessores* they had followed, though with modifications that were profitable to themselves, the Roman system of billeting barbarian soldiers[2]. There were many *Romani* as well as many *barbari* for whom their kings could legislate. Hence the *Lex Romana Burgundionum* and the *Lex Romana Visigothorum.* The former[3] seems to be the law-book that Gundobad promised to his Roman subjects; he died in 516. Rules have been taken from the three Roman *codices,* from the current abridgements of imperial constitutions and from the works of Gaius and Paulus. Little that is good has been said of this book. Far more comprehensive and far more important was the Breviary of Alaric or *Lex Romana Visigothorum*[4]. Euric's son, Alaric II., published it in 506 as a statute-book; among the *Romani* of his realm it was to supplant all older books. It contained large excerpts from the Theodosian Codex, a few from the *Gregorianus* and *Hermogenianus,* some post-Theodosian constitutions, some of the *Sententiae* of Paulus, one little scrap of Papinian and an abridged version of the Institutes of Gaius. The greater part of these texts was equipped with a running commentary (*interpretatio*) which attempted to give their upshot in a more intelligible form. It is thought now-a-days that this 'interpretation' and the sorry version of Gaius represent, not Gothic barbarism, but degenerate Roman science. A time had come when lawyers could no longer understand their own old texts and were content with debased abridgements[5].

The *Lex Romana Visigothorum.*

Importance of the Breviary.

The West Goths' power was declining. Hardly had Alaric issued his statute-book when he was slain in battle by the Franks. Soon the Visigothic became a Spanish kingdom. But it was not in Spain that the *Breviarium* made its permanent mark. There it was abrogated by Reckessuinth when he issued a code for all his subjects of every race[6]. On the other hand, it struck deep root in Gaul. It became the principal, if

[1] Brunner, op. cit. i. 50–1. [2] Ibid. 64–7.

[3] Krüger, op. cit. 317; Brunner, op. cit. i. 354; Schröder, op. cit. 234. Edited by v. Salis in M. G.

[4] Krüger, op. cit. 309; Brunner, op. cit. i. 358. Edited by Hänel, 1849.

[5] Karlowa, op. cit. i. 976. [6] See above, p. 6.

not the only, representative of Roman law in the expansive realm of the Franks. But even it was too bulky for men's needs. They made epitomes of it and epitomes of epitomes[1].

The *Edictum Theodorici.*

Then, again, we must remember that while Tribonian was busy upon the Digest, the East Goths were still masters of Italy. We recall the event of 476; one emperor, Zeno at Byzantium, was to be enough. Odovacer had ruled as patrician and king. He had been conquered by the East Goths. The great Theodoric had reigned for more than thirty years (493–526); he had tried to fuse Italians and Goths into one nation; he had issued a considerable body of law, the *Edictum Theodorici*, for the more part of a criminal kind[2].

The *Collectio Dionysiana.*

Lastly, it must not escape us that about the year 500 there was in Rome a monk of Scythian birth who was labouring upon the foundations of the *Corpus Iuris Canonici*. He called himself Dionysius Exiguus. He was an expert chronologist and constructed the Dionysian cycle. He was collecting and translating the canons of eastern councils; he was collecting also some of the letters (decretal letters they will be called) that had been issued by the popes from Siricius onwards (384–498)[3]. This *Collectio Dionysiana* made its way in the West. Some version of it may have been the book of canons which our Archbishop Theodore produced at the Council of Hertford in 673[4]. A version of it (*Dionysio-Hadriana*) was sent by Pope Hadrian to Charles the Great in 774[5]. It helped to spread abroad the notion that the popes can declare, even if they can not make, law for the universal church, and thus to contract the sphere of secular jurisprudence.

Justinian's books.

In 528 Justinian began the work which gives him his fame in legal history; in 534, though there were novel constitutions to come from him, it was finished. Valuable as the Code of imperial statutes might be, valuable as might be the modernized and imperial edition of an excellent but ancient school-book,

[1] The epitomes will be found in Hänel's edition, Lex Romana Visigothorum, 1849.

[2] Brunner, op. cit. i. 365; Karlowa, op. cit. i. 947 ff. Edited by Bluhme in M. G.

[3] Maassen, op. cit. i. 422 ff.; Tardif, op. cit. 110. Printed in Migne, Patrologia, vol. 67.

[4] Haddan and Stubbs, Councils, iii. 119. See, however, the remarks of Mr C. H. Turner, E. H. R. ix. 727.

[5] Maassen, op. cit. i. 441.

the main work that he did for the coming centuries lies in the Digest. We are told now-a-days that in the Orient the classical jurisprudence had taken a new lease of life, especially in the school at Berytus[1]. We are told that there is something of a renaissance, something even of an antiquarian revival visible in the pages of the Digest, a desire to go back from vulgar practice to classical text, also a desire to display an erudition that is not always very deep. Great conqueror, great builder, great theologian, great law-giver, Justinian would also be a great master of legal science and legal history. The narrow escape of his Digest from oblivion seems to tell us that, but for his exertions, very little of the ancient treasure of wisdom would have reached modern times: and a world without the Digest would not have been the world that we know. Let us, however, remember the retrospective character of the book. The *ius*, the unenacted law, ceased to grow three hundred years ago. In time Justinian stands as far from the jurists whose opinions he collects as we stand from Coke or even from Fitzherbert.

Justinian and Italy.

Laws have need of arms: Justinian knew it well. Much depended upon the fortunes of a war. We recall from the Institutes the boast that Africa has been reclaimed. Little was at stake there, for Africa was doomed to the Saracens; nor could transient success in Spain secure a western home for the law books of Byzantium[2]. All was at stake in Italy. The struggle with the East Goths was raging; Rome was captured and recaptured. At length the emperor was victorious (552), the Goths were exterminated or expelled; we hear of them no more. Justinian could now enforce his laws in Italy and this he did by the pragmatic sanction *pro petitione Vigilii* (554)[3]. Fourteen years were to elapse and then the Lombard hordes under Alboin would be pouring down upon an exhausted and depopulated land. Those fourteen years are critical in legal history; they suffer Justinian's books to obtain a lodgement in the West. The occidental world has paid heavily for Code and Digest in the destruction of the Gothic kingdom, in the temporal power of the papacy, and in an Italy never united until our own day; but perhaps the price was not too high. Be that as it may, the coincidence is memorable. The Roman

[1] Krüger, op. cit. 319. [2] Conrat, op. cit. i. 32.

[3] Krüger, op. cit. 354; Karlowa, op. cit. i. 938; Hodgkin, Italy and her Invaders, vi. 519.

empire centred in New Rome has just strength enough to hand back to Old Rome the guardianship of her heathen jurisprudence, now 'enucleated' (as Justinian says) in a small compass, and then loses for ever the power of legislating for the West. True that there is the dwindling exarchate in Italy; true that the year 800 is still far off; true that one of Justinian's successors, Constantine IV., will pay Rome a twelve days' visit (663) and rob it of ornaments that Vandals have spared[1]; but with what we must call Græco-Roman jurisprudence, with the Ecloga of Leo the Isaurian and the Basilica of Leo the Wise, the West, if we except some districts of southern Italy[2], has no concern. Two halves of the world were drifting apart, were becoming ignorant of each other's language, intolerant of each other's theology. He who was to be the true lord of Rome, if he loathed the Lombard, loved not the emperor. Justinian had taught Pope Vigilius, the Vigilius of the pragmatic sanction, that in the Byzantine system the church must be a department of the state[3]. The bishop of Rome did not mean to be the head of a department.

Laws of Æthelbert.

During some centuries Pope Gregory the Great (590–604) is one of the very few westerns whose use of the Digest can be proved[4]. He sent Augustin to England. Then 'in Augustin's day,' about the year 600, Æthelbert of Kent set in writing the dooms of his folk 'in Roman fashion[5].' Not improbably he had heard of Justinian's exploits; but the dooms, though already they are protecting with heavy *bót* the property of God, priests and bishops, are barbarous enough. They are also, unless discoveries have yet to be made, the first Germanic laws that were written in a Germanic tongue. In many instances the desire to have written laws appears so soon as a barbarous race is brought into contact with Rome[6]. The acceptance of the new religion must have revolutionary consequences in the

[1] Gregorovius, History of Rome (transl. Hamilton), ii. 153 ff.; Oman, Dark Ages, 237, 245.

[2] For Byzantine law in southern Italy see Conrat, op. cit. i. 49.

[3] Hodgkin, Italy and her Invaders, iv. 571 ff.: 'The Sorrows of Vigilius.'

[4] Conrat, op. cit. i. 8.

[5] Bede, Hist. Eccl., lib. 2, c. 5 (ed. Plummer, i. 90): 'iuxta exempla Romanorum.' Bede himself (Opera, ed. Giles, vol. vi. p. 321) had read of Justinian's Codex; but what he says of it seems to prove that he had never seen it: Conrat, op. cit. i. 99.

[6] Brunner, op. cit. i. 283.

world of law, for it is likely that heretofore the traditional customs, even if they have not been conceived as instituted by gods who are now becoming devils, have been conceived as essentially unalterable. Law has been the old; new law has been a contradiction in terms. And now about certain matters there must be new law[1]. What is more, 'the example of the Romans' shows that new law can be made by the issue of commands. Statute appears as the civilized form of law. Thus a fermentation begins and the result is bewildering. New resolves are mixed up with statements of old custom in these *Leges Barbarorum.*

Centuries VII and VIII. Germanic laws.

The century which ends in 700 sees some additions made to the Kentish laws by Hlothær and Eadric, and some others made by Wihtræd; there the Kentish series ends. It also sees in the dooms of Ine the beginning of written law in Wessex[2]. It also sees the beginning of written law among the Lombards; in 643 Rothari published his edict[3]; it is accounted to be one of the best statements of ancient German usages. A little later the Swabians have their *Lex Alamannorum*[4], and the Bavarians their *Lex Baiuwariorum*[5]. It is only in the Karolingian age that written law appears among the northern and eastern folks of Germany, the Frisians, the Saxons, the Angli and Warni of Thuringia, the Franks of Hamaland[6]. To a much later time must we regretfully look for the oldest monuments of Scandinavian law[7]. Only two of our 'heptarchic'

[1] The oldest Germanic word that answers to our *law* seems to be that which appears as A.-S. *ǽ*. This word lives on in our Eng. *ay* or *aye* (=ever, from all time). It is said to be cognate to Lat. *aevum*. See Brunner, op. cit. i. 109; Schröder, op. cit. 222; Schmid, Gesetze, 524; Oxf. Eng. Dict. s. v. *ay*. For *lagu*, see Brunner, loc. cit.; Schmid, 621. Hlothær and Eadric increase the *ǽ* of the Kentish folk by their dooms.

[2] Whether we have Ine's code or only an Alfredian recension of it is a difficult question, lately discussed by Turk, Legal Code of Ælfred (Halle, 1893) p. 42.

[3] Brunner, op. cit. i. 368; Schröder, op. cit. 236. Edited by Bluhme in M. G.

[4] Brunner, op. cit. i. 308; Schröder, op. cit. 238. Edited by Lehmann in M. G. There are fragments of a *Pactus Alamannorum* from circ. 600. The *Lex* is supposed to come from 717–9.

[5] Brunner, op. cit. i. 313; Schröder, op. cit. 239. Edited by Merkel in M. G. This is now ascribed to the years 739–48.

[6] Brunner, op. cit. i. 340 ff.; Schröder, op. cit. 240 ff. Edited by v. Richthofen and Sohm in M. G.

[7] K. Maurer, Ueberblick über die Geschichte der nordgermanischen Rechtsquellen in v. Holtzendorff, Encyklopädie.

kingdoms leave us law, Kent and Wessex, though we have reason to believe that Offa the Mercian (ob. 796) legislated[1]. Even Northumbria, Bede's Northumbria, which was a bright spot in a dark world, bequeaths no dooms. The impulse of Roman example soon wore out. When once a race has got its *Lex*, its aspirations seem to be satisfied. About the year 900 Alfred speaks as though Offa (circ. 800), Ine (circ. 700), Æthelbert (circ. 600) had left him little to do. Rarely upon the mainland was there any authoritative revision of the ancient *Leges*, though transcribers sometimes modified them to suit changed times, and by so doing have perplexed the task of modern historians. Only among the Lombards, who from the first, despite their savagery, seem to show something that is like a genius for law[2], was there steadily progressive legislation. Grimwald (668), Liutprand (713-35), Ratchis (746) and Aistulf (755) added to the edict of Rothari. Not by abandoning, but by developing their own ancient rules, the Lombards were training themselves to be the interpreters and in some sort the heirs of the Roman *prudentes*.

System of personal laws.

As the Frankish realm expanded, there expanded with it a wonderful 'system of personal laws[3].' It was a system of racial laws. The *Lex Salica*, for example, was not the law of a district, it was the law of a race. The Swabian, wherever he might be, lived under his Alamannic law, or, as an expressive phrase tells us, he lived Alamannic law (*legem vivere*). So Roman law was the law of the Romani. In a famous, if exaggerated sentence, Bishop Agobard of Lyons has said that often five men would be walking or sitting together and each of them would own a different law[4]. We are now taught that this principle is not primitively Germanic. Indeed in England, where there were no Romani, it never came to the front, and, for example, 'the Danelaw' very rapidly became the name for a tract of land[5]. But in the kingdoms founded by Goths and Burgundians the intruding Germans were only a small part of

[1] Alfred, Introduction, 49, § 9 (Liebermann, Gesetze, p. 46).

[2] Brunner, op. cit. i. 370; Schröder, op. cit. 235.

[3] Brunner, op. cit. i. 259; Schröder, op. cit. 225; Esmein, op. cit. 57.

[4] Agobardi Opera, Migne, Patrol. vol. 104, col. 116: 'Nam plerumque contingit ut simul eant aut sedeant quinque homines et nullus eorum communem legem cum altero habeat.'

