THE COLLECTED PAPERS

OF

FREDERIC WILLIAM MAITLAND

IN THREE VOLUMES

VOLUME II

CAMBRIDGE UNIVERSITY PRESS
London: FETTER LANE, E.C.
C. F. CLAY, MANAGER

Edinburgh: 100, PRINCES STREET
Berlin: A. ASHER AND CO.
Leipzig: F. A. BROCKHAUS
New York: G. P. PUTNAM'S SONS
Bombay and Calcutta: MACMILLAN AND CO., LTD.

All rights reserved

THE COLLECTED PAPERS

OF

FREDERIC WILLIAM MAITLAND

DOWNING PROFESSOR OF THE LAWS OF ENGLAND

EDITED BY

H. A. L. FISHER

VOLUME II

Cambridge:
at the University Press
1911

467111

KD358
.M23
1911
v.2

INDIANA UNIVERSITY
LIBRARIES
BLOOMINGTON

Cambridge:

PRINTED BY JOHN CLAY, M.A.

AT THE UNIVERSITY PRESS

TABLE OF CONTENTS

VOLUME II

Papers of a less technical character are marked by an asterisk.

3/27/47 8-31-73

	PAGES
The Materials for English Legal History	1—60
Possession for Year and Day	61—80
The Introduction of English Law into Ireland	81—83
The Surnames of English Villages	84—95
Northumbrian Tenures	96—109
The History of the Register of Original Writs	110—173
Remainders after Conditional Fees	174—181
The "Praerogativa Regis"	182—189
A Conveyancer in the Thirteenth Century	190—201
A New Point on Villein Tenure	202—204
Frankalmoign in the Twelfth and Thirteenth Centuries	205—222
Review of "The Gild Merchant"	223—231
Henry II and the Criminous Clerks	232—250
Tenures in Rousillon and Namur	251—265
Glanvill revised	266—289
The Peace of God and the Land-Peace	290—297
History from the Charter Roll	298—312
*The Survival of Archaic Communities	313—365
The History of a Cambridgeshire Manor	366—402
The Origin of Uses	403—416
*Outlines of English Legal History, 560–1600	417—496

THE MATERIALS FOR ENGLISH LEGAL HISTORY[1]

A DISTINGUISHED English lawyer has recently stated his opinion that the task of writing a history of English law may perhaps be achieved by some of the antiquarian scholars of Germany or America, but that "it seems hardly likely that any one in this country [England, to wit] will have the patience and learning to attempt it[2]." The compliment thus paid to Germany and America is, as I venture to think, well deserved; but a comparison of national exploits is never a very satisfactory performance. It is pleasanter, easier, safer to say nothing about the quarter whence good work has come or is likely to come, and merely to chronicle the fact that it has been done or to protest that it wants doing. And as regards the matter in hand, the history of English law, there really is no reason why we should speak in a hopeless tone. If we look about us a little, we shall see that very much has already been achieved, and we shall also see that the times are becoming favourable for yet greater achievements.

[1] *Political Science Quarterly*, 1889.

[2] Charles Elton, *English Historical Review*, 1889, p. 155.

Let us take this second point first. The history of history seems to show that it is only late in the day that the laws of a nation become in the historian's eyes a matter of first-rate importance, or perhaps we should rather say, a matter demanding thorough treatment. No one indeed would deny the abstract proposition that law is, to say the least, a considerable element in national life; but in the past historians have been apt to assume that it is an element which remains constant, or that any variations in it are so insignificant that they may safely be neglected. The history of external events, of wars and alliances, conquests and annexations, the lives of kings and great men, these seem easier to write, and for a while they are really more attractive; a few lightly written paragraphs on "the manners and customs of the period" may be thrown in, but they must not be very long nor very serious. It is but gradually that the desire comes upon us to know the men of past times more thoroughly, to know their works and their ways, to know not merely the distinguished men but the undistinguished also. History then becomes "constitutional"; even for the purpose of studying the great men and the striking events, it must become constitutional, must try to reproduce the political atmosphere in which the heroes lived and their deeds were done. But it cannot stop there; already it has entered the realm of law, and it finds that realm an organized whole, one that cannot be cut up into departments by hard and fast lines. The public law that the historian wants as stage and scenery for his characters is found to imply private law, and private law a sufficient knowledge of which

cannot be taken for granted. In a somewhat different quarter there arises the demand for social and economic history; but the way to this is barred by law, for speaking broadly we may say that only in legal documents and under legal forms are the social and economic arrangements of remote times made visible to us. The history of law thus appears as means to an end, but at the same time we come to think of it as interesting in itself; it is the history of one great stream of human thought and endeavour, of a stream which can be traced through centuries, whose flow can be watched decade by decade and even year by year. It may indeed be possible for us, in our estimates of the sum total of national life, to exaggerate the importance of law; we may say, if we will, that it is only the skeleton of the body politic; but students of the body natural cannot afford to be scornful of bones, nor even of dry bones; they must know their anatomy. Have we then any cause to speak despondently when every writer on constitutional history finds himself compelled to plunge more deeply into law than his predecessors have gone, when every effort after economic history is demonstrating the absolute necessity for a preliminary solution of legal problems, when two great English historians who could agree about nothing else have agreed that English history must be read in the Statute Book[1]? In course of time the amendment will be adopted that to the Statute Book be added the Law Reports, the Court Rolls and some other little matters.

And then again we ought by this time to have learnt

[1] *Contemporary Review*, vol. XXXI. (1877–78), p. 824, Mr Freeman on Mr Froude.

the lesson that the history of our law is no unique phenomenon. For a moment it may crush some hopes of speedy triumph when we learn that, for the sake of English law, foreign law must be studied, that only by a comparison of our law with her sisters will some of the most remarkable traits of the former be adequately understood. But new and robuster hopes will spring up; we have not to deal with anything so incapable of description as a really unique system would be. At numberless points our mediaeval law, not merely the law of the very oldest times but also the law of our Year Books, can be illustrated by the contemporary law of France and Germany. The illustration, it is true, is sometimes of the kind that is produced by flat contradiction, teaching us what a thing is by showing us what it is not; but much more often it is of a still more instructive kind, showing us an essential unity of substance beneath a startling difference of form. And the mighty, the splendid efforts that have been spent upon reconstructing the law of mediaeval Germany will stimulate hopes and will provide models. We can see how a system has been recovered from the dead; how by means of hard labour and vigorous controversy one outline after another has been secured. In some respects the work was harder than that which has to be done for England, in some perhaps it was easier; but the sight of it will prevent our saying that the history of English law will never be written.

And a great deal has been done. It is true that as yet we have not any history of our whole law that can be called adequate, or nearly adequate. But such a work will only come late in the day, and there are

many things to be done before it will be produced. Still some efforts after general legal history have been made. No man of his age was better qualified or better equipped for the task than Sir Matthew Hale; none had a wider or deeper knowledge of the materials; he was perhaps the last great English lawyer who habitually studied records; he studied them pen in hand and to good purpose. Add to this that, besides being the most eminent lawyer and judge of his time, he was a student of general history, found relaxation in the pages of Hoveden and Matthew Paris, read Roman law, did not despise continental literature, felt an impulse towards scientific arrangement, took wide and liberal views of the object and method of law. Still it is by his *Pleas of the Crown* and his *Jurisdiction of the House of Lords* that he will have helped his successors rather than by his posthumous and fragmentary *History of the Common Law*[1]. Unfortunately he was induced to spend his strength upon problems which in his day could not permanently be solved, such as the relation of English to Norman law, and the vexed question of the Scottish homage; and just when one expects the book to become interesting, it finishes off with protracted panegyrics upon our law of inheritance and trial by jury. When, nearly a century later, John Reeves[2] brought to the same task powers which cer-

[1] *The History of the Common Law of England*, written by a learned hand (1713). There are many later editions.

[2] *History of the English Law* (4 vols., 1783–87). Originally the work was brought down to the end of Mary's reign; in 1814 a fifth volume dealing with Elizabeth's reign was added. An edition published in 1869 cannot be recommended.

tainly were far inferior to Hale's, he nevertheless achieved a much more valuable result. Until it is superseded, his *History* will remain a most useful book, and it will assuredly help in the making of the work which supersedes it. Reeves had studied the Year Books patiently, and his exposition of such part of our legal history as lies in them is intelligent and trustworthy; it is greatly to his credit that, writing in a very dark age (when the study of records in manuscript had ceased and the publication of records had not yet begun), he had the courage to combat some venerable or at least inveterate fables. Still his work is very technical and, it must be confessed, very dull; it is only a book for those who already know a good deal about mediaeval law; no attempt is made to show the real, practical meaning of ancient rules, which are left to look like so many arbitrary canons of a game of chance; owing to its dreariness it is never likely to receive its fair share of praise. Crabb's *History of English Law* is a comparatively slight performance[1]; it adds little if anything to what was done by Reeves.

But particular departments of law have found their

[1] George Crabb, *A History of English Law* (1829). George Spence, in the first volume of his *Equitable Jurisdiction of the Court of Chancery* (2 vols., 1846), has given a learned and valuable account of the development of the common law, perhaps the best yet given. In 1882–83, Ernest Glasson published his *Histoire du Droit et des Institutions de l'Angleterre*; but this does not go very far below the surface. Heinrich Brunner in Holtzendorff's *Encyklopädie* has published a most useful sketch of the French, Norman and English materials for legal history; the part relating to England has been translated into English by W. Hastie (Edinburgh, 1888); this translation I have not seen.

historians. What we call constitutional history is the history of a department of law and of something more —a history of constitutional law and of its actual working. For men of English race, constitutional history has long had an interest; they can be stirred by the politics of the past, for they are "political animals" with a witness. It would be needless to say that in this quarter solid and secure results have been obtained, needless to mention the names of Palgrave, Hallam, Stubbs, Gneist. Still, for modern times, much remains to be done. In relation to those times "constitutional history" but too frequently means a history of just the showy side of the constitution, the great disputes and great catastrophes, matters about which no one can form a really sound opinion who is not thoroughly versed in the sober, humdrum legal history of the time. But this work will certainly be done; the "general historian" will see more and more clearly after every attempt that he cannot be fair, that he cannot even be very interesting, unless he succeeds in reproducing for us not merely the facts but the atmosphere of the past, an atmosphere charged with law.