[5] Stubbs, Constit. Hist. i. 216. See, however, Dahn, Könige der Germanen, vii. (3), pp. 1 ff.

a population, the bulk of which was Gallo-Roman, and the barbarians, at least in show, had made their entry as subjects or allies of the emperor. It was natural then that the Romani should live their old law, and, as we have seen[1], their rulers were at pains to supply them with books of Roman law suitable to an age which would bear none but the shortest of law-books. It is doubtful whether the Salian Franks made from the first any similar concession to the provincials whom they subdued; but, as they spread over Gaul, always retaining their own *Lex Salica,* they allowed to the conquered races the right that they claimed for themselves. Their victorious career gave the principle an always wider scope. At length they carried it with them into Italy and into the very city of Rome. It would seem that among the Lombards, the Romani were suffered to settle their own disputes by their own rules, but Lombard law prevailed between Roman and Lombard. However, when Charles the Great vanquished Desiderius and made himself king of the Lombards, the Frankish system of personal law found a new field. A few years afterwards (800) a novel Roman empire was established. One of the immediate results of this many-sided event was that Roman law ceased to be the territorial law of any part of the lands that had become subject to the so-called Roman Emperor. Even in Rome it was reduced to the level of a personal or racial law, while in northern Italy there were many Swabians who lived Alamannic, and Franks who lived Salic or Ripuarian law, besides the Lombards[2]. In the future the *renovatio imperii* was to have a very different effect. If the Ottos and Henries were the successors of Augustus, Constantine and Justinian, then Code and Digest were *Kaiserrecht,* statute law for the renewed empire. But some centuries were to pass before this theory would be evolved, and yet other centuries before it would practically mould the law of Germany. Meanwhile Roman law was in Rome itself only the personal law of the Romani.

The vulgar Roman law.

A system of personal laws implies rules by which a 'conflict of laws' may be appeased, and of late years many of the international or intertribal rules of the Frankish realm have been recovered[3]. We may see, for example, that the law of the slain, not that of the slayer, fixes the amount of the wergild, and that the law of the grantor prescribes the ceremonies with which land

[1] See above, p. 8. [2] Brunner, op. cit. i. 260. [3] Ibid. 261 ff.

must be conveyed. We see that legitimate children take their father's, bastards their mother's law. We see also that the churches, except some which are of royal foundation, are deemed to live Roman law, and in Italy, though not in Frankland, the rule that the individual cleric lives Roman law seems to have been gradually adopted[1]. This gave the clergy some interest in the old system. But German and Roman law were making advances towards each other. If the one was becoming civilized, the other had been sadly barbarized or rather vulgarized. North of the Alps the current Roman law regarded Alaric's *Lex* as its chief authority. In Italy Justinian's Institutes and Code and Julian's epitome of the Novels were known, and someone may sometimes have opened a copy of the Digest. But everywhere the law administered among the Romani seems to have been in the main a traditional, customary law which paid little heed to written texts. It was, we are told, *ein römisches Vulgarrecht,* which stood to pure Roman law in the same relation as that in which the vulgar Latin or Romance that people talked stood to the literary language[2]. Not a few of the rules and ideas which were generally prevalent in the West had their source in this low Roman law. In it starts the history of modern conveyancing. The Anglo-Saxon 'land-book' is of Italian origin[3]. That England produces no formulary books, no books of 'precedents in conveyancing,' such as those which in considerable numbers were compiled in Frankland[4], is one of the many signs that even this low Roman law had no home here; but neither did our forefathers talk low Latin.

The latent Digest.

In the British India of to-day we may see and on a grand scale what might well be called a system of personal laws, of racial laws. If we compared it with the Frankish, one picturesque element would be wanting. Suppose that among the native races there was one possessed of an old law-book, too good for it, too good for us, which gradually, as men studied it afresh, would begin to tell of a very ancient but eternally modern civilization and of a skilful jurisprudence which the lawyers of the ruling race would some day make their model. This romance of history will not repeat itself.

[1] Brunner, op. cit. i. 269; Löning, op. cit. ii. 284. [2] Brunner, op. cit. i. 255.

[3] Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde, i. 187.

[4] Brunner, D. R. G. i. 401; Schröder, op. cit. 254. Edited in M. G. by Zeumer; also by E. de Rozière, Recueil général des formules.

The capitularies.

During the golden age of the Frankish supremacy, the age which closely centres round the year 800, there was a good deal of definite legislation: much more than there was to be in the bad time that was coming. The king or emperor issued capitularies (*capitula*)[1]. Within a sphere which can not be readily defined he exercised a power of laying commands upon all his subjects, and so of making new territorial law for his whole realm or any part thereof; but in principle any change in the law of one of the folks would require that folk's consent. A superstructure of capitularies might be reared, but the *Lex* of a folk was not easily alterable. In 827 Ansegis, Abbot of St Wandrille, collected some of the capitularies into four books[2]. His work seems to have found general acceptance, though it shows that many capitularies were speedily forgotten and that much of the Karolingian legislation had failed to produce a permanent effect. Those fratricidal wars were beginning. The legal products which are to be characteristic of this unhappy age are not genuine laws; they are the forged capitularies of Benedict the Levite and the false decretals of the Pseudo-Isidore.

Growth of Canon law.

Slowly and by obscure processes a great mass of ecclesiastical law had been forming itself. It rolled, if we may so speak, from country to country and took up new matter into itself as it went, for bishop borrowed from bishop and transcriber from transcriber. Oriental, African, Spanish, Gallican canons were collected into the same book and the decretal letters of later were added to those of earlier popes. Of the *Dionysiana* we have already spoken. Another celebrated collection seems to have taken shape in the Spain of the seventh century; it has been known as the *Hispana* or *Isidoriana*[3], for without sufficient warrant it has been attributed to that St Isidore of Seville (ob. 636), whose *Origines*[4] served as an encyclopædia of jurisprudence and all other sciences. The *Hispana* made its way into France, and

[1] Brunner, op. cit. i. 374; Schröder, op. cit. 247; Esmein, op. cit. 116. Edited in M. G. by Boretius and Krause; previously by Pertz.

[2] Brunner, op. cit. i. 382; Schröder, op. cit. 251; Esmein, op. cit. 117.

[3] Maassen, op. cit. i. 667 ff.; Tardif, op. cit. 117. Printed in Migne, Patrol. vol. 84.

[4] For the Roman law of the Origines, see Conrat, op. cit. i. 150. At first or second hand this work was used by the author of our *Leges Henrici*. That the learned Isidore knew nothing of Justinian's books seems to be proved, and this shows that they were not current in Spain.

it seems to have already comprised some spurious documents before it came to the hands of the most illustrious of all forgers.

Centuries IX and X. The false Isidore.

Then out of the depth of the ninth century emerged a book which was to give law to mankind for a long time to come. Its core was the *Hispana;* but into it there had been foisted besides other forgeries, some sixty decretals professing to come from the very earliest successors of St Peter. The compiler called himself Isidorus Mercator; he seems to have tried to personate Isidore of Seville. Many guesses have been made as to his name and time and home. It seems certain that he did his work in Frankland, and near the middle of the ninth century. He has been sought as far west as le Mans, but suspicion hangs thickest over the church of Reims. The false decretals are elaborate mosaics made up out of phrases from the bible, the fathers, genuine canons, genuine decretals, the West Goth's Roman law-book; but all these materials, wherever collected, are so arranged as to establish a few great principles: the grandeur and superhuman origin of ecclesiastical power, the sacrosanctity of the persons and the property of bishops, and, though this is not so prominent, the supremacy of the bishop of Rome. Episcopal rights are to be maintained against the *chorepiscopi*, against the metropolitans, and against the secular power. Above all (and this is the burden of the song), no accusation can be brought against a bishop so long as he is despoiled of his see: *Spoliatus episcopus ante omnia debet restitui.*

The forged capitularies.

Closely connected with this fraud was another. Some one who called himself a deacon of the church of Mainz and gave his name as Benedict, added to the four books of capitularies, which Ansegis had published, three other books containing would-be, but false capitularies, which had the same bent as the decretals concocted by the Pseudo-Isidore. These are not the only, but they are the most famous manifestations of the lying spirit which had seized the Frankish clergy. The Isidorian forgeries were soon accepted at Rome. The popes profited by documents which taught that ever since the apostolic age the bishops of Rome had been declaring, or even making, law for the universal church. On this rock or on this sand a lofty edifice was reared[1].

[1] The Decretales Pseudo-Isidorianae were edited by Hinschius in 1863. See also Tardif, op. cit. 133 ff.; Conrat, op. cit. i. 299; Brunner, op. cit. i. 384.

Church and State.

And now for the greater part of the Continent comes the time when ecclesiastical law is the only sort of law that is visibly growing. The stream of capitularies ceased to flow; there was none to legislate; the Frankish monarchy was going to wreck and ruin; feudalism was triumphant. Sacerdotalism also was triumphant, and its victories were closely connected with those of feudalism. The clergy had long been striving to place themselves beyond the reach of the state's tribunals. The dramatic struggle between Henry II. and Becket has a long Frankish prologue[1]. Some concessions had been won from the Merovingians; but still Charles the Great had been supreme over all persons and in all causes. Though his realm fell asunder, the churches were united, and united by a principle that claimed a divine origin. They were rapidly evolving law which was in course of time to be the written law of an universal and theocratic monarchy. The mass, now swollen by the Isidorian forgeries, still rolled from diocese to diocese, taking up new matter into itself. It became always more lawyerly in form and texture as it appropriated sentences from the Roman law-books and made itself the law of the only courts to which the clergy would yield obedience. Nor was it above borrowing from Germanic law, for thence it took its probative processes, the oath with oath-helpers and the ordeal or judgment of God. Among the many compilers of manuals of church law three are especially famous: Regino, abbot of Prüm (906-915[2]), Burchard, bishop of Worms (1012–1023)[3], and Ivo, bishop of Chartres (ob. 1117)[4]. They and many others prepared the way for Gratian, the maker of the church's Digest, and events were deciding that the church should also have a Code and abundant Novels. In an evil day for themselves the German kings took the papacy from the mire into which it had fallen, and soon the work of issuing decretals was resumed with new vigour. At the date of the Norman Conquest the flow of these edicts was becoming rapid.

The darkest age.

Historians of French and German law find that a well-marked period is thrust upon them. The age of the folk-laws

[1] Hinschius, op. cit. iv. 849 ff.

[2] Tardif, op. cit. 162. Printed in Migne, Patrol. vol. 132; also edited by Wasserschleben, 1840.

[3] Ibid. 164. Printed in Migne, Patrol. vol. 140.

[4] Ibid. 170. See Fournier, Yves de Chartres, Paris, 1898.

and the capitularies, 'the Frankish time,' they can restore. Much indeed is dark and disputable; but much has been made plain during the last thirty years by their unwearying labour. There is no lack of materials, and the materials are of a strictly legal kind: laws and statements of law. This done, they are compelled rapidly to pass through several centuries to a new point of view. They take their stand in the thirteenth among law-books which have the treatises of Glanvill and Bracton for their English equivalents. It is then a new world that they paint for us. To connect this new order with the old, to make the world of 'the classical feudalism[1]' grow out of the world of the folk-laws is a task which is being slowly accomplished by skilful hands; but it is difficult, for, though materials are not wanting, they are not of a strictly legal kind; they are not laws, nor law-books, nor statements of law. The intervening, the dark age, has been called 'the diplomatic age,' whereby is meant that its law must be hazardously inferred from *diplomata*, from charters, from conveyances, from privileges accorded to particular churches or particular towns. No one legislates. The French historian will tell us that the last capitularies which bear the character of general laws are issued by Carloman II. in 884, and that the first legislative *ordonnance* is issued by Louis VII. in 1155[2]. Germany and France were coming to the birth and the agony was long. Long it was questionable whether the western world would not be overwhelmed by Northmen and Saracens and Magyars; perhaps we are right in saying that it was saved by feudalism[3]. Meanwhile the innermost texture of human society was being changed; local customs were issuing from and then consuming the old racial laws.

Legislation in England.

Strangely different, at least upon its surface, is our English story. The age of the capitularies (for such we well might call it) begins with us just when it has come to its end upon the Continent. We have had some written laws from the newly converted Kent and Wessex of the seventh century. We have

[1] We borrow *la féodalité classique* from M. Flach: Les origines de l'ancienne France, ii. 551.

[2] Esmein, op. cit. 487–8; Viollet, op. cit. 152. Schröder, op. cit. 624: 'Vom 10. bis 12. Jahrhundert ruhte die Gesetzgebung fast ganz...Es war die Zeit der Alleinherrschaft des Gewohnheitsrechtes.'

[3] Oman, The Dark Ages, 511.

heard that in the day of Mercia's greatness Offa (ob. 796), influenced perhaps by the example of Charles the Great, had published laws. These we have lost, but we have no reason to fear that we have lost much else. Even Egbert did not legislate. The silence was broken by Alfred (871—901), and then, for a century and a half we have laws from almost every king: from Edward, Æthelstan, Edmund, Edgar, Æthelred and Cnut. The age of the capitularies begins with Alfred, and in some sort it never ends, for William the Conqueror and Henry I. take up the tale[1]. Whether in the days of the Confessor, whom a perverse, though explicable, tradition honoured as a preeminent law-giver, we were not on the verge of an age without legislation, an age which would but too faithfully reproduce some bad features of the Frankish decadence, is a question that is not easily answered. Howbeit, Cnut had published in England a body of laws which, if regard be had to its date, must be called a handsome code. If he is not the greatest legislator of the eleventh century, we must go as far as Barcelona to find his peer[2]. He had been to Rome; he had seen an emperor crowned by a pope; but it was not outside England that he learnt to legislate. He followed a fashion set by Alfred. We might easily exaggerate both the amount of new matter that was contained in these English capitularies and the amount of information that they give us; but the mere fact that Alfred sets, and that his successors (and among them the conquering Dane), maintain, a fashion of legislating is of great importance. The Norman subdues, or, as he says, inherits a kingdom in which a king is expected to publish laws.

England and the continent.

Were we to discuss the causes of this early divergence of English from continental history we might wander far. In the first place, we should have to remember the small size, the plain surface, the definite boundary of our country. This

[1] As to the close likeness between the English dooms and the Frankish capitularies, see Stubbs, Const. Hist. i. 223. We might easily suppose direct imitation, were it not that much of the Karolingian system was in ruins before Alfred began his work.

[2] The Usatici Barchinonensis Patriae (printed by Giraud, Histoire du droit français, ii. 465 ff.) are ascribed to Raymond Berengar I. and to the year 1068 or thereabouts. But how large a part of them really comes from him is a disputable question. See Conrat, op. cit. i. 467; Ficker, Mittheilungen des Instituts für österreichische Geschichtsforschung, 1888, ii. p. 236.

thought indeed must often recur to us in the course of our work: England is small: it can be governed by uniform law: it seems to invite general legislation. Also we should notice that the kingship of England, when once it exists, preserves its unity: it is not partitioned among brothers and cousins. Moreover we might find ourselves saying that the Northmen were so victorious in their assaults on our island that they did less harm here than elsewhere. In the end it was better that they should conquer a tract, settle in villages and call the lands by their own names, than that the state should go to pieces in the act of repelling their inroads. Then, again, it would not escape us that a close and confused union between church and state prevented the development of a body of distinctively ecclesiastical law which would stand in contrast with, if not in opposition to, the law of the land[1]. Such power had the bishops in all public affairs, that they had little to gain from decretals forged or genuine[2]; indeed Æthelred's laws are apt to become mere sermons preached to a disobedient folk. However we are here but registering the fact that the age of capitularies, which was begun by Alfred, does not end. The English king, be he weak like Æthelred or strong like Cnut, is expected to publish laws.

Century XI. The Pavian law-school.

But Italy was to be for a while the focus of the whole world's legal history. For one thing, the thread of legislation was never quite broken there. Capitularies or statutes which enact territorial law came from Karolingian emperors and from Karolingian kings of Italy, and then from the Ottos and later German kings. But what is more important is that the old Lombard law showed a marvellous vitality and a capacity of being elaborated into a reasonable and progressive system. Lombardy was the country in which the principle of personal law struck its deepest roots. Besides Lombards and Romani there were many Franks and Swabians who transmitted their law from father to son. It was long before the old question *Qua lege vivis?* lost its importance. The 'conflict of laws' seems to have favoured the growth of a mediating and

[1] Stubbs, Const. Hist. i. 263: 'There are few if any records of councils distinctly ecclesiastical held during the tenth century in England.'

[2] There seem to be traces of the Frankish forgeries in the Worcester book described by Miss Bateson, E. H. R. x. 712 ff. English ecclesiastics were borrowing and it is unlikely that they escaped contamination.

instructed jurisprudence. Then at Pavia in the first half of the eleventh century a law-school had arisen. In it men were endeavouring to systematize by gloss and comment the ancient Lombard statutes of Rothari and his successors. The heads of the school were often employed as royal justices (*iudices palatini*); their names and their opinions were treasured by admiring pupils. From out this school came Lanfranc. Thus a body of law, which though it had from the first been more neatly expressed than, was in its substance strikingly like, our own old dooms, became the subject of continuous and professional study. The influence of reviving Roman law is not to be ignored. These Lombardists knew their Institutes, and, before the eleventh century was at an end, the doctrine that Roman law was a subsidiary common law for all mankind (*lex omnium generalis*) was gaining ground among them; but still the law upon which they worked was the old Germanic law of the Lombard race. Pavia handed the lamp to Bologna, Lombardy to the Romagna[1].

The new birth of Roman law.

As to the more or less that was known of the ancient Roman texts there has been learned and lively controversy in these last years[2]. But, even if we grant to the champions of continuity all that they ask, the sum will seem small until the eleventh century is reached. That large masses of men in Italy and southern France had Roman law for their personal law is beyond doubt. Also it is certain that Justinian's Institutes and Code and Julian's Epitome of the Novels were beginning to spread outside Italy. There are questions still to be solved about the date and domicile of various small collections of Roman rules which some regard as older than or uninfluenced by the work of the Bolognese glossators. One critic discovers

[1] Boretius, Preface to edition of Liber legis Langobardorum, in M. G.; Brunner, op. cit. i. 387 ff.; Ficker, Forschungen zur Reichs- u. Rechtsgeschichte Italiens, iii. 44 ff., 139 ff.; Conrat, op. cit. i. 393 ff.

[2] It is well summed up for English readers by Rashdall, Universities of Europe, i. 89 ff. The chief advocate of a maximum of knowledge has been Dr Hermann Fitting in Juristiche Schriften des früheren Mittelalters, 1876, Die Anfänge der Rechtsschule zu Bologna, 1888, and elsewhere. He has recently edited a Summa Codicis (1894) and some Quaestiones de iuris subtilitatibus, both of which he ascribes to Irnerius. See also Pescatore, Die Glossen des Irnerius, 1888; Mommsen, Preface to two-volume edition of the Digest; Flach, Études critiques sur l'histoire du droit romain, 1890; Besta, L'Opera d'Irnerio, 1896; Ficker, op. cit. vol. iii. and Conrat, op. cit. passim.

evanescent traces of a school of law at Rome or at Ravenna which others can not see. The current instruction of boys in grammar and rhetoric involved some discussion of legal terms. Definitions of *lex* and *ius* and so forth were learnt by heart; little catechisms were compiled[1]; but of anything that we should dare to call an education in Roman law there are few, if any, indisputable signs before the school of Bologna appears in the second half of the eleventh century. As to the Digest, during some four hundred years its mere existence seems to have been almost unknown. It barely escaped with its life. When men spoke of 'the pandects' they meant the bible[2]. The romantic fable of the capture of an unique copy at the siege of Amalfi in 1135 has long been disproved; but, if some small fragments be neglected, all the extant manuscripts are said to derive from two copies, one now lost, the other the famous Florentina written, we are told, by Greek hands in the sixth or seventh century. In the eleventh the revival began. In 1038 Conrad II., the emperor whom Cnut saw crowned, ordained that Roman law should be once more the territorial law of the city of Rome[3]. In 1076 the Digest was cited in the judgment of a Tuscan court[4]. Then, about 1100, Irnerius was teaching at Bologna[5].

The recovered Digest.

Here, again, there is room for controversy. It is said that he was not self-taught; it is said that neither his theme nor his method was quite new; it is said that he had a predecessor at Bologna, one Pepo by name. All this may be true and is probable enough: and yet undoubtedly he was soon regarded as the founder of the school which was teaching Roman law to an intently listening world. We with our many sciences can hardly comprehend the size of this event. The monarchy of theology over the intellectual world was disputed. A lay

[1] See E. J. Tardif, Extraits et abrégés juridiques des étymologies d'Isidore de Séville, 1896.

[2] Conrat, op. cit. i. 65.

[3] M. G. Leges, ii. 40; Conrat, op. cit. i. 62.

[4] Ficker, Forschungen, iii. 126; iv. 99; Conrat, op. cit. 67. Apparently the most industrious research has failed to prove that between 603 and 1076 any one cited the Digest. The bare fact that Justinian had issued such a book seems to have vanished from memory. Conrat, op. cit. i. 69.

[5] In dated documents Irnerius (his name seems to have really been Warnerius, Guarnerius) appears in 1113 and disappears in 1125. The University of Bologna kept 1888 as its octocentenary.

science claimed its rights, its share of men's attention. It was a science of civil life to be found in the human, heathen Digest[1].

Influence of the Bolognese jurisprudence.

A new force had begun to play and sooner or later every body of law in western Europe felt it. The challenged church answered with Gratian's Decretum (circ. 1139) and the Decretals of Gregory IX. (1234). The canonist emulated the civilian and for a long while maintained in the field of jurisprudence what seemed to be an equal combat. Unequal it was in truth. The Decretum is sad stuff when set beside the Digest and the study of Roman law never dies. When it seems to be dying it always returns to the texts and is born anew. It is not for us here to speak of its new birth in the France of the sixteenth or in the Germany of the nineteenth century; but its new birth in the Italy of the eleventh and twelfth concerns us nearly. Transient indeed but all-important was the influence of the Bologna of Irnerius and of Gratian upon the form, and therefore upon the substance, of our English law. The theoretical continuity or 'translation' of the empire which secured for Justinian's books their hold upon Italy, and, though after a wide interval, upon Germany also, counted for little in France or in England. In England, again, there was no mass of Romani, of people who all along had been living Roman law of a degenerate and vulgar sort and who would in course of time be taught to look for their law to Code and Digest. Also there was no need in England for that *reconstitution de l'unité nationale* which fills a large space in schemes of French history, and in which, for good and ill, the Roman texts gave their powerful aid to the centripetal and monarchical forces. In England the new learning found a small, homogeneous, well conquered, much governed kingdom, a strong, a legislating kingship. It came to us soon; it taught us much; and then there was healthy resistance to foreign dogma. But all this we shall see in the sequel.

[1] Esmein, op. cit. 347: 'Une science nouvelle naquit, indépendante et laïque, la science de la société civile, telle que l'avaient dégagée les Romains, et qui pouvait passer pour le chef-d'œuvre de la sagesse humaine...Il en résulta qu'à côté du théologien se plaça le légiste qui avait, comme lui, ses principes et ses textes, et qui lui disputa la direction des esprits avides de savoir.' It is only by slow degrees that the Digest comes by its rights. Throughout the middle ages the Code appears, as Justinian intended that it should appear, as the prominent book: it contains the new law. See Fitting, Preface to the Summa of Irnerius.

CHAPTER II.

ANGLO-SAXON LAW.

[p. 1] THIS book is concerned with Anglo-Saxon legal antiquities, but only so far as they are connected with, and tend to throw light upon, the subsequent history of the laws of England, and the scope of the present chapter is limited by that purpose. Much of our information about the Anglo-Saxon laws and customs, especially as regards landholding, is so fragmentary and obscure that the only hope of understanding it is to work back to it from the fuller evidence of Norman and even later times. It would be outside our undertaking to deal with problems of this kind[1].

Scope of this chapter.

The habit of preserving some written record of all affairs of importance is a modern one in the north and west of Europe. But it is so prevalent and so much bound up with our daily habits that we have almost forgotten how much of the world's business, even in communities by no means barbarous, has been carried on without it. And the student of early laws and institutions, although the fact is constantly thrust upon him, can hardly accept it without a sort of continuing surprise. This brings with it a temptation of some practical danger, that of overrating both the trustworthiness of written documents and the importance of the matters they deal with as compared with other things for which the direct authority of documents is wanting. The danger is a specially besetting one in the early history of English law; and that inquirer is fortunate who is not beguiled into positive error by the desire of making his statements appear less imperfect. In truth, the manners, dress, and dialects of our ancestors before the Norman Conquest

Imperfection of written records of early Germanic law.

[1] See Maitland, Domesday Book and Beyond, Cambridge, 1897.

are far better known to us than their laws. Historical inquiry must be subject, in the field of law, to peculiar and inevitable difficulties. In most other cases the evidence, whether full or [p. 2] scanty, is clear so far as it goes. Arms, ornaments, miniatures, tell their own story. But written laws and legal documents, being written for present use and not for the purpose of enlightening future historians, assume knowledge on the reader's part of an indefinite mass of received custom and practice. They are intelligible only when they are taken as part of a whole which they commonly give us little help to conceive. It may even happen that we do not know whether a particular document or class of documents represents the normal course of affairs, or was committed to writing for the very reason that the transaction was exceptional. Even our modern law is found perplexing, for reasons of this kind, not only by foreigners, but by Englishmen who are not lawyers.

We can not expect, then, that the extant collections of Anglo-Saxon laws should give us anything like a complete view of the legal or judicial institutions of the time. Our Germanic ancestors were no great penmen, and we know that the reduction of any part of their customary laws to writing was in the first place due to foreign influence. Princes who had forsaken heathendom under the guidance of Roman clerks made haste, according to their lights, to imitate the ways of imperial and Christian Rome[1].

Although English princes issued written dooms with the advice of their wise men at intervals during nearly five centuries, it seems all but certain that none of them did so with the intention of constructing a complete body of law. The very

[1] The A.-S. laws were first printed by Lambard, Archaionomia, 1568. A second edition of his work was published by Whelock, Archaionomia, Cambridge, 1644.—This was followed in 1721 by Wilkins, Leges Anglo-Saxonicae.—In 1840 the Ancient Laws and Institutes of England were edited for the Record Commission by Price and Thorpe.—This was followed by Reinhold Schmid, Gesetze der Angelsachsen, 2nd ed. Leipzig, 1858, which superseded a first and incomplete edition of 1832.—A new edition by Dr F. Liebermann is in course of publication.—For detailed discussion see, besides Kemble's well-known works, the Glossary in Schmid's edition—Konrad Maurer, Angelsächsische Rechtsverhältnisse, in Kritische Ueberschau der deutschen Gesetzgebung, vol. i. ff. Munich, 1853, ff.—Essays in Anglo-Saxon Laws (Adams, Lodge, Young, Laughlin), 1876.—Full use has been made of the A.-S. documents by historians of German law, Brunner, Schröder, v. Amira and others.—For the Scandinavian side of the story, see Steenstrup, Danelag, Copenhagen, 1882.

slight and inconspicuous part which procedure takes in the written Anglo-Saxon laws is enough to show that they are mere superstructures on a much larger base of custom. All they do is to regulate and amend in details now this branch of customary law, now another. In short, their relation to the laws and customs of the country as a whole is not unlike that which Acts of Parliament continue to bear in our own day to the indefinite mass of the common law.