Again, other parts of the law have been submitted to historical treatment; in particular, those which in early times were most closely interwoven with the law of the constitution, criminal law[1] and real property law[2], while the history of trial by jury has a literature of its own and the history of some early stages in the de-

[1] James Fitzjames Stephen, *History of the Criminal Law* (3 vols., 1883); Luke Owen Pike, *History of Crime* (2 vols., 1873).

[2] Kenelm Edward Digby, *Introduction to the History of the Law of Real Property* (1875).

velopment of civil procedure has not been neglected[1]. But every effort has shown the necessity of going deeper and deeper. Everywhere the investigator finds himself compelled to deal with ideas which are not the ideas of modern times. These he has painfully to reconstruct, and he cannot do so without calling in question much of the traditional learning, without tracing the subtle methods in which legal notions expand, contract, take in a new content, or, as is sometimes the case, become hide-bound, wither and die. This task of probing and defining the great formative ideas of law is one that cannot be undertaken until much else has been done; it is only of late that the possibility and the necessity of such a task have become apparent, but already progress has been made in it. We are not where we were when a few years ago Holmes published a book which for a long time to come will leave its mark wide and deep on all the best thoughts of Americans and Englishmen about the history of their common law[2].

And here let us call to mind the vast work done by our Record commission, by the Rolls series, by divers

[1] Melville Madison Bigelow, *History of Procedure in England* (1880).

[2] O. W. Holmes, Jr., *The Common Law* (1882). *The History of Assumpsit*, by J. B. Ames (*Harvard Law Review*, April, May, 1888), is a masterly dissertation on some of the central ideas. In many articles in magazines, American and English, one may see a freer and therefore truer handling of particular themes of legal history than would have been possible twenty years ago; and the best text writers, though their purpose is primarily dogmatical, have felt the necessity of testing such history as they have to introduce instead of simply copying what Coke or Blackstone said.

antiquarian societies, towards providing the historian of law with new materials. Let us think what Reeves had at his disposal, what we have at our disposal. He had the Statute Book, the Year Books in a bad and clumsy edition, the old text-books in bad and clumsy editions. He made no use of Domesday Book; he had not the *Placitorum Abbreviatio*, nor Palgrave's *Rotuli Curiae Regis*; he had no Parliament Rolls, Pipe, Patent, Close, Fine, Charter, Hundred Rolls, no Proceedings of the King's Council, no early Chancery Proceedings, not a cartulary, not a manorial extent, not a manorial roll; he had not Nichols' *Britton*, nor Pike's nor Horwood's Year Books, nor Stubbs' *Select Charters*, nor Bigelow's *Placita Anglo-Normannica*; he had no collection of Anglo-Saxon "land books," only a very faulty collection of Anglo-Saxon dooms, while the early history of law in Normandy was utter darkness. The easily accessible materials for that part of our history which lies before Edward I have been multiplied ten-fold, perhaps twenty-fold; even as to later periods our information has been very largely supplemented. Where Reeves was only able to state a naked rule, taken from Bracton or the Statute Book, and leave it looking bare and silly enough, we might clothe that rule with a score of illustrations which would show its real meaning and operation. The great years of the Record commission, 1830 to 1840, the years when Palgrave and Hardy issued roll after roll, such years we shall hardly see again; the bill, one is told, was heavy; but happily the work was done, and there it is[1]. A curious memorial it may seem of the age of

[1] Yes, but by no means all of it is in print. The nation was

"the radical reform," of the time when Parliament, for once in a way, was really showing some interest in the ordinary, every-day law of the realm, and was wisely freeing it from its mediaeval forms. But in truth there is nothing strange in the coincidence; the desire to reform the law went hand in hand with the desire to know its history; and so it has always been and will always be[1]. The commencement in 1858 of the Rolls series is, of course, one of the greatest events in the history of English history, and in that series are now to be found not only most of our principal chronicles, but also several books of first-rate legal importance, Year Books never before printed and monastic cartularies. The English Historical Society published Kemble's collection of Anglo-Saxon charters, the Camden Society published Hale's *Domesday of St Paul's* and several similar works. More recently the Pipe Roll Society started with the purpose of "dealing with all national manuscripts of a date prior to 1200," and the Selden Society with the purpose of "printing manuscripts and new editions and translations of books having an important bearing on English legal history." Such work must chiefly be done in the old country, but it would be base ingratitude were an Englishman to forget that the Selden Society owes its very existence

attacked with one of its periodical fits of parsimony, and the consequence is that there exist volumes upon volumes of transcripts made by Palgrave or under his eye. Very possibly the commissioners were for a while extravagant, still it was hardly wise to stop a great work when the cost of transcription was already incurred. However, these transcripts will become useful some day.

[1] Some of the coincidences are very striking: thus "fines" were abolished in 1834; in 1835 the earliest fines were printed.

to the support that has been given to it in America. And then again the original documents themselves are now freely and conveniently accessible to the investigator, and a very great deal has been done towards making catalogues and indexes of them. Our Public Record office, if I may speak from some little experience of it, is an institution of which we may justly be proud; certainly it is a place in which even a beginner meets with courtesy and attention, and soon finds far more than he had ever hoped to find. Then, lastly, there has been a steady flow of manuscripts towards a few great public libraries. He who would use them has no longer to go about the country begging favours of the great; he will generally find what he wants at the British Museum, at Oxford, or at Cambridge. No, most certainly we do not stand where Reeves stood[1].

But perhaps we have not yet cast our eyes towards what will prove to be the brightest quarter of all, the study of our common law in the universities. Not only are there law schools, but (and this is more to our point) we on this side of the water have the pleasure of reading about schools of political science, schools in which law is taught along with history and along with political economy. Surely it cannot be very rash in us to say that the training there provided is just the training best calculated to excite an interest in the history

[1] To any one who proposes to investigate the English public records the following books will be of use: C. P. Cooper, *An Account of the Public Records* (2 vols., 1832); F. S. Thomas, *Handbook to the Public Records* (1853); Richard Sims, *A Manual for the Genealogist* (1856); Walter Rye, *Records and Record Searching* (1888). The Annual Reports of the Deputy Keeper of the Public Records are also very useful.

467111

of law. Possibly that interest may be sufficiently keen and sufficiently patient to tolerate the somewhat dreary information which it is the purpose of this article to afford. An attempt to indicate briefly the nature and the whereabouts of our materials may be of some use though it stops short of a formal bibliography. In the course of this attempt the writer may take occasion to point out not merely what has been done, but also what has not been done, and in this way he may perhaps earn the thanks of some one who is on the outlook for a task.

To break up the history of law into periods is of course necessary; but there must always be something arbitrary in such a proceeding, and only one who is a master of his matter will be in a position to say how the arbitrary element can best be brought to the irreducible minimum. It would be natural to make one period end with the Norman Conquest; and though, if no line were drawn before that date, the first period would be enormously long, five or six hundred years, still we may doubt whether our English materials will ever enable us to present any picture of a system of English or Anglo-Saxon law as it was at any earlier date than the close of the eleventh century. By that time our dooms and land books have become a considerable mass. If we stop short of that time, we shall have to eke out our scanty knowledge with inferences drawn from foreign documents, the *Germania* of Tacitus, the continental "folk laws," notably the *Lex Salica*. In that case the outcome will be much rather an account of German law in general than an account of that slip of German law which was planted in

England: a very desirable introduction to a history of English law it may be, but hardly a part of that history. Passing by for a moment the deep question whether the English law of later times can be treated as a genuine development of Anglo-Saxon law, whether the historian would not be constrained to digress into the legal history of Scandinavia, Normandy, the Frankish Empire, we shall probably hold that the reigns of our Norman kings, including Stephen, make another good period. The reign of Henry II there might be good reason for treating by itself, so important is it. "From Glanvill to Bracton" might be no bad title, though there would be something to be said for pausing at the Great Charter. The reign of Edward I, "the English Justinian," has claims to be dealt with separately, or the traditional line drawn between the Old Statutes and the New might make us carry on the tale to the death of Edward II. "The period of the Year Books"—Edward II to Henry VIII—is, so far at least as private law is concerned, a wonderfully unbroken period. If a break were made in it, the accession of Edward IV, the beginning of "the new monarchy" as some call it, might be taken as the occasion of a halt. The names of Coke and Blackstone suggest other halting places. After the date of Blackstone, the historian, if an Englishman dealing solely with England, would hardly stop again until he reached some such date as 1830, the passing of the Reform Acts, the death of Jeremy Bentham, the beginning of the modern period of legislative activity; if an American, he would draw a marked line at the Declaration of Independence, and it would be pre-

sumption in an Englishman to guess what he would do next. But on this occasion we shall not get beyond the end of the middle ages, and for the sake of brevity our periods will be made few.

I. *England before the Norman Conquest.*

The materials consist chiefly of (1) the laws, or "dooms," as they generally call themselves; (2) the "land books" and other diplomata; (3) the ecclesiastical documents, in particular canons and penitentials.

(1) We have first a group of very ancient Kentish laws, those of Ethelbert (*circa* 600), those of Hlothar and Eadric (*circa* 675), and those of Wihtred (696). A little earlier than these last come the dooms of the West-Saxon Ine (690). Then follows a sad gap, a gap of two centuries, for we get no more laws before those of Alfred; it is to be feared that we have lost some laws of the Mercian Offa. With the tenth century and the consolidation of the realm of England, legislation becomes a much commoner thing. Edward, Ethelstan, Edmund, Edgar issue important laws, and Ethelred issues many laws of a feeble, distracted kind. The series of dooms ends with the comprehensive code of Canute, one of the best legal monuments that the eleventh century has to show. Besides these laws properly so called, issued by King and Witan, our collections include a few documents which bear no legislative authority, namely, some statements of the *wergelds* of different orders of men, a few procedural formulas, the ritual of the ordeal, and the precious *Rectitudines Singularum Personarum*, a statement of

the rights and duties of the various classes of persons to be found on a landed estate, a document the date of which is at present very indeterminate. Some further light on the law of the times before the Conquest is thrown by certain compilations made after the Conquest, of which hereafter; to wit, the so-called *Leges* of the Confessor, the Conqueror, and Henry I. With scarce an exception these dooms and other documents are written in Anglo-Saxon. An ancient Latin version [*vetus versio*] of many of them has been preserved, and testifies to the rapidity with which they became unintelligible after the Conquest[1].