Anglo-Saxon dooms and custumals.

[p. 3] Our knowledge of Anglo-Saxon law rests, so far as positive evidence goes, on several classes of documents which supplement one another to some extent, but are still far from giving a complete view. We have in the first place the considerable series of laws and ordinances of Saxon and English princes, beginning with those of Æthelbert of Kent, well known to general history as Augustine's convert, which are of about the end of the sixth century. The laws of Cnut may be said to close the list. Then from the century which follows the Norman Conquest we have various attempts to state the old English law. These belong to the second class of documents, namely, compilations of customs and formulas which are not known ever to have had any positive authority, but appear to have been put together with a view to practical use, or at least to preserve the memory of things which had been in practice, and which the writer hoped to see in practice again. Perhaps our most important witness of this kind is the tract or custumal called *Rectitudines singularum personarum*[1]. Some of the so-called laws are merely semi-official or private compilations, but their formal profession of an authority they really had not makes no difference to their value as evidence of what the compilers understood the customary law to have been. To some extent we can check them by their repetition of matter that occurs in genuine Anglo-Saxon laws of earlier dates. Apocryphal documents of this kind are by no means confined to England, nor, in English history, to the period before the Conquest. Some examples from the thirteenth century have found their way into the worshipful company of the Statutes of the Realm among the 'statutes of uncertain time.' It has been the work of more than one generation of scholars to detect

[1] Schmid, Gesetze, p. 371. The *Gerefa*, which seems to be a continuation of this tract, was published by Dr Liebermann, in Anglia, ix. 251, and by Dr Cunningham, Growth of English Industry, ed. 3, vol. i. p. 571 ff.

their true character, nor indeed is the work yet wholly done. From the existence and apparent, sometimes real, importance of such writings and compilations as we have now mentioned there has arisen the established usage of including them, together with genuine legislation, under the common heading of [p. 4] 'Anglo-Saxon laws.' As for the deliberate fables of later apocryphal authorities, the 'Mirror of Justices' being the chief and flagrant example, they belong not to the Anglo-Saxon but to a much later period of English law. For the more part they are not even false history; they are speculation or satire.

Charters. Another kind of contemporary writings affords us most valuable evidence for the limited field of law and usage which those writings cover. The field, however, is even more limited than at first sight it appears to be. We mean the charters or 'land-books' which record the munificence of princes to religious houses or to their followers, or in some cases the administration and disposition of domains thus acquired. Along with these we have to reckon the extant Anglo-Saxon wills, few in number as compared with charters properly so called, but of capital importance in fixing and illustrating some points. It was Kemble's great achievement to make the way plain to the appreciation and use of this class of evidences by his *Codex Diplomaticus.* We have to express opinions more or less widely different from Kemble's on several matters, and therefore think it well to say at once that no one who has felt the difference between genius and industrious good intentions can ever differ with Kemble lightly or without regret. Kemble's work often requires correction; but if Kemble's work had not been, there would be nothing to correct[1].

Chronicles etc. Then we have incidental notices of Anglo-Saxon legal matters in chronicles and other writings, of which the value for this purpose must be judged by the usual canons of coincidence or nearness in point of time, the writer's means of access to contemporary witness or continuous tradition not otherwise preserved, his general trustworthiness in things more easily verified, and so forth. Except for certain passages of Bede, we

[1] The principal collections are:—Kemble, Codex Diplomaticus, 1839–48.—Thorpe, Diplomatarium, 1865.—Earle, Land Charters, 1888.—Birch, Cartularium, 1885 ff.—Napier and Stevenson, Crawford Charters, 1895.—Four volumes of facsimiles published by the British Museum, 1873 ff., and two volumes by the Ordnance Survey, 1877 ff.

do not think that the general literary evidence, so to call it, is remarkable either in quantity or in quality. Such as we have is, as might be expected, of social and economic interest in the first place, and throws a rather indirect light upon the legal aspect of Anglo-Saxon affairs.

Anglo-Norman documents.

Lastly, we have legal and official documents of the Anglo-Norman time, and foremost among them Domesday Book, which [p. 5] expressly or by implication tell us much of the state of England immediately before the Norman Conquest. Great as is the value of their evidence, it is no easy matter for a modern reader to learn to use it. These documents, royal and other inquests and what else, were composed for definite practical uses. And many of the points on which our curiosity is most active, and finds itself most baffled, were either common knowledge to the persons for whose use the documents were intended, or were not relevant to the purpose in hand. In the former case no more information was desired, in the latter none at all. Thus the Anglo-Norman documents raise problems of their own which must themselves be solved before we can use the results as a key to what lies even one generation behind them.

Survey of Anglo-Saxon legal institutions.

On the whole the state of English law before the Conquest presents a great deal of obscurity to a modern inquirer, not so much for actual lack of materials as for want of any sure clue to their right interpretation at a certain number of critical points. Nevertheless we cannot trace the history of our laws during the two centuries that followed the Conquest without having some general notions of the earlier period; and we must endeavour to obtain a view that may suffice for this purpose. It would be a barren task to apply the refined classification of modern systems to the dooms of Ine and Alfred or the more ambitious definitions of the *Leges Henrici Primi.* We shall take the main topics rather in their archaic order of importance. First comes the condition of persons; next, the establishment of courts, and the process of justice; then the rules applicable to breaches of the peace, wrongs and offences, and finally the law of property, so far as usage had been officially defined and enforced, or new modes of dealing with property introduced. The origin and development of purely political institutions has been purposely excluded from our scope.

Personal conditions: lordship.

As regards personal condition, we find the radical distinction, universal in ancient society, between the free man and the slave.

But in the earliest English authorities, nay, in our earliest accounts of Germanic society, we do not find it in the clear-cut simplicity of Roman law. There is a great gulf between the lowest of free men and the slave; but there are also differences of rank and degrees of independence among free men, which already prepare the way for the complexities of medieval society. Some free men are lords, others are dependents or followers of lords. We have nothing to show the origin or antiquity of this [p. 6] division; we know that it was the immemorial custom of Germanic chiefs to surround themselves with a band of personal followers, the *comites* described by Tacitus, and we may suppose that imitation or repetition of this custom led to the relation of lord and man being formally recognized as a necessary part of public order. We know, moreover, that as early as the first half of the tenth century the division had become exhaustive. An ordinance of Æthelstan treats a 'lordless man' as a suspicious if not dangerous person; if he has not a lord who will answer for him, his kindred must find him one; if they fail in this, he may be dealt with (to use the nearest modern terms) as a rogue and vagabond[1]. The term 'lord' is applied to the king, in a more eminent and extensive but at the same time in a looser sense, with reference to all men owing or professing allegiance to him[2]. Kings were glad to draw to their own use, if they might, the feeling of personal attachment that belonged to lordship in the proper sense, and at a later time the greater lords may now and again have sought to emulate the king's general power. In any case this pervading division of free persons into lords and men, together with the king's position as general over-lord, combined at a later time with the prevalence of dependent land tenures to form the more elaborate arrangements and theories of medieval feudalism. It does not seem possible either to assign any time in English history when some free men did not hold land from their personal lords, or to assign the time when this became a normal state of things. In the latter part of the ninth century there was already a considerable class of free men bound to work on the lands of others, for an ordinance of Alfred fixes the holidays that are to be allowed them; and we can hardly doubt that this work was

[1] Æthelst. II. 2. A man who was considerable enough to have only the king above him required, of course, no other lord.

[2] A.-S. Chron. ann. 921.

incident to their own tenure[1]. At all events dependent landholding appears to have been common in the century before the Norman Conquest. It was the work of the succeeding century to establish the theory that all land must be 'held of' some one as a fixed principle of English law, and to give to the [p. 7] conditions of tenure as distinct from the personal status of the tenant an importance which soon became preponderant, and had much to do with the ultimate extinction of personal servitude under the Tudor dynasty[2].

The family. Dependence on a lord was not the only check on the individual freedom of a freeborn man. Anglo-Saxon polity preserved, even down to the Norman Conquest, many traces of a time when kinship was the strongest of all bonds. Such a stage of society, we hardly need add, is not confined to any one region of the world or any one race of men. In its domestic aspect it may take the form of the joint family or household which, in various stages of resistance to modern tendencies and on various scales of magnitude, is still an integral part of Hindu and South Slavonic life. When it puts on the face of strife between hostile kindreds, it is shown in the war of tribal factions, and more specifically in the blood-feud. A man's kindred are his avengers; and, as it is their right and honour to avenge him, so it is their duty to make amends for his misdeeds, or else maintain his cause in fight. Step by step, as the power of the State waxes, the self-centred and self-helping autonomy of the kindred wanes. Private feud is controlled, regulated, put, one may say, into legal harness; the avenging and the protecting clan of the slain and the slayer are made pledges and auxiliaries of public justice. In England the legalized blood-feud expired almost within living memory, when the criminal procedure by way of 'appeal' was finally abolished. We have to conceive, then, of the kindred not as an artificial body or corporation to which the State allows authority over its members in order that it may be answerable for them, but as an element of the State not yielding precedence to the State itself. There is a constant tendency to conflict between the old customs of the family and the newer laws of the State; the family preserves archaic habits and claims which clash at every turn with the development of a law-abiding

[1] Ælf. 43.

[2] A solitary claim of villeinage is reported in the reign of James I.

commonwealth of the modern type. In the England of the tenth century[1], we find that a powerful kindred may still be a danger to public order, and that the power of three shires may be called out to bring an offending member of it to justice. At the same time the family was utilized by the growing institutions of the State, so far as was found possible. We [p. 8] have seen that a lordless man's kinsfolk might be called upon to find him a lord. In other ways too the kindred was dealt with as collectively responsible for its members[2]. We need not however regard the kindred as a defined body like a tribe or clan, indeed this would not stand with the fact that the burden of making and the duty of exacting compensation ran on the mother's side as well as the father's. A father and son, or two half-brothers, would for the purposes of the blood-feud have some of their kindred in common, but by no means all.

The legal importance of the kindred continues to be recognized in the very latest Anglo-Saxon custumals, though some details that we find on the subject in the so-called laws of Henry I. fall under grave suspicion, not merely of an antiquary's pedantic exaggeration, but of deliberate copying from other Germanic law-texts. It is probable that a man could abjure his kindred, and that the oath used for the purpose included an express renunciation of any future rights of inheritance. We do not know whether this was at all a common practice, or whether any symbolic ceremonies like those of the Salic law were or ever had been required in England[3].

Ranks: ceorl, eorl, gesið.

Further, we find distinctions of rank among freemen which, though not amounting to fundamental differences of condition, and not always rigidly fixed, had more or less definite legal incidents. From the earliest times a certain pre-eminence is accorded (as among almost all Germanic people)[4] to men of noble birth. The ordinary freeman is a 'ceorl,' churl (there is no trace before the Norman Conquest of the modern degradation of the word); the noble by birth is an 'eorl.' This last word came later, under Danish influence, to denote a specific

[1] Æthelst. VI. (Iudicia civitatis Lundoniae) 8, § 2.

[2] Kemble, Saxons, i. 261. The A.-S. term for the kindred is 'mægð,' in Latin versions 'parentela.'

[3] Hen. 88, § 13; Schmid points out the strong resemblance to Lex Sal. 60, 'De eo qui se de parentilla tollere vult.'

[4] Brunner, D. R. G. i. 104 ff.

office of state, and our present 'earl' goes back to it in that sense. The Latin equivalent *comes* got specialized in much the same way. But such was not its ancient meaning. Special relations to the king's person or service produced another and somewhat different classification. 'Gesíð' was the earliest [p. 9] English equivalent, in practical as well as literal meaning, of *comes* as employed by Tacitus; it signified a well-born man attached to the king by the general duty of warlike service, though not necessarily holding any special office about his person. It is, however, a common poetic word, and it is not confined to men. It was current in Ine's time but already obsolete for practical purposes in Alfred's; latterly it appears to have implied hereditary rank and considerable landed possessions. The element of noble birth is emphasized by the fuller and commoner form 'gesíðcund.'

Thegn. The official term of rank which we find in use in and after Alfred's time is 'thegn[1]' (þegen, in Latin usually *minister*). Originally a thegn is a household officer of some great man, eminently and especially of the king. From the tenth century to the Conquest thegnship is not an office unless described by some specific addition (horsþegen, discþegen, and the like) showing what the office was. It is a social condition above [p. 10] that of the churl, carrying with it both privileges and customary duties. The 'king's thegns,' those who are in fact attached to the king's person and service, are specially distinguished. We may perhaps roughly compare the thegns of the later Anglo-Saxon monarchy to the country gentlemen of modern times who are in the commission of the peace and serve on the grand jury. But we must remember that the thegn had a definite legal rank. His wergild, for example, the fixed sum with which his death must be atoned for to his kindred, or which he might in some cases have to pay for his own misdoing, was six times as great as a common man's; and his oath weighed as much more in the curious contest of asseverations, quite different from anything we now understand by evidence, by which early Germanic lawsuits were decided. It is stated in more than one old document that a thegn's rights might be claimed by the owner of five hides (at the normal value of the hide, 600 acres) of land, a church and belfry, a 'burgh-gate-seat' (which may imply a private jurisdiction, or may only

[1] The modern form *thane* has acquired misleading literary associations.

signify a town house), and a special place in the king's hall. The like right is ascribed to a merchant who has thrice crossed 'the wide sea' (the North Sea as opposed to the Channel) at his own charges[1]. This may be suspected, in the absence of confirmation, of being merely the expression of what, in the writer's opinion, an enlightened English king ought to have done to encourage trade, still it is not improbable. We have no reason to reject the tradition about the five hides, which is borne out by some later evidence. But this gives us no warrant in any case for denying that a thegn might have less than five hides of land, or asserting that he would forfeit his rank if he lost the means of supporting it on the usual scale. However, these details are really of no importance in the general history of our later law, for they left no visible mark on the structure of Anglo-Norman aristocracy[2].

Other distinctions.

The last remark applies to certain other distinctions which [p. 11] are mentioned in our authorities as well known, but never distinctly explained. We read of 'twelf-hynd' and 'twy-hynd' men, apparently so called from their wergild being twelve hundred and two hundred shillings respectively. There was also an intermediate class of 'six-hynd' men. It would seem that the 'twelf-hynd' men were thegns, and the 'twy-hynd' man might or might not be. But these things perhaps had no more practical interest for Glanvill, certainly no more for Bracton, than they have for us.

Privileges of clergy.

In like manner, the privileges of clerks in orders, whether of secular or regular life, do not call for close investigation here. Orders were regarded as conferring not only freedom where any doubt had existed, but a kind of nobility. There was a special scale of wergild for the clergy; but it was a question whether a priest who was in fact of noble birth should not be atoned for with the wergild appropriate to his birth, if it exceeded that which belonged to his ecclesiastical rank, and some held that for the purpose of wergild only the man's rank by birth should be considered.

It is well known that the superior clergy took (and with good cause) a large part in legislation and the direction of justice, as well as in general government. Probably we owe it

[1] Schmid, Gesetze, pp. 389, 397, 431.

[2] Little, Gesiths and Thegns, E. H. R. iv. 723; Maitland, Domesday Book, 161.

to them that Anglo-Saxon law has left us any written evidences at all. But the really active and important part of the clergy in the formation of English law begins only with the clear separation of ecclesiastical and civil authority after the Conquest.

We now have to speak of the unfree class.

Slavery. Slavery, personal slavery, and not merely serfdom or villeinage consisting mainly in attachment to the soil, existed, and was fully recognized, in England until the twelfth century. We have no means of knowing with any exactness the number of slaves, either in itself, or as compared with the free population. But the recorded manumissions would alone suffice to prove that the number was large. Moreover, we know, not only that slaves were bought and sold, but that a real slave-trade was carried on from English ports. This abuse was increased in the evil times that set in with the Danish invasions. Raids of heathen Northmen, while they relaxed social order and encouraged crime, brought wealthy slave-[p. 12] buyers, who would not ask many questions, to the unscrupulous trader's hand. But slaves were exported from England much earlier. Selling a man beyond the seas occurs in the Kentish laws as an alternative for capital punishment[1]; and one obscure passage seems to relate to the offence of kidnapping freeborn men[2]. Ine's dooms forbade the men of Wessex to sell a countryman beyond seas, even if he were really a slave or justly condemned to slavery[3].

Slave-trade. Selling Christian men beyond seas, and specially into bondage to heathen, is forbidden by an ordinance of Æthelred, repeated almost word for word in Cnut's laws[4]. Wulfstan, archbishop of York, who probably took an active part in the legislation of Æthelred, denounced the practice in his homilies[5], and also complained that men's thrall-right was narrowed. This is significant as pointing to a more humane doctrine, whatever the practice may have been, than that of the earlier Roman law. It seems that even the thrall had personal rights of some sort, though we are not able with our present information to specify them. Towards the end of the eleventh century

[1] Wiht. 26.

[2] Hl. and E. 5; see Schmid thereon. The slave-traders were often foreigners, commonly Jews. Ireland and Gaul were the main routes.

[3] In. 11.

[4] Æthelr. v. 2, vi. 9; Cn. ii. 3; cf. Lex Rib. 16; Lex Sal. 39 § 2.

[5] A. Napier, Berlin, 1883, pp. 129, *n.*, 158, 160-1.

the slave trade from Bristol to Ireland (where the Danes were then in power) called forth the righteous indignation of another Wulfstan, the bishop of Worcester, who held his place through the Conquest. He went to Bristol in person, and succeeded in putting down the scandal[1]. Its continued existence till that time is further attested by the prohibition of Æthelred and Cnut being yet again repeated in the laws attributed to William the Conqueror[2].

Mannmission.

Free men sometimes enslaved themselves in times of distress as the only means of subsistence; manumission of such persons after the need was past would be deemed a specially meritorious work, if not a duty[3]. Sometimes well-to-do people bought slaves, and immediately afterwards freed them for the [p. 13] good of their own souls, or the soul of some ancestor. At a later time we meet with formal sales by the lord to a third person in trust (as we should now say) to manumit the serf[4]. The Anglo-Saxon cases do not appear to be of this kind. Sometimes a serf 'bought himself' free. We may suppose that a freedman was generally required or expected to take his place among the free dependants of his former master; and the express licence to the freedman to choose his own lord, which is occasionally met with, tends to show that this was the rule. The lord's rights over the freedman's family were not affected if the freedman left the domain[5]. There is nothing to suggest that freedmen were treated as a distinct class in any other way. What has just been said implies that a bondman might acquire, and not unfrequently did acquire, money of his own; and, in fact, an ordinance of Alfred expressly makes the Wednesday in the four ember weeks a free day for him, and declares his earnings to be at his own disposal[6]. Moreover, even the earliest written laws constantly assume that a 'theow' might be able to pay fines for public offences.

[1] Will. Malm. Vita Wulstani, in Wharton, Anglia Sacra, ii. 258; quoted nearly in full, Freeman, Norman Conquest, iv. 386.

[2] Leges Willelmi, I. 41.

[3] Cod. Dipl. iv. 263 (manumission by Geatflæd of 'all the men whose heads she took for their food in the evil days'). This and other examples are conveniently collected at the end of Thorpe's Diplomatarium.

[4] L. Q. R. vii. 64.

[5] Wiht. 8: an archaic authority, but there is nothing to show any change.

[6] Ælf. 43 (as Schmid and the Latin version take it). Cp. Theod. Pen. xiii. 3 (Haddan and Stubbs, Councils, iii. 202).

Slavery and serfage.

On the whole the evidence seems to show that serfdom was much more of a personal bondage and less involved with the occupation of particular land before the Norman Conquest than after; in short that it approached, though it only approached, the slavery of the Roman law. Once, and only once, in the earliest of our Anglo-Saxon texts[1], we find mention in Kent, under the name of *læt,* of the half-free class of persons called *litus* and other like names in continental documents. To all appearance there had ceased to be any such class in England before the time of Alfred: it is therefore needless to discuss their condition or origin.

There are traces of some kind of public authority having been required for the owner of a serf to make him free as regards third persons; but from almost the earliest Christian times manumission at an altar had full effect[2]. In such cases a written record was commonly preserved in the later Anglo-Saxon period at any rate, but it does not appear to have been [p. 14] necessary or to have been what we should now call an operative instrument. This kind of manumission disappears after the Conquest, and it was long disputed whether a freed bondman might not be objected to as a witness or oath-helper[3].

Courts and justice.

We now turn to judicial institutions. An Anglo-Saxon court, whether of public or private justice, was not surrounded with such visible majesty of the law as in our own time, nor furnished with any obvious means of compelling obedience. It is the feebleness of executive power that explains the large space occupied in archaic law by provisions for the conduct of suits when parties make default. In like manner the solemn prohibition of taking the law into one's own hands without having demanded one's right in the proper court shows that law is only just becoming the rule of life. Such provisions occur as early as the dooms of Ine of Wessex[4], and perhaps preserve the tradition of a time when there was no jurisdiction save by consent of the parties. Probably the public courts

[1] Æthelb. 26.

[2] Wiht. 8: 'If one manumits his man at the altar, let him be folk-free.'

[3] Glanvill, ii. 6. Details on Anglo-Saxon servitude may be found in Kemble, Saxons, bk. i. c. 8, and Larking, Domesday Book of Kent, note 57. See also Maurer, Kritische Ueberschau, i. 410; Jastrow, Zur strafrechtlichen Stellung der Sklaven (Gierke's Untersuchungen, 1878); Brunner, D. R. G. i. 95.

[4] In. 9. The wording 'wrace dó' is vague: doubtless it means taking the other party's cattle.

were always held in the open air; there is no mention of churches being used for this purpose, a practice which was expressly forbidden in various parts of the continent when court houses were built. Private courts were held, when practicable, in the house of the lord having the jurisdiction, as is shown by the name *halimote* or hall-moot. This name may indeed have been given to a lord's court by way of designed contrast with the open-air hundred and county courts. The manor-house itself is still known as a court in many places in the west and south-east of England[1]. *Halimote* is not known, however, to occur before the Norman Conquest.

So far as we can say that there was any regular judicial system in Anglo-Saxon law, it was of a highly archaic type. We find indeed a clear enough distinction between public offences and private wrongs. Liability to a public fine or, in grave cases, corporal or capital punishment, may concur with liability to make redress to a person wronged or slain, or to his [p.15] kindred, or to incur his feud in default. But neither these ideas nor their appropriate terms are confused at any time. On the other hand, there is no perceptible difference of authorities or procedure in civil and criminal matters until, within a century before the Conquest, we find certain of the graver public offences reserved in a special manner for the king's jurisdiction.

The staple matter of judicial proceedings was of a rude and simple kind. In so far as we can trust the written laws, the only topics of general importance were manslaying, wounding, and cattle-stealing. So frequent was the last-named practice that it was by no means easy for a man, who was minded to buy cattle honestly, to be sure that he was not buying stolen beasts, and the Anglo-Saxon dooms are full of elaborate precautions on this head, to which we shall return presently.

Procedure. As to procedure, the forms were sometimes complicated, always stiff and unbending. Mistakes in form were probably fatal at every stage. Trial of questions of fact, in anything like the modern sense, was unknown. Archaic rules of evidence make no attempt to apply any measure of probability to

[1] *E g.* Clovelly Court, N. Devon. Cp. Rentalia et Custumaria, Somerset Record Society, 1891, Glossary, s. v. *Curia.* For the *aula, haula, halla* of D. B., see Maitland, Domesday Book, 109 ff.

individual cases[1]. Oath was the primary mode of proof, an oath going not to the truth of specific fact, but to the justice of the claim or defence as a whole. The number of persons required to swear varied according to the nature of the case and the rank of the persons concerned. Inasmuch as the oath, if duly made, was conclusive, what we now call the burden of proof was rather a benefit than otherwise under ancient Germanic procedure. The process of clearing oneself by the full performance of the oath which the law required in the particular case is that which later medieval authorities call 'making one's law,' *facere legem.* It remained possible, in certain cases, down to quite modern times. An accused person who failed in his oath, by not having the proper number of oath-helpers[2] prepared to swear, or who was already disqualified from clearing himself by oath, had to go to one of the forms of [p. 16] ordeal. The ordeal of hot water appears in Ine's laws though until lately it was concealed from our view by the misreading of one letter in the text[3] Trial by combat was to all appearance unknown to the Anglo-Saxon procedure[4], though it was formally sanctioned on the continent by Gundobad, king of the Burgundians, at the beginning of the sixth century and is found in the laws of nearly all the German tribes[5]. An apparently genuine ordinance of William the Conqueror enables Englishmen to make use of trial by battle in their lawsuits with Normans, but expressly allows them to decline it. This is strong to prove that it was not an English institution in any form[6] Permitted or justified private war, of which we do find considerable traces in England[7], is quite a different matter.

[1] Brunner, D. R. G. ii. 375.

[2] The usual modern term 'compurgator' was borrowed by legal antiquaries from ecclesiastical sources in much later times.

[3] This discovery is due to Dr Liebermann, Sitzungsberichte der berliner Akademie, 1896, xxxv. 829. The less common word *ceac* (a cauldron) was confused with *ceap* (buying) and the genuine reading was treated by the editors as an unmeaning variant.

[4] The appearance of *orest* (a correct Northern form = Eng. *eornest*) among the privileges of Waltham Abbey, Cod. Dipl. iv. 154, is probably due to a post-Norman scribe, for our text rests on a very late copy. At all events the charter is only a few years before the Conquest. However, trial by battle may well have been known in the Danelaw throughout the tenth century.

[5] Brunner, D. R. G. ii. 415.

[6] Leg. Will. II. (Willelmes cyninges ásetnysse).

[7] Ælf. 42. Sir James Stephen's statement (Hist. Crim. Law, i. 61) that 'trial by battle was only private war under regulations' cannot be accepted.

The Anglo-Norman judicial combat belongs to a perfectly regular and regulated course of proceeding, is as strictly controlled as any other part of it, and has no less strictly defined legal consequences.

A 'fore-oath,' distinct from the definitive oath of proof, was required of the party commencing a suit, unless the fact complained of were manifest; thus a fore-oath was needless if a man sued for wounding and showed the wound to the court. A defendant who was of evil repute might be driven by the fore-oath alone to the alternative of a three-fold oath or the ordeal[1].

As regards the constitution of Anglo-Saxon courts, our direct evidence is of the scantiest. We have to supplement it with indications derived from the Norman and later times.

Union of temporal and spiritual jurisdiction.

One well-known peculiarity of the Anglo-Saxon period is that secular and ecclesiastical courts were not sharply separated, and the two jurisdictions were hardly distinguished. The bishop [p. 17] sat in the county court; the church claimed for him a large share in the direction of even secular justice[2], and the claim was fully allowed by princes who could not be charged with weakness[3]. Probably the bishop was often the only member of the court who possessed any learning or any systematic training in public affairs.

The king's justice not ordinary.

The most general Anglo-Saxon term for a court or assembly empowered to do justice is *gemót*. In this word is included all authority of the kind from the king and his witan[4] downwards. *Folc-gemót* appears to mean any public court whatever, greater or less. The king has judicial functions, but they are very far removed from our modern way of regarding the king as the fountain of justice. His business is not to see justice done in his name in an ordinary course, but to exercise a special and

[1] Cn. II. 22, and the newly-printed gloss in Liebermann, Consil. Cnuti, p. 14. From this, so far as it may be trusted, it would seem that a triple fore-oath might put the 'credible' defendant to a stronger oath and the 'incredible' one to the severe 'three-fold' ordeal.