The dooms are far from giving us a complete

[1] Some of the dooms, forgotten for many centuries, were printed by William Lambard in his *Archaionomia* (1568). An improved and enlarged edition of this book was published by Abraham Whelock (Cambridge, 1644). A yet ampler collection was issued in 1721 by David Wilkins, *Leges Anglo-Saxonicae Ecclesiasticae et Civiles*. In 1840 these works were superseded by that of Richard Price and Benjamin Thorpe, *Ancient Laws and Institutes of England*, published for the Record commissioners both in folio and in octavo; the second volume contains ecclesiastical documents; a translation of the Anglo-Saxon text is given. Meanwhile Reinhold Schmid, then of Jena and afterwards of Bern, had published the first part of a new edition, *Die Gesetze der Angelsachsen*, Erster Theil. In 1858, having the commissioners' work before him, instead of finishing his original book he published what is now the standard edition of all the dooms, *Die Gesetze der Angelsachsen* (Leipzig, 1858), an excellent edition equipped with a German translation of the Anglo-Saxon text and a glossary which amounts to a digest. Yet another edition has for some time been promised by F. Liebermann. The manuscripts are so numerous and in some cases so modern and corrupt, and the study of the Anglo-Saxon tongue and of the foreign documents parallel to our dooms is making such rapid progress, that in all probability no edition published for some time to come will be final.

statement of the law. With possibly a few exceptions there seems to have been no attempt to put the general law in writing; rather the King and the Wise add new provisions to the already existing law or define a few points in it which are of special importance to the state. Hence we learn little of private law, and what we learn is implied rather than expressed; to get the peace kept is the main care of the rulers; thus we obtain long tariffs of the payments by which offences can be expiated, very little as to land-holding, inheritance, testament, contract, or the like. We have no document which purports to be the *Lex* of the English folk, or of any of the tribes absorbed therein; we have nothing quite parallel to the *Lex Salica* or the *Lex Saxonum*. Again, we cannot show for this period any remains of scientific or professional work, and we have no reason to suppose that any one before the Conquest ever thought of writing a text-book of law.

(2) The diplomata of this age consist chiefly of grants of land ("land books"), for the more part royal grants, together with a comparatively small number of wills. The charters of grant are generally in Latin, save that the description of the boundaries of the land is often in English; the wills are usually in English. The latest collection of them will contain between two and three thousand documents[1]. If all were genuine,

[1] The standard collection is (or until lately was) the great work of John Mitchell Kemble, *Codex Diplomaticus Aevi Saxonici* (6 vols., 1839–48), published for the English Historical Society, with excellent introductions, a work not now easily to be bought. Kemble marks with an asterisk the documents that he does not accept as genuine. Benjamin Thorpe's *Diplomatarium Aevi Saxonici* (1865), is a small collection of much less importance. Walter de Gray Birch, under

about one hundred of them should come from the seventh century, and about two hundred from the eighth; of course, however, many of them are not genuine, or but partially genuine, and perhaps the history of law presents no more difficult problem than that of drawing just inferences from documents which have either been tampered with or very carelessly copied. Invaluable as these instruments are, the use hitherto made of them for the purpose of purely legal history is somewhat disappointing. The terms in which rights are transferred are singularly vague and the amount of private law that can be got out of them is small. However they have only been accessible for some forty years past and their jural side[1] has not yet been very thoroughly discussed. A few of the land books contain incidental accounts of litigation, but for the oldest official records of lawsuits we must look to a much later age.

(3) Besides these we have ecclesiastical documents,

the title *Cartularium Saxonicum*, is publishing a collection which will contain all Kemble's documents and more also and which will be based on a new examination of the MSS.; two volumes of this work are already completed. John Earle's *Handbook to the Land Charters and other Saxonic Documents* (1888), is a most useful work, containing many typical charters which are critically discussed chiefly from the standpoints of philology and the diplomatic art. For close study the following are invaluable: Bond's *Facsimiles of Ancient Charters in the British Museum* (4 vols., 1873–78; photographs of about 120 documents), and the photozincographed *Facsimiles of Anglo-Saxon Manuscripts*, edited by W. Basevi Sanders, 3 vols.

[1] Some of the legal points in these documents are discussed by Brunner, *Zur Rechtsgeschichte der römischen und germanischen Urkunde* (1880). Kemble's introductions are still of the highest value.

canons and penitentials[1] which must not be neglected. During this period it is impossible to draw a very sharp line between the law of the church and the law of the realm. It is highly probable again that the penitential literature had an important influence on the development of jurisprudence, and it often throws light on legal problems, for instance the treatment of slaves.

Materials being scanty, all that is said by the chroniclers and historians of the time and even by those of the next age will have to be carefully weighed; use must be made of Beda's works and of the Anglo-Saxon Chronicle. But the time had not yet come when annalists would incorporate legal documents in their books or give accurate accounts of litigation.

For the continental history of this same period there are two classes of documents which are of great service, but the like of which England cannot show: namely, formularies, that is, in our modern language, "precedents in conveyancing," and estate registers,

[1] The classical collection of the Councils has been David Wilkins, *Concilia* (1737, 4 vols.). The first volume goes far beyond the end of this period, goes as far as 1265. For the first time before 870 this is superseded by vol. III. of *Councils and Ecclesiastical Documents relating to Great Britain and Ireland*, by Arthur West Haddan and William Stubbs (Oxford, 1869–73); a yet unfinished work, the first volume of which refers to the British, Cornish, Welsh, Irish, and Scottish churches. This collection contains, besides the Councils, many other ecclesiastical documents and what seems to be the best part of the penitential literature. Canons and penitentials are also to be found in vol. II. of the *Ancient Laws and Institutes*, but it is said that they were not very discriminately edited. The history of penitentials seems to be an intricately tangled skein.

that is, descriptions of the manors of great landowners showing the names of the tenants and the nature of their services. We have, as it seems, nothing to set beside the *Formulae Marculfi* or the *Polyptyque* of the Abbot Irmino. The practice of conveying land by written instrument seems never to have worked itself thoroughly into the English folk-law, and the religious houses and other donees of "book-land" seem to have been allowed to draw up their own books pretty much according to their taste, a taste inclining towards pompous verbosity rather than juristic elegance. Still, it is possible that a very careful comparison of the most genuine books would lay bare the formulas on which they were constructed and show a connection between those formulas and the continental precedents. That we should have no manorial registers or "extents" from this period is much to be regretted; it suggests the inference, very probable for other reasons, that the manorial system formed itself much more rapidly in France than in England.

That we shall ever be able to reconstruct on a firm foundation a complete system of Anglo-Saxon law, of the law of the Confessor's day, to say nothing of Alfred's day or Ethelred's, may well be doubted; the materials are too scanty. The "dooms" are chiefly concerned with keeping the peace; the "land books," considering their number and their length, tell us wonderfully little, so vague, so untechnical, is their wording. Still the most sceptical will not deny that within the present century a great deal of knowledge has been secured, especially about what we may call the public law of the time. And here of course it is

important to observe that the old English law is no unique system; it is a slip of German law. This makes permissible a circumspect use of foreign materials, and it should be needless to say that during the last fifty years these have been the subject of scientific research which has achieved very excellent results. The great scholars who have done that work have not neglected our English dooms; these indeed have proved themselves invaluable in many a controversy. The fact that they are written, with hardly an exception, in the native tongue of the people, whereas from the first the continental lawgiver speaks in Latin; the fact that they are almost absolutely free from any taint of Roman law; the fact that their golden age begins with the tenth century, when on the continent the voice of law has become silent and the state for a while seems dissolved in feudal anarchy—these facts have given our dooms a high value in the eyes even of those whose primary concern was less for England than for Germany or France. There is good reason then to hope that the main outlines of the development even of private law will be drawn, although we may not aspire to that sort of knowledge which would have enabled us to plead a cause in an Anglo-Saxon hundred moot.

How much law there was common to all England, or common to all Englishmen, is one of the dark questions. After the Norman Conquest we find a prevailing opinion that England is divided between three great laws, West-Saxon, Mercian, Danish, three territorial laws as it would seem. On the surface of the documents the differences between these three laws seem rather a matter of words than a matter of sub-

stance; but neither by this nor by the universality of the later "common law" are we justified in setting aside a theory which writers of the eleventh and twelfth centuries regarded as of great importance. In earlier times the various laws would be tribal rather than territorial; but we have little evidence that the Kenting could carry with him his Kentish law into Mercia in the same way that the Frank or Bavarian could preserve his national law in Lombardy; the fact that there was not in England any race or class of men "living Roman law," may have prevented the development of that system of "personal laws" which is a remarkable feature in the history of the continent. There is much evidence, however, that in the twelfth century local customs were many and important. The difficulty of reconstructing these will always be very great unless some new materials be found; still, work on Domesday Book and on the later manorial documents may succeed in disclosing some valuable distinctions.

In noticing what has been done already, it should be needless to mention Kemble's *Saxons in England* or his introductions to the various volumes of the *Codex Diplomaticus*. It will be more to the point to mention with regret that Konrad Maurer's *Angelsächsische Rechtsverhältnisse* is to be found only in the back numbers (volumes I., II., III.) of the *Kritische Ueberschau* published in Munich. The *Essays in Anglo-Saxon Law* (Boston, 1876), by Adams, Lodge, Young and Laughlin, should be well known in America. The public law is dealt with in the constitutional histories of Palgrave, Gneist, Stubbs; also by Freeman, in the first volume of his *Norman Conquest*. To name the

books of foreign writers in which Anglo-Saxon law has been touched incidentally would be to give something like a catalogue of the labours of the "Germanists." The influence of the Danes in the development of English law has until recent years been too much neglected. It is the subject of an elaborate work by Johannes C. H. R. Steenstrup, *Danelag* (Copenhagen, 1882). This constitutes the fourth volume of the *Normannerne* (1876–82).