[2] Edg. III. 5 (third quarter of tenth century); 'Institutes of Polity' in Thorpe, Ancient Laws, ii. 313.

[3] However, as to the manner in which justice was done in ecclesiastical causes and when clerks were accused extremely little is known. See Stubbs, Historical Appendix to Report of Eccl. Courts Comm. 1883, p. 23; Makower, Const. Hist. of the Church of England, 384 ff.

[4] 'Witenagemót' does not appear to have been an official term.

reserved power which a man must not invoke unless he has failed to get his cause heard in the jurisdiction of his own hundred[1]. Such failure of justice might happen, not from ill-will or corruption on the part of any public officer, but from a powerful lord protecting offenders who were his men[2]. In such cases the king might be invoked to put forth his power. It is obvious that the process was barely distinguishable from that of combating an open rebellion[3].

After the Norman Conquest, as time went on, the king's justice became organized and regular, and superseded nearly all the functions of the ancient county and hundred courts. But the king's power to do justice of an extraordinary kind was far from being abandoned. The great constructive work of Henry II. and Edward I. made it less important for a time. In the fifteenth and sixteenth centuries it showed its vitality in the hands of the king's chancellors, and became the root of the modern system of equity[4]. Down to our own time that system preserved the marks of its origin in the peculiar character of the compulsion exercised by courts of equitable jurisdiction. Disobedience to their process and decrees was a direct and special contempt of the king's authority, and a 'commission of [p. 18] rebellion' might issue against a defendant making default in a chancery suit, however widely remote its subject-matter might be from the public affairs of the kingdom[5].

Jurisdiction of witan.

We have many examples, notwithstanding the repeated ordinances forbidding men to seek the king's justice except after failure to obtain right elsewhere, of the witan exercising an original jurisdiction in matters of disputed claims to book-land[6]. This may be explained in more than one way. Book-land was (as we shall see) a special form of property which only the king could create, and which, as a rule, he created with the consent and witness of his wise men. Moreover, one or both parties to such suits were often bishops or the heads of great houses of religion, and thus the cause might be regarded as an ecclesiastical matter fit to be dealt with by a synod rather than by temporal authority, both parties doubtless consenting to the jurisdiction.

[1] Edg. III. 2; repeated Cnut, II. 17.

[2] Æthelst. II. 3.

[3] Cf. Æthelst. VI. (Iud. Civ. Lund.) 8 §§ 2, 3.

[4] Blackstone, Comm. iii. 51.

[5] Blackstone, Comm. iii. 444.

[6] Cases collected in Essays in Anglo-Saxon Law, ad fin.

The charters that inform us of what was done, especially in 803 and 825, at the synods or synodal councils of Clovesho[1], that 'famous place' whose situation is now matter of mere conjecture[2], leave no doubt that on these occasions, at least, the same assembly which is called a synod also acted as the witan. The secular and spiritual functions of these great meetings might have been discriminated by lay members not taking part in the ecclesiastical business; but it is by no means certain that they were[3]. In any case it is highly probable that the prohibitions above cited were never meant to apply to the great men of the kingdom, or royal foundations, or the king's immediate followers.

County and hundred courts.

The ordinary Anglo-Saxon courts of public justice were the county court and the hundred court, of which the county court was appointed to be held twice a year, the hundred every four weeks[4]. Poor and rich men alike were entitled to have right done to them, though the need of emphasizing this elementary point of law in the third quarter of the tenth century suggests that the fact was often otherwise[5].

Thus the hundred court was the judicial unit, so to speak, for ordinary affairs. We have no evidence that any lesser [p. 19] public court existed. It is quite possible that some sort of township meeting was held for the regulation of the common-field husbandry which prevailed in most parts of England: and the total absence of any written record of such meetings, or (so far as we know) allusion to them, hardly makes the fact less probable. But we have no ground whatever for concluding that the township-moot, if that were its name, had any properly judicial functions. 'Mark-moot,' which has been supposed to be the name of a primary court, appears rather to mean a court held on the marches of adjacent counties or hundreds, or perhaps on the boundary dyke itself[6].

The ordinances which tell us of the times of meeting appointed for the county and hundred courts tell us nothing whatever of their procedure. It may be taken as certain,

[1] Haddan and Stubbs, Councils, iii. 541, 596.

[2] Earle, Land Charters, 453.

[3] Kemble, Saxons, ii. 247, 249.

[4] Edg. I. 1 (the ascription of this ordinance to Edgar is conjectural, but serves to fix its earliest possible date, Schmid, p. xlviii.; Liebermann, Consil. Cnuti, p. v.); Edg. III. 5.

[5] Edg. III. 1.

[6] Cf. Schmid, Glossar, s. v. *mearc*; Maitland, Domesday Book, 275.

however, that they had no efficient mode of compelling the attendance of parties or enforcing their orders. A man who refused to do justice to others according to the law could only be put out of the protection of the law, save in the cases which were grave enough to call for a special expedition against him. Outlawry, developed in the Danish period as a definite part of English legal process, remained such until our own time. All this is thoroughly characteristic of archaic legal systems in general. Nothing in it is peculiarly English, not much is peculiarly Germanic.

Private jurisdiction.

Thus far we have spoken only of public jurisdiction. But we know that after the Norman Conquest England was covered with the private jurisdictions of lords of various degrees, from the king himself downwards, holding courts on their lands at which their tenants were entitled to seek justice in their own local affairs, and bound to attend that justice might be done to their fellows. 'Court baron' is now the most usual technical name for a court of this kind, but it is a comparatively modern name. Further, we know that private jurisdiction existed on the continent much earlier, and that it existed in England in the early part of the eleventh century. It is a question not [p. 20] free from doubt whether the institution was imported from the continent not long before that time, or on the contrary had been known in England a good while before, perhaps as early as the date of our earliest Anglo-Saxon laws and charters, notwithstanding that it is not expressly and directly mentioned in documents of the earlier period. For our present purpose it is enough to be sure that private courts were well established at the date of the Conquest, and had been increasing in number and power for some time[1].

Subject-matter of Anglo-Saxon justice.

[p. 21] Proceeding to the subject-matters of Anglo-Saxon jurisdiction, we find what may be called the usual archaic features. The only substantive rules that are at all fully set forth have to do with offences and wrongs, mostly those which are of a violent kind, and with theft, mostly cattle-lifting. Except so far as it is involved in the law of theft, the law of property is almost entirely left in the region of unwritten custom and local usage. The law of contract is rudimentary, so rudimentary as to be barely distinguishable from the law of property. In fact people who have no system of credit and very little foreign

[1] Maitland, Domesday Book, 80 ff., 258 ff.

trade, and who do nearly all their business in person and by word of mouth with neighbours whom they know, have not much occasion for a law of contract. It is not our purpose to consider in this place the relation of Anglo-Saxon customs and ordinances to those of Germanic nations on the continent; to inquire, for example, why the Salic or the Lombard laws should present striking resemblances even in detail to the laws of Alfred or Cnut, but provide with equal or greater minuteness for other similar cases on which the Anglo-Saxon authorities are silent. In the period of antiquarian compilation which set in after the Norman Conquest, and of which the so-called laws of Henry I. are the most conspicuous product, we see not only imitation of the continental collections, but sometimes express reference to their rules[1]. But this kind of reference, at the [p. 22] hands of a compiler who could also quote the Theodosian code[2], throws no light whatever on the possibilities of continental influence at an earlier time. It is highly probable that Alfred and his successors had learned persons about them who were more or less acquainted with Frankish legislation if not with that of remoter kingdoms. But it suffices to know that, in its general features, Anglo-Saxon law is not only archaic, but offers an especially pure type of Germanic archaism. We are therefore warranted in supposing, where English authority fails, that the English usages of the Anglo-Saxon period were generally like the earliest corresponding ones of which evidence can be found on the continent.

The king's peace.

Preservation of the peace and punishment of offences were dealt with, in England as elsewhere, partly under the customary jurisdiction of the local courts, partly by the special authority of the king. In England that authority gradually superseded all others. All criminal offences have long been said to be committed against the king's peace; and this phrase, along with 'the king's highway,' has passed into common use as a kind of ornament of speech, without any clear sense of its historical meaning. The two phrases are, indeed, intimately connected; they come from the time when the king's protection was not

[1] Leg. Hen. c. 87 § 10, 89 § 1, secundum legem Saligam; 90 § 4, secundum legem Ribuariorum solvatur.

[2] Leg. Hen. c. 33 § 4: 'de libro Theodosianae legis, iniuste victus infra tres menses reparet causam.' The quotation is really from an epitome of the Lex Romana Visigothorum.

universal but particular, when the king's peace was not for all men or all places, and the king's highway was in a special manner protected by it. Breach of the king's peace was an act of personal disobedience, and a much graver matter than an ordinary breach of public order; it made the wrong-doer the king's enemy. The notion of the king's peace appears to have had two distinct origins. These were, first, the special sanctity of the king's house, which may be regarded as differing only in degree from that which Germanic usage attached everywhere to the homestead of a free man; and, secondly, the special protection of the king's attendants and servants, and other persons whom he thought fit to place on the same footing. In the later Anglo-Saxon period the king's particular protection is called *griδ* as distinct from the more general word *friδ*. Although the proper name is of comparatively recent introduc- [p. 23] tion[1] and of Scandinavian extraction, the thing seems to answer to the Frankish *sermo* or *verbum regis*, which is as old as the Salic law[2]. The rapid extension of the king's peace till it becomes, after the Norman Conquest, the normal and general safeguard of public order, seems peculiarly English[3]. On the continent the king appears at an early time to have been recognized as protector of the general peace, besides having power to grant special protection or peace of a higher order[4].

The various peaces.

It is not clear whether there was any fixed name for the general peace which was protected only by the hundred court and the ealdorman. Very possibly the medieval usage by which an inferior court was said to be in the peace of the lord who held the court may go back in some form to the earliest time when there were any set forms of justice; and there is some evidence that in the early part of the tenth century men spoke

[1] See A.-S. Chron. ann. 1002.

[2] Fustel de Coulanges, Origines du système féodal, 300 ff. Lex Sal. xiii. 6; lvi. 5. Edict of Chilperic, 9. To be out of the king's protection is to be *extra sermonem suum, foras nostro sermone*. In xiv. 4, *praeceptum* appears to be the king's written protection or licence. The phrase in Ed. Conf. 6 § 1 (cf. Brunner, D. R. G. ii. 42), *ore suo utlagabit eum rex*, or, as the second edition gives it, *utlagabit eum rex verbo oris sui*, looks more like the confused imitation of an archaizing compiler than a genuine parallel.

[3] For some further details see Pollock, Oxford Lectures, 1890, 'The King's Peace,' 65.

[4] See Brunner, D. R. G. ii. §§ 65, 66, who calls attention (p. 42) to the relative weakness of the crown in England before the Conquest.

of the peace of the witan[1]. We have not found English authority for any such term as *folk-peace*, which has sometimes been used in imitation of German writers. No light is thrown on early Anglo-Saxon ideas or methods of keeping the peace by the provision that every man shall be in a hundred and tithing, for it first appears in this definite form in the laws of Cnut[2], and both its history and meaning are disputable. This, however, is a matter of administrative mechanism rather than of the law itself. We shall have a word to say about this matter when hereafter we speak of frankpledge.

Feud and atonement.

In Anglo-Saxon as well as in other Germanic laws we find [p.21] that the idea of wrong to a person or his kindred is still primary, and that of offence against the common weal secondary, even in the gravest cases. Only by degrees did the modern principles prevail, that the members of the community must be content with the remedies afforded them by law, and must not seek private vengeance, and that, on the other hand, public offences cannot be remitted or compounded by private bargain.

Personal injury is in the first place a cause of feud, of private war between the kindreds of the wrong-doer and of the person wronged. This must be carefully distinguished from a right of specific retaliation, of which there are no traces in Germanic law[3]. But the feud may be appeased by the acceptance of a composition. Some kind of arbitration was probably resorted to from a very early time to fix the amount. The next stage is a scale of compensation fixed by custom or enactment for death or minor injuries, which may be graduated according to the rank of the person injured. Such a scale may well exist for a time without any positive duty of the kindred to accept the composition it offers. It may serve only the purpose of saving disputes as to the amount proper to be paid when the parties are disposed to make peace. But this naturally leads to the kindred being first expected by public opinion and then required by public authority not to pursue the feud if the proper composition is forthcoming, except in a

[1] Edw. II. 1. Schmid, Gloss. s. v. *Friede*, considers the general peace to have been the king's peace in some sense. This lacks authority, but seems accepted as regards the continent: Brunner, D. R. G. ii. 42. It is nearer the truth than any talk about the 'folk-peace.'

[2] Cn. II. 20.

[3] Ælf. Prolog. 19, copied from the book of Exodus, is of course no exception.

few extreme cases which also finally disappear. At the same time, the wrong done to an individual extends beyond his own family; it is a wrong to the community of which he is a member; and thus the wrong-doer may be regarded as a public enemy. Such expressions as 'outlaw against all the people' in the Anglo-Saxon laws preserve this point of view[1]. The conception of an offence done to the state in its corporate person, or (as in our own system) as represented by the king, is of later growth.

Tariff of compositions.