II. *Norman Law.*

If the history of the law which prevailed in England from 1066 to, let us say, 1200 is to be written, the history of the law which prevailed in Normandy before 1066 will have to be studied. Such study will always be a very difficult task, because, unless some great discovery remains to be made, it will be the reconstruction of law which has left no contemporary memorials of itself. We have at present hardly anything that can be called direct evidence of the legal condition of Normandy between the time when it ceased to be a part of the West-Frankish realm and a date long subsequent to the conquest of England. It is only about the middle of the twelfth century that we begin to get documents, and even then they come sparsely. What then we shall know about the period in question will be learnt by way of inferences, drawn partly from the time when Normandy was still a part of Neustria, when its written law consisted of the *Lex Salica* and the capitularies; partly from the Normandy of Henry II's reign and yet later times; partly again from what we

find in England after the Norman Conquest. Much will always remain very dark, and there is reason to fear that a perverted patriotism will give one bias to English, another to continental writers—an American might surely afford to be strictly impartial. But enough has happened of late years to show that if historians will go deeply enough into legal problems a substantial accord may be established between them. The extreme opinions are the superficial opinions, and they are falling into discredit. The doctrines of Stubbs, Gneist and Brunner have a great deal in common. It is impossible now to maintain that William just swept away English in favour of Norman law. It is quite undeniable that new ideas and new institutions of far-reaching importance "came in with the Conqueror." Hale made a good remark when he said:

> It is almost an impossible piece of chymistry to reduce every *Caput Legis* to its true original, as to say, this is a piece of the Danish, this is of the Norman, or this is of the Saxon or British law.

But even the chemical metaphor is inadequate, for the operation of law on law is far subtler than any process that the world of matter has to show. It is not that English law is swept away by any decree to make room for Norman law; it is much rather that ideas and institutions which come from Normandy slowly but surely transfigure the whole body of English law, especially English private law. Much evidently remains to be done for Norman law, much that will hardly be done by an Englishman; but already of late years a great deal has been gained, and the student of Glanvill must have the coaeval *Très ancien Coutumier* constantly in his hand.

In three very accessible places Heinrich Brunner has sketched the history of law in Normandy: (1) *Das anglonormannische Erbfolgesystem* (Leipzig, 1869); (2) *Die Entstehung der Schwurgerichte* (Berlin, 1871); (3) *Ueberblick über die Geschichte der französischen, normannischen und englischen Rechtsquellen*, in Holtzendorff's *Encyclopädie der Rechtswissenschaft* (1882), page 297. In his view, Norman law is Frankish: Frankish institutions take out a new lease of life in Normandy, when they are falling into decay in other parts of the quondam Frankish Empire.

The chief materials[1] for Norman legal history are:

(1) *Exchequer Rolls.* We possess, in whole or in part, rolls for the years 1180, 1184, 1195, 1198, 1201–03[2]. They answer to the English Pipe Rolls.

(2) *Collections of judgments.* We have several private collections of judgments of the Exchequer in the thirteenth century, beginning in 1207[3], drawn from official records not now forthcoming.

(3) *Law books.* We have to distinguish:

(i) A compilation, of which both Latin and French

[1] In the following remarks I rely partly upon Brunner, partly upon Ernest Joseph Tardif, who is engaged upon editing the Norman Coutumiers.

[2] Thomas Stapleton, *Magni Rotuli Scaccarii Normanniae* (2 vols., 1840–44). A fragment of the roll of 1184 was published by Leopold Delisle, *Magni Rotuli Scaccarii Normanniae Fragmentum* (Caen, 1851).

[3] These are most accessible in Leopold Victor Delisle's *Recueil de Jugements de l'Exchiquier de Normandie au XIII^e siècle* (Paris, 1864). A collection of judgments delivered in the "Assizes" between 1234 and 1237 (Assisae Normanniae) will be found in Warnkönig's *Französische Staats- und Rechtsgeschichte*, vol. II., pp. 48–64.

versions exist, known as *Statuta et Consuetudines Normanniae*, or *Établissements et Coutumes de Normandie*[1]; but this compilation proves to be composed of two different works: (*a*) a treatise which Brunner gives to the last years of the twelfth or the first years of the thirteenth century, and which Tardif dates in 1199 or 1200; and (*b*) a later treatise compiled a little after 1218 according to Brunner, about 1220 according to Tardif.

(ii) Then comes the *Grand Coutumier de Normandie*. The Latin version of this, which is older than the French, calls itself *Summa de Legibus Consuetudinum Normanniae*, or *Summa de Legibus in Curia Laicali*, and was composed before 1280 and probably between 1270 and 1275[2].

There are a few later law-books of minor importance.

(4) *Diplomata*. Normandy is poor in diplomata of early date and, according to Brunner, many of those that exist are still unprinted; but in the *Collection de Documents Inédits* is a small but ancient (1030–91)

[1] The former has lately been edited by Tardif under the title, *Le très ancien Coutumier de Normandie* (Rouen, 1881); the latter may be found in A. J. Marnier's *Établissements et Coutumes, Assises et Arrêts de l'Exchiquier de Normandie* (Paris, 1839).

[2] This was first printed in 1483; there have been many subsequent editions. The Latin text can be found in Johann Peter Ludewig, *Reliquiae Manuscriptorum* (Frankfort and Leipzig), vol. VII.; the French in Bourdot de Richebourg, *Coutumier Général*, vol. IV. For some time past a new edition of the Latin *Summa* by Tardif has been advertised as in the press. The authorship of the work has been discussed by Tardif in a pamphlet entitled *Les Auteurs présumés du Grand Coutumier de Normandie* (Paris, 1885).

Cartulaire de la Sainte Trinité du Mont de Rouen, edited by Deville in 1841; Leopold Delisle has published a *Cartulaire Normand de Philippe Auguste, Louis VIII, Saint Louis, et Philippe le Hardi* (Caen, 1852); and there exists in the English Record office a manuscript collection made by Léchaudé d'Anisy, entitled *Cartulaire de la Basse Normandie, from various Norman Archives*[1].

III. *From the Norman Conquest* (1066) *to Glanvill* (*circa* 1188) *and the Beginning of Legal Memory* (1189).

We may classify the materials thus: (1) laws; (2) private collections of laws and legal text-books; (3) work done on Roman and Canon law; (4) diplomata; (5) Domesday Book, surveys, public accounts, etc.; (6) records of litigation.

(1) *Laws.* It is, as we shall see, a little difficult to draw the line between the first two classes of documents. No one of the Norman Kings was a great legislator; but we have one short set of laws which may in the main be considered as the work of the Conqueror; besides these we have his ordinance separating the ecclesiastical from the temporal courts and another ordinance touching trial by battle. Henry I's coronation charter (1100) is of great value,

[1] From this and other sources, some very important documents are printed by way of appendix to M. M. Bigelow's *History of Procedure* (London, 1880); as to their date, see Brunner, *Zeitschrift der Savigny Stiftung*, II., 202. Tardif, in his edition of the *Très ancien Coutumier*, p. 95, has given a list of unprinted cartularies.

and Stephen's second charter (1136) is of some value. Henry II was a legislator; we have from his day the Constitutions of Clarendon (1164), the Assize of Clarendon (1166), the Assize of Northampton (1176), the Assize of Arms (1181), and the Assize of the Forest (1184); but we have reason to fear that we have lost ordinances of the greatest importance, in particular the Grand Assize and the Assize of Novel Disseisin, two ordinances which had momentous results in the history of private and even of public law.

(2) *Private collections of laws and legal text-books.* Our first class of documents shades off into the second class by the intermediation of the so-called *Leges Edwardi, Willelmi, Henrici Primi.* A repeated confirmation of the Confessor's law (*lagam* not *legem* or *leges Edwardi*) apparently led to several attempts at the reproduction of this "good old law." First we have an expanded version of the code of Canute (Schmid's *Pseudoleges Canuti*); then we have the *Leges Edwardi Confessoris*, a document which professedly states the result of an inquiry for the old law made by the Conqueror in the fourth year after the Conquest; but the purest version that we have alludes to the doings of William Rufus. Then we have a highly ornate and expanded version of the probably genuine laws of the Conqueror mentioned above: it looks like work of the thirteenth century. Then there is another set of laws attributed to the Conqueror, which as it appears both in French and Latin may be conveniently called "the bilingual code"; its author made great use of the laws of Canute; its history is in some degree implicated with the forgery of the false

Ingulf. These various documents demand a more thorough criticism than any to which they have as yet been subjected[1]. Of much greater importance is the text-book known as the *Leges Henrici Primi*. Until lately it was usual to give this work to the reign of Stephen or even of Henry II, on the ground that the author had used the *Decretum Gratiani*; but his last critic, Liebermann, says that this is not so, and dates the work between 1108 and 1118; this earlier date seems for several reasons the more acceptable[2]. The writer has made a large use of the Anglo-Saxon

[1] The "Leges" will be found in the Record Commissioners' *Ancient Laws*, and in Schmid's *Gesetze*. The best version of the Conqueror's ordinances, together with the charters of Henry I and Stephen and the various assizes of Henry II, is in Stubbs's *Select Charters*, which book now becomes indispensable. An earlier collection of the laws of this age, which is still useful, is Henry Spelman's *Codex Legum Veterum*, published from Spelman's posthumous papers by David Wilkins in his *Leges Anglo-Saxonicae*. Some points about the "Leges" are discussed by Stubbs in the Introduction to vol. II. of his edition of *Roger Hoveden* (Rolls Series), and by Freeman in his *Norman Conquest*, vol. v. app. note kk.