Absolute chronology has very little to do with the stage of growth or decay in which archaic institutions, and this one in particular, may be found in different countries and times. The Homeric poems show us the blood-feud in full force in cases of [p. 25] manslaying (there is little or nothing about wounding), tempered by ransom or composition which appears to be settled by agreement or arbitration in each case. In the classical period of Greek history this has wholly disappeared. But in Iceland, as late as the time of the Norman Conquest of England, we find a state of society which takes us back to Homer. Manslayings and blood-feuds are constant, and the semi-judicial arbitration of wise men, though often invoked, is but imperfectly successful in staying breaches of the peace and reconciling adversaries. A man's life has its price, but otherwise there is not even any recognized scale of compositions. In the Germanic laws both of England and of the mainland we find a much more settled rule some centuries earlier. Full scales of composition are established. A freeman's life has a regular value set upon it, called *wergild*, literally 'man's price' or 'man-payment[2],' or oftener in English documents *wer* simply; moreover, for injuries to the person short of death there is an elaborate tariff. The modern practice of assessing damages, though familiar to Roman law in the later republican period, is unknown to early Germanic law, nor were there in Germanic procedure any means of applying the idea if it had existed. Composition must generally be accepted if offered; private war is lawful only when the adversary obstinately refuses to do right. In that case indeed, as we learn from a well-known ordinance of Alfred[3], the power

[1] Cp. Grettis Saga, c. 79.

[2] Brunner, D. R. G. i. 86. An archaic synonym *leód* occurs Æthelb. 22, 23, cp. Grimm, 652.

[3] Ælf. 42.

of the ealdorman, and of the king at need, may be called in if the plaintiff is not strong enough by himself; in other words the contumacious denier of justice may be dealt with as an enemy of the commonwealth. At a somewhat later time we find the acceptance and payment of compositions enforced by putting the obligation between the parties under the special sanction of the king's peace[1]. But it was at least theoretically possible, down to the middle of the tenth century, for a man-slayer to elect to bear the feud of the kindred[2]. His own kindred, however, might avoid any share in the feud by disclaiming him; any of them who maintained him after this, as well as any of the avenging kinsfolk who meddled with any [p. 26] but the actual wrong-doer, was deemed a foe to the king (the strongest form of expressing outlawry) and forfeited all his property.

Wer, wíte, bót.

We find the public and private aspects of injurious acts pretty clearly distinguished by the Anglo-Saxon terms. *Wer*, as we have said, is the value set on a man's life, increasing with his rank. For many purposes it could be a burden as well as a benefit; the amount of a man's own *wer* was often the measure of the fine to be paid for his offences against public order. *Wíte* is the usual word for a penal fine payable to the king or to some other public authority. *Bót* (the modern German *Busse*) is a more general word, including compensation of any kind. Some of the gravest offences, especially against the king and his peace, are said to be *bótleás*, 'bootless'; that is, the offender is not entitled to redeem himself at all, and is at the king's mercy. The distinction between *wer* and *wíte* must be very ancient; it corresponds to what is told us of German custom by Tacitus[3].

Punishment.

The only punishments, in the proper sense, generally applicable to freemen, were money fines, and death in the extreme cases where redemption with a money fine was not allowed. A credible tradition preserved in the prologue to Alfred's laws tells us that after the conversion of the English to Christianity

[1] Edm. II. 7, and *Be Wergilde* (Schmid, App. vii.) § 4.

[2] Edm. II. 1. Æthelr. II. 6 § 1, suggests but hardly proves a change, leaving the option with the slain man's kindred alone, though such is held to have been the settled rule on the continent: Brunner, D. R. G. i. 163.

[3] Tac. Germ. c. 12. *Bót* is closely connected with 'better': the idea is 'making good.'

the bishops and wise-men 'for the mild-heartedness sake that Christ taught' sanctioned the redemption by fine of offences less than that of treason against one's lord[1]. Mutilation and other corporal punishments are prescribed (but with the alternative of redemption by a heavy fine) for false accusers, for habitual criminals, and for persons of evil repute who have failed in the ordeal[2].

Imprisonment occurs in the Anglo-Saxon laws only as a means of temporary security. Slaves were liable to capital and other corporal punishment, and generally without redemption. The details have no material bearing on the general history of the law, and may be left to students of semi-barbarous manners. Outlawry, at first a declaration of war by the commonwealth against an offending member, became a regular means of compelling submission to the authority of the courts, as in form it continued so to be down to modern times[3]. In criminal pro- [p. 27] ceedings, however, it was used as a substantive penalty for violent resistance to a legal process or persistent contempt of court[4] Before the Conquest, outlawry involved not only forfeiture of goods to the king, but liability to be killed with impunity. It was no offence to the king to kill his enemy, and the kindred might not claim the wergild[5]. It was thought, indeed, down to the latter part of the sixteenth century, that the same reason applied to persons under the penalties appointed by the statutes of *praemunire*, which expressly included being put out of the king's protection[6].

Difficulties in compelling submission to courts.

It would appear that great difficulty was found both in obtaining specific evidence of offences, and in compelling accused and suspected persons to submit themselves to justice, and pay their fines if convicted. This may serve to explain the severe provisions of the later Anglo-Saxon period against a kind of

[1] Ælf. Prolog. 49 § 7.

[2] In. 18; Ælf. 32; Cn. II. 16, 30. The 'folk-leasing' of Alfred's law must be habitual false accusation in the folk-moot, not private slander.

[3] It was formally abolished in civil proceedings only in 1879, 42 & 43 Vict. c. 59, s. 3. In criminal matters it is still possible. But it has not been in use for a generation or more.

[4] E. & G. 6 § 6; cp. Edg. I. 3; Æthelr. I. 1 § 9, and many later passages.

[5] E. & G. 6 § 7: the outlaw, if slain, shall lie *ægylde*, the exact equivalent of the Homeric νήποινος.

[6] Co. Litt. 130 a; Blackstone, Comm. iv. 118; 5 Eliz. c. 1.

persons described as 'frequently accused,' 'of no credit[1].' One who had been several times charged (with theft, it seems we must understand), and kept away from three courts running, might be pursued and arrested as a thief, and treated as an outlaw if he failed to give security to answer his accusers[2]. A man of evil repute is already half condemned, and if he evades justice it is all but conclusive proof of guilt. In communities where an honest man's neighbours knew pretty well what he was doing every day and most of the day, this probably did not work much injustice. And English criminal procedure still held to this point of view two centuries after the Conquest. It may be said to linger even now-a-days in the theoretical power of grand juries to present offences of their own knowledge.

Mainten-ance of offenders by great men.

Several passages, and those from a period of comparatively settled government, show that great men, whose followers had committed crimes, often harboured and maintained them in open defiance of common right[3]. If it was needful for Æthelstan, the victor of Brunanburh, to make ordinances against lawless- [p. 23] ness of this kind, we can only think that weaker princes left it without remedy, not because the evil was less in their days, but because they had no power to amend it. The same thing was common enough in the Scottish highlands as late as the early part of the eighteenth century[4].

Why no trial by battle.

Putting together these indications of a feeble executive power, we are apt to think that the absence of trial by battle from Anglo-Saxon procedure can best be explained by the persistence of extra-judicial fighting. Gundobad of Burgundy, and other Germanic rulers after him, tempted their subjects into court by a kind of compromise. It is hardly possible to suppose that their ostensible reason of avoiding perjury was the real one. Rather it was understood, though it could not be officially expressed, that Burgundian and Lombard[5] freemen

[1] Eng. *tiht-bysig*, *folce ungetrýwe*, Lat. *incredibilis*. The idea is the contradiction of *getrýwe* = *homo probus* or *legalis*. *Folce* or *eallum folce* signifies merely notoriety: we cannot find in the text, as some writers have done, a doctrine of fealty to the people as a quasi-sovereign.

[2] Edg. III. 7; Cn. II. 33; cp. ib. 22.

[3] Æthelst. II. 3, cp. 17; IV. 3. Cp. VI. 8, as to over-powerful clans.

[4] Cf. Baillie Nicol Jarvie on the state of the Highlands, Rob Roy, ii. ch. 12 (original edition).

[5] Liutprand openly regretted that trial by combat could not be abolished. Liutpr. c. 118: 'incerti sumus de iudicio dei, et multos audiuimus per pugnam

would submit to being forbidden to fight out of court on the terms of being allowed to fight under legal sanction, thus combining the physical joy of battle with the intellectual luxury of strictly formal procedure. It seems plausible to suppose that the mechanism of Anglo-Saxon government was not commonly strong enough to accomplish even so much. All this, however, is conjectural. There is no reason to doubt that among some Germanic tribes battle was recognized as a form of ordeal from very ancient times; we have no means of solving the ulterior question why those tribes did not include the ancestors of the Anglo-Saxons.

Special offences treason

Offences specially dealt with in various parts of the Anglo-Saxon laws are treason, homicide, wounding and assault (which, however, if committed by free men, are more wrongs than crimes), and theft. Treason to one's lord, especially to the king, is a capital crime. And the essence of the crime already consists in compassing or imagining the king's death, to use the later language of Edward III.'s Parliament[1]. The like appears in other Germanic documents[2]. It seems probable, however, that this does not represent any original Germanic tradition, but is borrowed from the Roman law of *maiestas*, of which one main head was plotting against the lives of the chief magis-[p. 29]trates[3]. No part of the Roman law was more likely to be imitated by the conquerors of Roman territory and provinces; and when an idea first appears in England in Alfred's time, there is no difficulty whatever in supposing it imported from the continent. Not that rulers exercising undefined powers in

sine iustitia causam suam perdere: sed propter consuitutinem gentis nostrae langobardorum legem ipsam uetare non possumus'. Avitus, bishop of Vienne, protested against Gundobad's ordinance. At a later time Agobard of Lyons denounced it. See Lea, Superstition and Force, ed. 4, p. 409.

[1] Ælf. 4.

[2] Ed. Roth. 1 (L. Langob.) 'contra animam regis cogitaverit aut consiliaverit'; L. Sax. 24, 'de morte consiliatus fuerit'; so L. Baiuw. ii. 1; L. Alam. 23: 'in mortem ducis consiliatus fuerit'; cp. Brunner, D. R. G. ii. 688.

[3] The following words no doubt substantially represent the text of the lex Julia: 'Cuiusve opera *consilio* dolo malo *consilium initum erit* quo quis magistratus populi Romani quive imperium potestatemve habeat occidatur.' Dig. 48. 4. ad l. Iuliam maiestatis, 1 § 1. The *consiliaverit, consiliatus fuerit*, of the Germanic laws can hardly be an accidental resemblance. In Glanv. xiv. 1, the principal terms are *machinatum fuisse vel aliquid fecisse*, but *consilium dedisse* is there too.

a rude state of society needed the *Lex Julia* to teach them the importance of putting down conspiracies at the earliest possible stage. We are now speaking of the formal enunciation of the rule. On the other hand, the close association of treason against the king with treason against one's personal lord who is not the king is eminently Germanic. This was preserved in the 'petty treason' of medieval and modern criminal law.

The crime of treason was unatonable[1], and the charge had to be repelled by an oath adequate in number of oath-helpers, and perhaps in solemnity, to the wergild of the king or other lord as the case might be. If the accused could not clear himself by oath, and was driven to ordeal, he had to submit to the threefold ordeal[2], that is, the hot iron was of three pounds' weight instead of one pound, or the arm had to be plunged elbow-deep instead of wrist-deep into the boiling water[3].

Homicide. Homicide appears in the Anglo-Saxon dooms as a matter for composition in the ordinary case of slaying in open quarrel. There are additional public penalties in aggravated cases, as where a man is slain in the king's presence or otherwise in breach of the king's peace. And a special application of the [p. 30] king's protection is made in favour of strangers; a matter of some importance when we remember that before the time of Alfred a Mercian was a stranger in Kent, and a Wessex man in Mercia. Two-thirds of a slain stranger's *wer* goes to the king. We find a rudiment of the modern distinction between murder and manslaughter, but the line is drawn not between wilful and other killing, but between killing openly and in secret. It would seem indeed that 'morð' at one time meant only killing by poison or witchcraft. The offence of 'morð' was unatonable,

[1] *Cn.* II 64; *Leg. Hen.* 12.

[2] Ælf. 4; Æthelst. II. 4; Æthelr. v. 30, VI. 37; Cn. II. 57. This last passage, in its literal terms, would not allow purgation by oath-helpers at all, but send the accused straight to the ordeal. So great a change of the previous law can scarcely have been intended. Æthelred's ordinance, VI. 37, requires the 'deepest oath,' whatever that was. Cp. Godwine's oath 'cum totius fere Angliae principibus et ministris dignioribus,' Flor. Wigorn. i. 195. Possibly Danish law may have been stricter than English. We hear of an oath of 48 thanes against the charge of robbing a corpse: *Be walreáje*, Schmid, App. xv. in a document apparently of Danish extraction; see Brunner, D. R. G. ii. 684. The Lex Ribuaria requires in some special cases an oath of 36 or even 72 men.

[3] Edg. i. 9; *Dóm be hátan isene and wætre*, Schm. App. xvi.

and the murderer, if ascertained, might be delivered over to the dead man's kindred[1].

Justifiable homicide.

An outlaw might, as we have seen, be slain with impunity; and it was not only lawful but meritorious to kill a thief flying from justice[2]. An adulterer taken *in flagrante delicto* by the woman's lawful husband, father, brother, or son, might be killed without risk of blood-feud. In like manner homicide was excusable when the slayer was fighting in defence of his lord, or of a man whose lord he was, or of his kinsman; but a man must in no case fight against his own lord[3]. A man who slew a thief (or, it would seem, any one) was expected to declare the fact without delay, otherwise the dead man's kindred might clear his fame by their oath and require the slayer to pay wergild as for a true man[4]. We do not find any formalities prescribed in the genuine dooms. The safest course would no doubt be to report to the first credible person met with, and to the first accessible person having any sort of authority[5].

Personal injuries: misadventure.