[2] Liebermann's article on the date of the *Leges Henrici* is in *Forschungen zur deutschen Geschichte*, Bd. XVI.; his book on the *Dialogus de Scaccario*, mentioned below, has some critical remarks on the *Leges Edwardi*. The lost legislation of Henry II may be partially reconstructed by means of Glanvill and Bracton. There is yet room for a great deal of work on the assizes and "leges." We have reason to believe that there once existed an important law book of Henry I's day, but it is not now forthcoming; what is known about it will be found in Cooper's *Account of the Public Records* (1832), II., 412. For the strange history of "the bilingual code" reference should be made to the famous article in the *Quarterly Review*, No. 67 (June, 1826), p. 248, in which Palgrave exposed the Ingulfine forgery, and two articles by Riley in the *Archaeological Journal* (1862), vol. XIX.

laws, which in general he treats as still in force, but on occasion he stops gaps with extracts from the *Lex Salica*, *Lex Ripuaria*, the Frankish capitularies and some collections of canons; he has one passage which comes by a round-about way from Roman law; it is taken from an epitome of the Breviary of Alaric. Altogether he gives us a striking picture of an ancient system of law in course of dissolution and transformation; a great deal might yet be done for his text, which in places is singularly obscure.

The end of Henry II's reign is marked by the *Tractatus de Legibus et Consuetudinibus Angliae*[1], usually, though on no very conclusive evidence, attributed to Ranulf Glanvill, who became chief justiciar in 1180, and died a crusader at the siege of Acre in 1190. This book, always referred to as "Glanvill," was apparently written at the very end of Henry's reign, and was not finished until after 1187. It is the first of our legal classics, and its orderly, practical brevity contrasts strongly with the diffuse, chaotic, antiquarian *Leges Henrici*. This is due in part to the fact that the

[1] The treatise was printed by Tottel without date about 1554; later editions were published in 1604, 1673, 1780; an English translation by Beames in 1812. It will be found also in the official edition of *Acts of Parliament of Scotland*, vol. i., where it is collated with the Scottish law book *Regiam Majestatem*. It will also be found in David Houard's *Traités sur les Coutumes Anglo-Normandes* (1776), and in Georg Phillips' *Englische Reichs- und Rechtsgeschichte* (1827–28). An ancient French translation of it, not yet printed, exists in Mus. Brit. MS. Lands, 467. A new edition in the Rolls Series by Travers Twiss is advertised. The evidence as to Glanvill's authorship will be briefly canvassed in the *Dictionary of National Biography*, *s.v.* Glanvill.

author deals only with the doings of the King's Court, which is now beginning to make itself a tribunal of first instance for all England at the expense of the communal and seigniorial courts, partly also to the fact that he knew some Roman law and made good use of his knowledge in the arrangement of his matter. The great outlines of our land law have now taken shape, and many of the "forms of action" are already established.

The *Dialogus de Scaccario*, written, as is supposed, by Richard Fitz Neal, bishop of London, between 1178 and the end of Henry II's reign, is hardly a "law book," but is an excellent and valuable little treatise on the practice of the Exchequer and the whole fiscal system, the work of one very familiar with his subject. This book, written by an administrator rather for the benefit of the intelligent public than for the use of legal practitioners, stands alone in our mediaeval literature and must be invaluable to the historian of public law[1].

(3) *Work upon Roman and Canon law.* In dealing with any century later than the thirteenth, the historian of English law could afford to be silent about Roman and Canon law, for, though these were studied and practised in England, and in particular many of the ordinary affairs of life, testamentary and matrimonial

[1] The *Dialogue*, which was at one time cited as the work of "Gervasius Tilburiensis," was appended by Thomas Madox to his beautiful *History of the Exchequer* (1st ed. in one vol., 1711; 2nd ed. in two vols., 1769), one of the greatest historical works of the last century. It will also be found in the *Select Charters*. It is the subject of an essay by Felix Liebermann, *Einleitung in den Dialogus de Scaccario* (Göttingen, 1875).

cases, were governed solely by the Canon law, still these laws appear in a strictly subordinate position, are administered by special courts, and exercise very little, if any, influence on the common law of England. But a really adequate treatment of the period which lies between the Norman Conquest and the accession of Edward I would require some knowledge of Roman law and its mediaeval history, also some knowledge of the earlier stages in the development of Canon law. Lanfranc, the right-hand man of the Conqueror, was trained in the Pavian law school, where Roman doctrines were already leavening the mass of ancient Lombard law; his subtle arguments were long remembered in Pavia. The influence of the Lombard school on Norman and English law is a theme worthy of discussion[1]. Then in Stephen's reign, as is well known, Vacarius[2] lectured in England on Roman law; it has even been conjectured that the youth who was to be Henry II sat at his feet[3]. Vacarius wrote a book of

[1] Lanfranc's juristic exploits are chronicled in the *Liber Papiensis*, *Monumenta Germaniae*, *Leges*, IV., pp. xcvi, 402, 404, 566. It is not absolutely certain that this Lanfranc is our Lanfranc. The Pavian law school, which was engaged in reducing the ancient Leges Longobardorum, a body of law very similar to our Anglo-Saxon dooms, into rational order, would have afforded an excellent training for the future minister of the Norman Conqueror; and the close resemblance of some of our writs and pleadings to the Lombard formulas has before now been remarked.

[2] Carl Friedrich Christian Wenck, *Magister Vacarius* (Leipzig, 1820), gives an elaborate account of Vacarius's work (the title of which was *Liber ex universo enucleato jure exceptus et pauperibus praesertim destinatus*), together with many passages from it. One of the few MSS. is in the library of Worcester Cathedral.

[3] Stubbs, *Lectures on Mediaeval and Modern History*, p. 303.

Roman law, designed for the use of poor scholars, a book that is extant, a book that surely ought to be in print. His school did not perish, his scholars glossed his work. There are extant, again, several books of practice of the twelfth century and the first years of the thirteenth, which good critics believe to have been written either in Normandy or in England. Among them is one that has been ascribed to William of Longchamp, who became chief justiciar of England. In many quarters there are signs that an acquaintance with Roman law was not uncommon among cultivated men. Glanvill's work was influenced, Bracton's work profoundly influenced, by Roman law. Some of Henry II's most important reforms, in particular the institution of definitely possessory actions, may be traced directly or indirectly to the working of the same influence. The part played by Roman and Canon law in this critical stage of the formation of the common law deserves a minuter examination than it has as yet received[1].

[1] As a starting-point the investigator might take Savigny, *Geschichte des römischen Rechts im Mittelalter*, Kap. 36, and E. Caillemer, *Le Droit Civil dans les Provinces Anglo-Normandes*, *Mémoires de l'Académie Nationale de Caen* (1883), p. 157. Caillemer gives what remains of the treatise of William Longchamp, and will put a student on the track of what is known about "Pseudo-Ulpianus," Ricardus Anglicus, who is identified with Richard le Poor, bishop of Salisbury and Durham, and William of Drogheda. The lectures of Stubbs on the history of Canon law in England, *Lectures on Mediaeval and Modern History* (1886), Lects. 13, 14, are of great interest. The old learning as to the history of Roman law in England is found in Selden's Dissertation suffixed to *Fleta* (more of this below); see also Thomas Edward Scrutton, *The Influence of Roman Law on the Law of England* (Cambridge, 1885).

(4) *The diplomata* of this period are numerous and of great interest; they are brief, formal documents, contrasting strongly with the lax and verbose land books of an earlier age; they are for the more part charters of feoffment and grants or confirmations of franchises; they have never been properly collected. Charters of liberties granted to towns should perhaps form a class by themselves, but those coming from this age are not numerous[1].

(5) *Domesday Book, surveys, public accounts, etc.* By far the greatest monument of Norman government is Domesday Book, the record of the survey of England instituted by the Conqueror and effected by inquests of local jurors; it was completed in the summer of 1086[2].

[1] Few aids would be more grateful to the historian of law or even to the historian of England than a *Codex Diplomaticus Normannici Aevi*. As it is, the documents must be sought for in the Monasticon and the cartularies and annals of various religious houses. Some of these have been published in the Rolls Series; those of Abingdon, Malmesbury, Gloucester, Ramsey and St Albans (Mat. Par. *Chron. Maj.* vol. VI.), may be mentioned. A useful selection for this and later times is given by Thomas Madox, *Formulare Anglicanum* (1702), with good remarks on matters diplomatic; another small selection of early charters has just been edited by J. Horace Round for the Pipe Roll Society. Stubbs, *Select Charters*, gives the municipal charters of this time.

[2] *Domesday*, or the *Exchequer Domesday*, as it is sometimes called, was published by royal command in 1783 in two volumes; in 1811 a volume of indexes appeared; in 1816 the work was completed by a supplementary volume containing (*a*) the *Exon Domesday*, a survey of the south-western counties, the exact relation of which to the *Exchequer Domesday* is disputed, (*b*) the *Inquisitio Eliensis*, containing the returns relating to the possessions of the church of Ely, and two later documents, viz. (*c*) the *Winton Domesday*, a survey of

The form of this document is generally known; it is primarily a fiscal survey; the liability for "geld" in time past, the capacity for paying "geld" in time to come are the chief points which are to be ascertained; it has been well called "a great rate book." Incidentally, however, it gives us a marvellously detailed picture of the legal, social and economic state of England, but a picture which in some respects is not easily interpreted. Of late it has become the centre of a considerable literature[1]; but the historian of law will have to regret that a great deal of labour and ingenuity has been thrown away on the impossible attempt to solve the economic problems without first solving the legal problems.

The other public records of this period consist chiefly of Pipe Rolls, that is, the rolls of the sheriffs'

Winchester in the time of Henry I, and (*d*) the *Bolden Book*, a survey of the Palatinate of Durham in 1183. Since then (1861–63) the *Exchequer Domesday* has been "facsimiled" by photozincography; the part relating to each county can be bought separately. The *Inquisitio Comitatus Cantabrigiensis*, published by N. E. S. A. Hamilton in 1876, contains the returns made by the jurors of Cambridgeshire to the Domesday inquest.

[1] Among the works relating to Domesday may be mentioned the following: Henry Ellis, *A General Introduction to Domesday Book* (Rec. Com., 2 vols., 1833); Samuel Heywood, *A Dissertation upon the Distinctions in Society and Ranks of the People under the Anglo-Saxon Governments* (1818); James F. Morgan, *England under the Norman Occupation* (1858); several works of Robert William Eyton, *A Key to Domesday* [Dorset], *Domesday Studies* [Somerset] (2 vols., 1880); *Domesday Studies* [Stafford] (1881); appendixes to vol. v. of Freeman's *Norman Conquest*; *Domesday Studies* (1888), a volume of essays by various writers edited by P. Edward Dove (a second volume of this work is promised).

accounts as audited by the Exchequer. Chance has preserved one very ancient roll, now ascribed to 31 Henry I. No other roll is found until 2 Henry II, but thenceforward the series is very continuous[1]. These rolls throw light directly on fiscal machinery and administration, indirectly on numberless points of law. The feudal arrangement of England, the distribution of knights' fees and serjeanties, the obligation of military service and so forth are illustrated by documents of Henry II's reign contained in the *Black Book of the Exchequer*[2].

(6) *Records of litigation.* Though we have evidence that before the end of Henry II's reign pleas before the king's court were enrolled, we have no extant plea rolls from this age. Accounts of litigation must be sought for in the monastic annals; when found they are too often loose statements of interested parties. However, a good many transcripts of procedural writs have been preserved and these are of the highest value. Before our period is out we begin to get a few "fines" (*i.e.* records of actions brought and compromised, already a common means of conveying land); in four cases the original documents are preserved, in other cases we have copies.[3]

[1] The *Pipe Rolls* of 31 Henry I, 2, 3, 4 Henry II, 1 Richard I and 3 John (this last from the Chancellor's antigraph) were edited for the Record Commissioners by Joseph Hunter. The Pipe Roll Society has now taken these documents in hand and published the rolls for 5–12 Henry II.

[2] The *Liber Niger Scaccarii* was edited by Thomas Hearne (2 vols., 1728).

[3] Melville Madison Bigelow, in his *Placita Anglo-Normannica* (London, 1879), has collected most of what has been discovered

In passing we should note that the chronicles of this age are fruitful fields. Not only do they sometimes contain documents of great importance, laws, ordinances, diplomata, but they also supply many illustrations of the working of law and from time to time give us contemporary criticism of legal measures and legal arrangements.

On the whole we have no reason to complain of the tools provided for us. We cannot say of England, as has been said of France and Germany, that between the period of the folk laws and the period of the law books lies a dark age which has left no legal monument of itself. In particular the *Leges Henrici* serve to mediate between the dooms of Canute and the treatise of Glanvill. The lack is rather of workmen than of implements. But it is to be remembered that it is only of late years that those implements have become generally accessible; also that we have had not only to learn but also to unlearn many things, for the whole of the traditional treatment of the legal history of the Norman time has been vitiated by the great Ingulfine forgery, one of the most splendidly successful frauds ever perpetrated. A great deal of what went on in the local courts we never shall know; but in Henry II's

touching litigation between 1066 and 1189. For a newly found case, see F. Liebermann, *Ungedruckte anglo-normannische Geschichtsquellen* (Strassburg, 1879), pp. 251–256; for Norman cases of great value and their connection with English law, Brunner's *Entstehung der Schwurgerichte* (Berlin, 1871). As to early plea rolls and early fines, reference may be made to the Selden Society's *Select Pleas of the Crown*, vol. I. (1887), Introduction; since that introduction was written five more copies of fines of Henry II's day have been found in Camb. Univ. Libr. MS. Ee. iii, 60.

day the practice and procedure of the king's court become clear to us, and subsequent history has shown that the king's court, becoming in course of time the king's courts, was to have the whole fate of English law in its hands. Towards the end of the period the history of law begins to be, at least in part, a history of professional learning.

There is no very modern work devoted to the legal history of this age as a whole, but it is the subject of Georg Phillips' *Englische Reichs- und Rechtsgeschichte* (1827–28). M. M. Bigelow's *History of Procedure* (London, 1880) has provided for one important department. Of course constitutional history has had a large share of attention, and books have collected round Domesday and round two other points, namely, frankpledge and trial by jury. As to the former of these two points, it will only be necessary to mention Heinrich Marquardsen's *Haft und Bürgschaft bei den Angelsachsen* (Erlangen, 1852), as this will put its reader in the current of the discussion. As to the latter, Brunner's brilliant book, *Entstehung der Schwurgerichte*, has already been named; William Forsyth's *History of Trial by Jury* (1852), and Friedrich August Biener's *Das Englische Geschwornengericht* (Leipzig, 1852), are useful, though chiefly as regards a somewhat later time.

IV. *From the Coronation of Richard I to the Death of Edward I.*

Our sources of information now begin to flow very freely, and so much has already been printed that very probably the historian would find it easier to paint a life-like picture of the thirteenth century than to accomplish the same task for either the fourteenth or the fifteenth. We may arrange the materials under the following heads: (1) laws; (2) judicial records; (3) other public records; (4) law books; (5) law reports; (6) manorial law; (7) municipal and mercantile law.

(1) *Laws.* For reasons which will soon appear, we use the untechnical term "laws" rather than any more precise term. Neither Richard nor John was a legislator; they give us nothing that can be called laws except a few ordinances touching weights, measures, money, the prices of victuals. At the end of his reign, however, John was forced to grant the Great Charter (1215); this, if it is a treaty between the various powers of the state, is also an act declaring and amending the law in a great number of particulars: to use terms familiar in our own day, *Magna Carta* is an act for the amendment of the law of real property and for the advancement of justice. The various editions (1215–16–17–25) of the charter being distinguished, we note that it is the charter of 1225 which becomes the *Magna Carta* of subsequent ages and which gets to be generally considered as the first "statute." The term "statute" is one that cannot easily be defined. It comes into use in Edward I's

reign; supplanting "provisions," which is characteristic of Henry III's reign; which had supplanted "assize," characteristic of Henry II's, Richard's, John's. Our extant Statute Rolls begin with the statute of Gloucester (1278), and it is very doubtful whether before that date any rolls were set apart for the reception of laws. Some of the earlier laws of our period are to be found on other rolls, Patent, Close, *Coram Rege* Rolls: others are not to be found on any rolls at all, but have been preserved in monastic annals or other private manuscripts[1]. In later times of course it became the settled

[1] The laws must be sought primarily in editions of the *Statute Book*, in particular in the *Statutes of the Realm*, published for the Record Commissioners, the first volume of which work (1810) contains the Charters of Liberties besides the earliest statutes. Stubbs's *Select Charters* is invaluable for this period, especially as giving the documents relating to the revolutionary time which preceded the Barons' War. Blackstone, *The Great Charter* (1759), is a learned and useful work. It should be remembered that the text of the earliest statutes is not in all respects very well fixed, *e.g.* it is possible to raise doubts as to the contents of the statute of Merton. There is yet room for work in this quarter. Also it should be noticed that editions of the statutes, including the Commissioners' edition, contain Statuta Incerti Temporis. In lawyers' manuscripts these were found interpolated between the Statuta Vetera, which end with Edward II, and the Statuta Nova, which begin with Edward III, like the Apocrypha between the two Testaments; hence they came to be regarded as statutes of the last year of Edward II. Some of them are certainly older, and some of them were certainly never issued by any legislator, but are merely lawyers' notes; in the Year Books their statutory character is disputed; "apocryphal statutes" seems the best name for them. To make a critical edition of them would be a good deed. Perhaps the most interesting is the Prerogativa Regis, apparently some lawyer's notes about the king's prerogatives. Coke's *Second Institute* is the classical commentary on the early statutes.

doctrine that in a "statute" king, lords and commons must have concurred, and that a rule laid down with such concurrence is a "statute." But with our improved knowledge of the history of Parliament we cannot insist on this doctrine when dealing with the thirteenth century. Some of the received "statutes" even of Edward I's day, to say nothing of Henry III's, were issued without any participation by the commons in the legislative act. After the charter of 1225 we have the statute (or provisions) of Merton (1236), the provisions of Westminster (1259), the statute of Marlborough (1267), all of the first importance; and upon these follows the great series of Edward I's statutes, a most remarkable body of reforming laws. Hale's saying about Edward I was very true:

> I think I may safely say, all the ages since his time have not done so much in reference to the orderly settling and establishing of the distributive justice of this kingdom, as he did within a short compass of the thirty-five years of his reign; especially about the first thirteen years thereof.

(2) *Judicial records.* The extant Plea Rolls (rolls of pleadings and judgments) of the king's courts begin in 1194 (6 Richard I), and though we have by no means a complete series of them, we have for the thirteenth century far more than any one is likely to use. These rolls fall into divers classes; there are *Coram Rege* (King's Bench) Rolls, *De Banco* (Common Pleas) Rolls, Exchequer Rolls, Eyre Rolls, Assize Rolls, Gaol Delivery Rolls. The enormous value of these documents to the historian is obvious; they give him a very complete view of all the proceedings of the

royal tribunals[1]. The rolls of the thirteenth century are in one respect better material than those of later times, since they frequently give not merely the judgment but the *ratio decidendi* expressed in brief, neat terms. We also begin to get by the thousand "feet of fines," *i.e.* records of actions brought and compromised as a means of conveying land. The light which these hitherto neglected documents throw upon the history of conveyancing will some day be appreciated[2].

(3) *Other public records.* The Pipe Rolls continue

[1] We are still behindhand in the work of exploiting the Plea Rolls. In 1811 the Record Commissioners published the *Placitorum Abbreviatio*, a collection of extracts and abstracts extending from Richard I to the death of Edward II, made by Arthur Agard and others in the reign of Elizabeth. Valuable as this book is, it can only be regarded as a stop-gap; our wants are not those of Elizabeth's day. In 1835 Palgrave edited for the Commissioners a few of the rolls of Richard I and John under the title *Rotuli Curiae Regis*; the residue of Richard's rolls are to be published by the Pipe Roll Society; the earliest rolls are not the most interesting. The present writer has edited *Pleas of the Crown for the County of Gloucester* (1884), the criminal part of an Eyre Roll of 1221; Bracton's *Note Book* (3 vols., 1887), near two thousand cases of Henry III's reign; and, for the Selden Society, *Select Pleas of the Crown* (vol. I., 1887), a selection of criminal cases from the period 1200–25. In 1818 the Record Commissioners published a large volume of *Placita de Quo Warranto*, mostly from Edward I's reign, which is full of precious information about feudal justice. But only a beginning has been made; in particular the very valuable Rolls of Exchequer Memoranda must be brought to light; their general character may be gathered from the few extracts printed at the beginning of Maynard's *Year Book of Edward II* (1678).