Injuries and assaults to the person were dealt with by a minute scale of fixed compensations, which appears, though much abridged, as late as the Anglo-Norman compilations. But rules of this kind are not heard of in practice after the Conquest. It is worth while to notice that the contumelious outrage of binding a free man, or shaving his head in derision, or shaving off his beard, was visited with heavier fines than any but the gravest wounds[6]. In the modern common law [p. 31] compensation for insult, as distinct from actual bodily hurt, is arrived at only in a somewhat indirect fashion, by giving juries a free hand in the measure of damages. Accidental injuries are provided for in a certain number of particular cases. A man carrying a spear should carry it level on his shoulder in order to be free from blame if another runs upon the point. If the point is three fingers or more above the butt (so as to bring the point to the level of a man's face), he will be liable to pay *wer* in case of a fatal accident, and all the more if the point

[1] Cn. II. 56; Hen. 71, 92. See Schmid, Gloss. s. v. *morð*, and cp. the old Norse adage, 'Night-slaying is murder' (*Natt-vig er morð-vig*); also Lex Rib. 15.

[2] In. 35, cp. 28; Æthelst. VI. (Iud. Civ. Lund.) 7; cp. Ed. Conf. 36.

[3] Ælf. 42.

[4] In. 21.

[5] Hen. 83 § 6. The detailed instructions for laying out the slain man with his arms, etc., are curious but untrustworthy. The main object was to show that the killing was not secret.

[6] Ælf. 35. For continental analogies, see Brunner, D. R. G. ii. 674.

were in front (so that he could have seen the other's danger)[1]. This is rational enough; but in the case of harm ensuing even by pure accident from a distinct voluntary act, we find that the actor, however innocent his intention, is liable, and that the question of negligence is not considered at all. *Legis enim est qui inscienter peccat, scienter emendet,* says the compiler of the so-called laws of Henry I., translating what was doubtless an English proverb[2]. There is no earlier English authority, but such is known to have been the principle of all old Germanic laws. It seems to have extended, or to have been thought by some to extend, even to harm done by a stranger with weapons which the owner had left unguarded. Cnut's laws expressly declare, as if it were at least an unsettled point, that only the actual wrong-doer shall be liable if the owner can clear himself of having any part or counsel in the mischief[3]. Borrowing or stealing another man's weapons, or getting them by force or fraud from an armourer who had them in charge for repair, seems to have been a rather common way of obscuring the evidence of manslaying, or making false evidence; and it was a thing that might well be done in collusion. One man would be ready to swear with his oath-helpers, 'I did not kill him,' the other, with equal confidence, 'No weapon of mine killed him[4].' And in consequence, it would seem, of the general suspicion attaching to every one possibly concerned, an armourer [p 32] was bound to answer to the owner at all hazards (unless it were agreed to the contrary) for the safe custody and return of weapons entrusted to him[5], perhaps even for their return free from any charge of having been unlawfully used[6]. Such

[1] Ælf. 36 (probably enacted in consequence of some particular case in the king's court, or otherwise well known); cp. Hen. 88 §§ 1-3. The proviso as to holding the spear level is easily understood as referring to a spear of moderate length, which could not be well carried, like the long 16th-17th cent. pike, with the point so high up as to be wholly out of harm's way. The carriage of the 'puissant pike' was almost a special art when its time came.

[2] Hen. 88 § 6, 90 § 11. [þe] *brecht ungewealdes bete gewealdes*, in Germany *wer unwillig gethan muss willig zahlen*; see Heusler, Institutionen, ii. 263.

[3] Cn. II. 75; cp. Hen. 87 § 2.

[4] See Ine 29; Ælf. 19.

[5] Ælf. 19 § 3; Hen. 87 § 3. A similar rule as to arms given in pledge still has the force of law in Montenegro: Code général des biens (tr. Dareste), Paris 1892, art. 176.

[6] The word *gesund* may well point to a warranty of this kind. Brunner, Forschungen, 520.

a charge might have involved the forfeiture of the weapon until quite modern times.

Archaic principle of responsibility for accidents.

The extreme difficulty of getting any proof of intention, or of its absence, in archaic procedure is, perhaps, the best explanation of rules of this kind. At all events, they not only are characteristic of early German law, but they have left their mark on the developed common law to a notable extent. In modern times the principle of general responsibility for pure accidents arising from one's lawful act has been disallowed in the United States, and more lately in England. But, as regards the duty of safely keeping in cattle, and in the case of persons collecting or dealing with things deemed of a specially dangerous kind, the old Germanic law is still the law of this land and of the greater part of North America.

Fire, which English law has regarded for several centuries as a specially dangerous thing in this sense, and which is dealt with in some of the early Germanic dooms, is not mentioned for this purpose in our documents[1]. Liability for damage done by dogs is on the other hand rather elaborately dealt with by a scale of compensation increasing after the first bite[2].

There are traces of the idea which underlay the Roman noxal actions, and which crops up in the medieval rule of deodand, that where a man is killed by accident, the immediate cause of death, be it animate or inanimate, is to be handed over to the avenger of blood as a guilty thing. When men were at work together in a forest, and by misadventure one let a tree fall on another, which killed him, the tree belonged to the dead man's kinsfolk if they took it away within thirty days[3]. This kind of accident is still quite well known in the forest countries of Europe, as witness the rude memorial pictures, entreating the passer's prayers, that may be seen in any Tyrolese valley. Also a man whose beast wounded another might surrender the beast as an alternative for money compensation[4].

Theft.

[p. 33] Theft, especially of cattle and horses, appears to have been by far the commonest and most troublesome of offences. There is a solitary and obscure reference to 'stolen flesh' in the laws of Ine[5]. Perhaps this is to meet the case of a thief driving

[1] Ælf. 12 seems to relate only to wilful trespass in woods.
[2] Ælf. 23. [3] Ælf. 13. [4] Ælf. 24. [5] In. 17.

cattle a certain distance and then slaughtering them, and hiding the flesh apart from the hides and horns, which would be more easily identified. If we are surprised by the severity with which our ancestors treated theft, we have only to look at the prevalence of horse-stealing in the less settled parts of the western American states and territories in our own time, and the revival of archaic methods for its abatement. Collusion with thieves on the part of seemingly honest folk appears to have been thought quite possible: Cnut required every man above twelve years to swear that he would be neither a thief nor an accomplice with thieves[1], and special penalties for letting a thief escape, or failing to raise, or follow, the hue and cry, point in the same direction[2]. Slavery was a recognized penalty when the thief was unable to make restitution. This, if it stood alone, might be regarded as handing over the debtor's person by way of compensation rather than a punishment in the modern sense. But moreover the offender's whole family might lose their freedom as accomplices. The harshness of this rule was somewhat relaxed if the thief's wife could clear herself by oath from having had any part in stolen cattle which had been found in his house[3]. But as late as the early part of the eleventh century, Wulfstan's homily[4] complains that 'cradle-children' are unjustly involved in the slavery of their parents. All this, however, belongs to social antiquities rather than to legal history. The common law of theft is wholly post-Norman. Nor is it needful to dwell on the Anglo-Saxon treatment of special and aggravated forms of theft, such as sacrilege[5]. Stealing on Sunday, in Lent, and on Christmas, Easter, or Ascension Day, was punishable with a double fine by the old Wessex law[6].

Property

In a modern system of law we expect a large portion of the whole to be concerned with the rules of acquiring, holding, and transferring property. We look for distinctions between land and movables, between sale and gift, between the acts completed among living persons and dispositions to take effect [p. 34] by way of inheritance. If the word *property* be extended to include rights created by contract, we may say that we

[1] Cn. II. 21. [2] Ib. 29. [3] Ine 7, 57.

[4] Ed. Napier, Berlin, 1883, p. 158.

[5] As to robbing corpses, Schmid, App. xv. *Be Walreáfe.*

[6] Ælf. 5 § 5; the principle is reaffirmed, but so vaguely as to suggest that it had become obsolete in practice, in Cn. II. 38.

contemplate under this head by far the greater and weightier part of the whole body of legal rules affecting citizens in their private relations. But if we came with such expectations to examine laws and customs so archaic as the Anglo-Saxon, we should be singularly disappointed. Here the law of property is customary and unwritten, and no definite statement of it is to be found anywhere, while a law of contract can hardly be said to exist, and, so far as it does exist, is an insignificant appurtenance to the law of property. But we must remember that even Hale and Blackstone, long after that view had ceased to be appropriate, regarded contract only as a means of acquiring ownership or possession. Yet more than this; it is hardly correct to say that Anglo-Saxon customs or any Germanic customs, deal with ownership at all. What modern lawyers call ownership or property, the *dominium* of the Roman system, is not recognized in early Germanic ideas. Possession, not ownership, is the leading conception; it is possession that has to be defended or recovered, and to possess without dispute, or by judicial award after a dispute real or feigned, is the only sure foundation of title and end of strife. A right to possess, distinct from actual possession, must be admitted if there is any rule of judicial redress at all; but it is only through the conception of that specific right that ownership finds any place in pure Germanic law. Those who have studied the modern learning of possessory rights and remedies are aware that our common law has never really abandoned this point of view.

Sale and other contracts

Movable property, in Anglo-Saxon law, seems for all practical purposes to be synonymous with cattle. Not that there was no other valuable property; but arms, jewels, and the like, must with rare exceptions have been in the constant personal custody of the owners or their immediate attendants. Our documents leave us in complete ignorance of whatever rules existed. We may assume that actual delivery was the only known mode of transfer between living persons; that the acceptance of earnest-money and giving of faith and pledges were customary means of binding a bargain; and that contracts in writing were not in use. There is no evidence of any regular [p. 35] process of enforcing contracts, but no doubt promises of any special importance were commonly made by oath, with the purpose and result of putting them under the sanction of the

church. There is great reason to believe that everywhere or almost everywhere a religious sanction of promises has preceded the secular one[1], and that honourable obligation has been more effective than might be supposed in aiding or supplementing the imperfections of legality[2]. Apparently the earliest form of civil obligation in German law was the duty of paying wergild. Payment, when it could not be made forthwith, was secured by pledges, who no doubt were originally hostages. Gradually the giving of security sinks into the background, and the deferred duty of payment is transformed into a promise to pay. But our Anglo-Saxon authorities are of the very scantiest. We find the composition of a feud secured by giving pledges and the payment by instalments regulated[3]; and in Alfred's laws there is mention of a solemn kind of promise called 'god-borh'; if a suit is brought upon it, the plaintiff must make his fore-oath in four churches, and when that has been done, the defendant must clear himself in twelve, so that falsehood on either side would involve manifold perjury and contempt of the church and the saints[4]. Here we seem to have a mixture of secular and ecclesiastical sanctions, rendered all the easier by the bishop constantly being, as we have seen, the chief judicial officer of the shire. But this must have been a very special procedure, and probably confined to persons of high rank. And it is hard to tell what the subject-matter of these solemn undertakings can have been, unless it were marriages of the parties' children and what we now should call family settlements and, perhaps, reconciliation of standing feuds. We may guess, from what is known of the practice of local courts in the twelfth and thirteenth centuries, that before the Conquest the hundred courts did to some extent do justice in matters of bargain and promise in the ordinary affairs of life. But we have no direct [p. 36] information whatever.

Claims for stolen things: warranty.

On the other hand, there runs persistently through the Anglo-Saxon laws a series of ordinances impressing on buyers

[1] Muirhead, Private Law of Rome, 149, 163, 227 (origin of stipulation).

[2] The Roman words *credere, fides, spondere*, involve a whole history of this kind. Pernice, Labeo, i. 409; Pacchioni, Actio ex Sponsu, Bologna, 1888; *Ehrenverpfändung* in German formulas as late as 15th cent., see Kohler, Shakespeare vor dem Forum der Jurisprudenz, 1884, appx.

[3] Edm. II. 7, and *Be Wergilde*, Schmid, App. vii.

[4] Ælf. 33. Cp. the provisions as to 'briduw' in the laws of Howel (10th cent.) ap. Haddan and Stubbs, Councils, i. 237, 271.

of cattle the need of buying before good witnesses. But this has nothing to do with the validity of the sale between the parties. The sole purpose, judging by the terms and context of these enactments, is to protect the buyer against the subsequent claims of any person who might allege that the cattle had been stolen from him. Difficulties of this kind were especially rife when the sale had been made (in the earlier times) in another English kingdom, or up the country. Hlothær and Eadric laid down the precautions to be observed by a Kentish man buying cattle in London, then a Mercian town[1]. Evidently great suspicion attached to sales made anywhere out of open market. Some ordinances require the presence of the portreeve or other credible men at sales without the gates; others attempt to prohibit selling altogether except in towns. Afterwards witnesses are required in town and country alike[2], and in the latest period we find the number of four witnesses specified[3]. A buyer who neglected to take witness was liable to eviction, if the cattle were claimed as stolen, without even the chance of calling the seller to warrant him, and he might also incur a forfeiture to the lord of the place, and be called on to clear himself by oath of any complicity in the theft. If he had duly taken witness, he still had to produce the seller, or, if the seller could not be found, to establish his own good faith by oath.

If the seller appeared, he had in turn to justify his possession, and this process might be carried back to the fourth remove from the ultimate purchaser. These elaborate provisions for vouching to warranty (A.-S. *teám*)[4] or the custom on which they were founded, persisted for some time after the Norman Conquest[5], and are interesting by their analogy to the doctrine of warranty in the law of real property, which after-[p. 37] wards underwent a far more full and technical development, and remained, long after it had been forgotten in practice, at the foundation of many parts of modern conveyancing. The

[1] Hl. & E. 16. The supposed 'improbability of a Kentish king making a law for purchases made in the Mercian city of London' (Thorpe's note *ad loc.* is imaginary. The law applies to a claim made in Kent by a Mercian professing to be the true owner, and it is to be executed wholly in Kent.

[2] Edg. IV. 6; Cn. II. 24.

[3] Leg. Will. I. 45.

[4] See Æthelr. II. 9, *Be teámum*, and Schmid's Glossary s. vv. *Kaufe*, *Teám*.

[5] Glanv. x. 15–17.