[2] Some of the fines of Richard's and John's reigns were edited for the Commissioners by Joseph Hunter (2 vols., 1835–44); the residue are to be published by the Pipe Roll Society. The fines of a little later date are far more valuable and show elaborate family settlements; but they are unprinted.

to give us the sheriffs' accounts; but their importance now becomes much less, since they are eclipsed by far more communicative rolls, namely, the Rolls of Letters Patent and Letters Close, the Fine Rolls and the Charter Rolls. These enable us to study in minute detail the whole of the administrative machinery of the realm; and, owing to the publication of those belonging to John's reign, the governmental work of that age can be very thoroughly understood and illustrated. The Charter Rolls contain copies of the royal grants made to municipalities and to individuals, and thus to some extent they supply the place of a *Codex Diplomaticus*. Then from Edward I's reign we have parliamentary records, a broken series of Rolls of Parliament, of Petitions to Parliament, and Pleas in Parliament[1].

(4) *Law books*. In England as elsewhere the thirteenth century might be called "the period of the law books"; that is to say, the historian of this period will naturally reckon text-books, notably one text-book, as among the very best of his materials.

[1] Published for the Record Commissioners are the *Close Rolls*, 1204–1224, edited by T. D. Hardy (2 vols., 1833–44); the *Patent Rolls*, 1201–1216, by Hardy, with a learned Introduction (1 vol., 1835); the *Oblate and Fine Rolls* of John's reign, by Hardy (1 vol., 1835); *Excerpts from the Fine Rolls*, 1216–1272, by Charles Roberts (2 vols., 1835–36); the *Charter Rolls*, 1199–1216, by Hardy (1 vol., 1837). The *Rolls of Parliament* (6 vols. and Index) were officially published in the last century, but at least so far as the first period (Edward I, II, III) is concerned, this edition leaves much to be desired. Many materials for the illustration of parliamentary business have since come to light, and vast numbers of early Petitions to Parliament still remain unprinted. Of the *Hundred Rolls* hereafter.

(*a*) Bracton's *Tractatus* (or *Summa*) *de Legibus et Consuetudinibus Angliae* is by far the greatest of our mediaeval law books. It seems to be the work of Henry of Bratton, who for many years was a judge of the king's court and who died in 1268. It seems also to be an unfinished book and to have been composed chiefly between the years 1250 and 1256. It covers the greater part of the field of law. In laying out his scheme the author has made great use of the works of Azo, a Bolognese civilian, and thence he has taken many of the generalities of law; he may also have made some study of the Roman books at first hand; but he was no mere theorist; at every point he appeals to the rolls of the king's court, especially to the rolls of two judges already dead, Martin of Pateshull and William of Raleigh; his law is English case law systematized by the aid of methods and principles which have been learnt from the civilians. A *Note Book* full of cases extracted from the rolls has recently been discovered, and there is some reason for thinking that it was made by or for Bracton and used by him in the composition of his treatise[1].

[1] An edition of Bracton was published in 1569 and reprinted in 1640; a new edition has been given in the Rolls Series by Travers Twiss (6 vols., 1878–83); the editor however was hardly alive to the difficulty of his task and failed to observe that the very numerous MSS. present the work in several different stages of composition. A more adequate edition is much wanted. It should show what Bracton borrowed from Azo, and also, when this is important, what he declined to borrow from Azo; it should give all the cases cited by Bracton which are not already printed in the *Note Book*, or such of them as can yet be found on the rolls; it should settle the pedigree of the MSS., distinguish the author's original work from his after-

(*b*) *Fleta* is the work of an anonymous author, seemingly compiled about 1290. It gets its name from a preface which says that this book may well be called *Fleta* since it was written "in Fleta," *i.e.* in the Fleet gaol. In substance it is an edition of Bracton much abridged and "brought up to date" by references to the earlier statutes of Edward I. It has however some things that are not in Bracton, notably an account of the manorial organization; this the writer seems to have obtained from what we may call "the Walter of Henley literature," to which reference will be made below.

(*c*) Bracton and *Fleta* are Latin books: *Britton* is our first French text-book. It seems to have been written about 1290. The writer made great use of Bracton and perhaps he used *Fleta* also; but he has better claim to be treated as an original author than has the maker of *Fleta*. He arranges Bracton's material according to a new plan, and puts his whole book into the king's mouth, so that all the law in it appears as the king's command. Who he was we do not know; he has been identified with John le Breton, a royal judge and bishop of Hereford; but the book, as we have it, mentions statutes passed after the

thoughts and from the glosses by later hands, some of which glosses (never yet printed) are of great interest. Five years of hard work might give us a really good edition. The *Note Book* alluded to above was brought to light by Paul Vinogradoff in 1884 and has since been published (1887).

Bracton's relation to Azo is the subject of an excellent tract by Karl Güterbock, *Henricus de Bracton und sein Verhältniss zum römischen Rechte* (Berlin, 1862), translated by Brinton Coxe (Philadelphia, 1866).

bishop's death. To judge by the number of existing manuscripts, Bracton and *Britton* both became very popular, while *Fleta* had no success[1].

(*d*) Selden had a manuscript purporting to contain Bracton's treatise abridged by Gilbert Thornton in the twentieth year of Edward I; Thornton was chief justice. Selden's manuscript is not forthcoming and he did not know of any other like it. Possibly, however, Thornton's abridgement is represented by some of the existing manuscripts which give abbreviated versions of Bracton's book.

(*e*) Works of minor importance are two little treatises on procedure by Ralph Hengham, known respectively as *Hengham Magna* and *Hengham Parva*; a small French tract of uncertain date, also on procedure, known from its first words as *Fet assavoir*; and various little tracts found in manuscripts under such titles as *Summa ad cassandum omnimoda brevia, Summa quae vocatur Officium Justiciariorum, Summa quae vocatur Cadit Assisa, Placita placitata*, and the like. They are of an intensely practical character, but deserve to be collected[2].

[1] *Fleta* was printed in 1647 and again in 1685; these editions are faulty but are accompanied by a learned dissertation coming from Selden. Part of *Fleta* was edited anonymously by Sir Thomas Clark in 1735. An admirable edition of *Britton* has been published by Francis Morgan Nichols (2 vols., Oxford, 1865). *Britton* was first printed by Redman (without date) and was again printed in 1640; a translation of part of it was published in 1762 by Robert Kelham. *Britton* and *Fleta* are also to be found in Houard's *Traités sur les Coutumes Anglo-Normandes*.

[2] "Fet assavoir" appears at the end of the editions of *Fleta*. The two Henghams appear in Selden's edition of Fortescue's *De*

(*f*) To Edward II's reign, or perhaps to the end of his father's, we must attribute the interesting but dangerous *Mirror of Justices* of Andrew Horne, fishmonger and town clerk of London[1]. It is the work of one profoundly dissatisfied with the administration of the law by the king's judges. As against this he appeals to myths and legends about the law of King Alfred's day and the like, some of which myths and legends were perhaps traditional, while others may have been deliberately concocted. Intelligently read it is very instructive; but the intelligent reader will often infer that the law is exactly the opposite of what the writer represents it to be. It has done much harm to the cause of legal history; it imposed upon Coke and even in the present century has been treated as contemporary evidence of Anglo-Saxon law.

(*g*) There is hardly any book more urgently needed by the historian of English law than one which should trace the gradual growth of the body of original writs, *i.e.* of the writs whereby actions were begun; such writs were the very skeleton of our mediaeval *corpus juris*. The official *Registrum Omnium Brevium* as printed in the sixteenth century (1531, 1553, 1595, 1687) is obviously a collection that has been slowly put together. It is believed that extant manuscripts still offer a large supply of materials capable of illustrating

Laudibus (1616). Some of the minor tracts seem never to have been printed.

[1] A poor version of the French text of the *Mirror* was issued in 1642, an English translation of it by William Hughes in 1642, 1768 and 1840. A critical edition of this curious book would be of great value.

the process of its growth. Some of the manuscript collections of writs go back to Henry III's reign, and occasionally have notes naming the inventors of new writs[1]. Here is a field in which excellent work might be done.

(5) *Law reports.* Just at the end of the thirteenth century there appear books of a new kind, books whose successors are to play a very large part in the legal history of all subsequent ages; we have a few Year Books of Edward I's reign[2]. These are reports in French by anonymous writers of the discussions which took place in court between judges and counsel over cases of interest; whether they bore any official sanction we do not know. They are of special value as showing the development of legal conceptions, which is better displayed in the dialectic process than in the formal Latin record which gives the pleadings and judgment in their final form; we learn what arguments were used and also what arguments had to be abandoned. But for the period now in question we can

[1] Thus a Cambridge MS. Kk, v, 33, gives a very early Registrum Brevium in which we may read how a number of writs were invented by William Raleigh. The earliest register known to me is in Mus. Brit. MS. Cotton. Julius D. II.

[2] Happily the Year Books of Edward I remained unprinted until very lately; the consequence is that we have a good edition of them. Between 1863 and 1879 Alfred J. Horwood edited for the Rolls Series five volumes containing cases from the years 20, 21, 22, 30, 31, 32, 33, 35 Edw. I. Before his death he had begun work on the Year Books of a later age, and the inference might be drawn that he was unable to find any more reports of Edward I's reign. But he seems to have nowhere stated that this was so, and a cursory inspection of the manuscripts induces the belief that they have not yet been exhausted.

only give the Year Books a secondary place among our materials.

(6) *Manorial law.* Of late years our horizon has been enormously extended by the revelation of vast quantities of documents illustrative of manorial law and custom, a department of law which has hitherto been much neglected, but which is of the very highest interest to all students of economic and social history.

(*a*) In the first place we have numerous "extents" of manors, *i.e.* descriptions which give us the number and names of the tenants, the size of their holdings, the legal character of their tenure and the kind and amount of their service; the "extent" is a statement of all these things made by a jury of tenants. Such extents are found in the monastic cartularies and registers. Among these we may mention the *Boldon Book*, which is an account of the palatinate of Durham, the *Glastonbury Inquisitions*, the *Cartulary of Burton Abbey*, the *Domesday of St Paul's*, the *Register of Worcester Priory*, the *Cartularies of Gloucester*, *Ramsey*, and *Battle*. A few of those mentioned at the head of our list take us back into the twelfth century. There are still several cartularies which ought to be printed. The *Hundred Rolls* compiled in Edward I's reign give us the results of a great inquest prosecuted by royal authority into "the franchises," *i.e.* the jurisdictional and other regalia which were in the hands of subjects; we thus obtain an excellent picture of seignorial justice. But for certain counties and parts of counties these *Hundred Rolls* give us far more, namely, full "extents" of all manors. They thus serve to supplement and correct the notions which we might form if we studied

only the ecclesiastical manors as displayed in the cartularies[1].

(*b*) Almost nothing has yet been done towards the publication of a class of documents which are quite as important as the "extents," namely, the earliest rolls of the manorial and other local courts. We have a few older than 1250, a considerable number older than 1300[2]. They show the manorial system in full play, illustrate all its workings and throw light on many points of legal history which are not explained by the records of more exalted courts[3].

[1] The *Boldon Book* was published as an appendix to the official edition of *Domesday*, vol. IV., and again by the Surtees Society; the *Glastonbury Inquisitions* were printed for the Roxburghe Club; an abstract of the *Burton Cartulary* for the Salt Society; the *Black Book of Peterborough* for the Camden Society at the end of the *Chronicon Petroburgense*; the *Domesday of St Paul's* and the *Worcester Register* (both with valuable introductions by William Hale Hale) and the *Battle Cartulary* for the Camden Society; the *Gloucester and Ramsey Cartularies* are in the Rolls Series. The *Hundred Rolls* were published by the Record Commissioners (2 vols., 1812–18). The publications of the Camden Society are often in the market.

[2] The Selden Society's volume for 1888, *Select Pleas in Manorial and other Seignorial Courts*, gives extracts from some typical rolls of the thirteenth century and may serve to stimulate a desire for further information.

[3] There are several little treatises on the practice of manorial courts. Some of these in their final shape belong to the next period and are represented by the *Modus tenendi Curiam Baronis*, two editions, by R. Pynson (n.d.—1516–20?); *Modus tenendi unum Hundredum*, Redman (1539); *Modus tenendi Curiam Baronis*, Berthelet (1544); *The Maner of kepynge a Courte Baron*, Elisabeth Pykeringe (1542?); *The Maner of kepynge a Court Baron*, Robert Toye (1546). But beside these there is a quite early set of precedents which seems never to have been printed. It generally begins "Ici

(*c*) Little known to the world, there is a small but complicated literature of tracts on "husbandry" and the management of manors. In whole or in part it is often associated with the name of a certain "Walter of Henley." The author of *Fleta* has made use of it in his well-known chapter on the manorial system. Further investigation will perhaps distinguish between two or three tracts that are intertwined in the manuscripts and presented in varying forms. An edition of all or some of these tracts has been projected. They bear directly rather on agricultural and economic than on legal history; but the historian of manorial law cannot afford to neglect them[1].

This department of mediaeval law, concerning as it does the great mass of the population, is beginning to attract the attention that it deserves. The traditional

poet home trover suffysaument...tut le cours de court de baron." It is found in several MSS., *e.g.* Mus. Brit. Egerton, 656; Add. 5762; Lands, 467.

[1] One of these tracts (in an English version) got printed very early without date or printer's name. "Boke of husbandry. Here begynneth a treatyse of husbandry whiche mayster Groshede somtyme byssshop of Lyncoln made and translated it out of Frensshe into Englysshe....The I. chapitre. The fader in his olde age sayth to his sone lyve wysely.... Here endeth the boke of husbandry and of plantynge and graffynge of trees and vines." One of the tracts was published by Louis Lacour; *Traité inédit d'économie rurale composé en Angleterre*, Paris, 1856. These seem at present the only printed representatives of this "Walter of Henley literature"; but it appears in many manuscripts. For information on this subject I am indebted to my friend Dr William Cunningham, the author of *The Growth of English History and Commerce*, who proposes, I believe, to reprint in the second edition of his book the rare tract ascribed to Bishop Grosseteste of Lincoln. Some other of these tracts are, I hear, to be edited for the Royal Historical Society.

learning of lawyers about the manorial system went back only to comparatively recent times and their speculations about earlier ages had been meagre and fruitless. A new vista was opened by Erwin Nasse's *Ueber die mittelalterliche Feldgemeinschaft in England* (Bonn, 1869), which was translated into English by H. A. Ouvry (1871). H. S. Maine's *Lectures on Village Communities in the East and West* (1876) drew the attention of Englishmen to the work that had been done in Germany. Frederic Seebohm's *English Village Community* (1883) came into sharp conflict with what were coming to be accepted doctrines and must lead to yet further researches. In 1887 Paul Vinogradoff published at St Petersburg a Russian treatise in which much use was made of our manorial extents and rolls; a larger work in English by the same hand is expected. This of course is a department in which legal and economic history meet; and it has become clear that the historian of law must realize the economic meaning of legal rules while the historical school of economists must study mediaeval law.

(7) *Municipal and mercantile law.* The growth of municipal institutions, the development of guilds and corporations, are now recognized topics of "constitutional history." But a great deal remains to be done towards the publication of documents illustrating the laws and customs administered in the municipal courts. In particular there is much to be discovered about "the law merchant." Before the end of the thirteenth century the idea had been formed of a *lex mercatoria*, to be administered between merchants in mercantile

affairs, which differed in some respects from the common law. Throughout the middle ages the merchants had special tribunals to go to, and consequently very few of their affairs are noticed in the Year Books. Whether very much of this law merchant can be recovered may be doubtful, but until the archives of our cities and boroughs have been thoroughly explored by some one who knows what to look for, we shall do well to believe that something may yet be learned[1].

V. *From Edward III to Henry VIII.*

About the remainder of the middle ages we must speak more briefly. On the whole the law has no longer to be sought in out of the way or but newly accessible sources; it may be found in books which lawyers have long had by them and regarded not merely as evidence of old law but as authority, namely the Statute Book, the Year Books and the very few

[1] Thomas Madox's *Firma Burgi* (1726) is a vast mine of facts, and many will be found in *The History of Boroughs*, by Henry Alworth Mereweather and Archibald John Stephens (3 vols., 1835). For London, Henry Thomas Riley's *Monumenta Gildhallae Londoniensis* (Rolls Series, 3 vols. in 4, 1859–62) is the great book. A custumal of Ipswich is printed by Travers Twiss in vol. II. of the *Black Book of the Admiralty* (Rolls Series, 1873). A considerable number of other municipal custumals belonging to this and the next period are known to exist in manuscript. A little about the law merchant will be found in the Selden Society's vol. II., where some pleas in the court of the Fair of St Ives are given. A great deal about the legal treatment of merchants and mercantile affairs is collected by Georg Schanz, *Englische Handelspolitik* (2 vols., Leipzig, 1881).

text-books which this age presents. It would be a great mistake, however, to suppose that these sources should be exclusively used or that they are in the state in which they ought to be.

After Edward the Third's accession we can insist on a strict definition of a statute. The more important laws of a general character are placed on the Statute Roll and about their text there can seldom be any dispute; we have a good official edition of them. But the Parliament Rolls, an unfortunately broken series, also should be studied, as they often show the motives of the legislators and also contain some of those acts of Parliament which were not thought of sufficient general and permanent importance to be engrossed on the Statute Roll; a great deal that concerns trade and agriculture and villainage and the working of the inferior organs of the constitution, in particular the new magistracy, the justices of the peace, must be sought rather in the Parliament Rolls than among the collections of statutes. Again, most of the other series of non-judicial rolls mentioned above are continued; and though they are not of such priceless value for this as for former periods, they should certainly not be neglected by any one who wishes to make real to himself and others the working of our public law. A great deal of that law never comes into the pages of the Year Books and for that reason has remained unknown to us.

We turn to the law reports. A series of Year Books extends from Edward II to Henry VIII, from 1307 to 1535. They got into print piecemeal at various times; the most comprehensive edition is one

published in ten volumes, 1678–80. This edition has about as many faults as an edition can well have; it teems with gross and perplexing blunders. Happily it is not complete, and we have thus been enabled to contrast a good with a bad edition. It leaves a gap between the tenth and the seventeenth years of Edward III. This gap is being gradually filled up in the Rolls Series by L. O. Pike, who has already given the books for the years 11–14 Edward III; but there are several other considerable gaps to be filled, one for instance between the thirtieth and thirty-eighth years of the same reign, another representing the whole reign of Richard II. Henry VIII's long reign is scurvily treated, and though we begin now to get a little help from reporters whose names are known, from Dyer and others, still it is true that we have singularly few printed memorials of the law of this important time. An edition of all the Year Books similar to that which we now have in the Rolls Series for a few lucky years of Edward III would be an inestimable gain, not merely to the historian of law but to the historian of the English people.

One of the many excellent features of these newly published Year Books of Edward III's reign consists of further information about the cases there reported, which information has been obtained from the Plea Rolls. Often the report of a case in the Year Books is but partially intelligible to modern readers until they are told what are the pleadings and the judgment formally recorded on the official roll of the court. The Plea Rolls are extant. To print even a few rolls of the fourteenth or fifteenth century would be a heavy

task, so copious is the flow of litigation, so lengthy have the pleadings by this time become[1]. Still, in that new edition of the Year Books which is urgently needed, a brief statement of the recorded pleadings and judgment ought to be frequently given. But this is not the only use that should be made of the rolls. The Year Books, invaluable though they be (or would be were they made legible), are far from giving us a complete view even of the litigation of the period, to say nothing of a complete view of its law. They are essentially books made by lawyers for lawyers, and consequently they put prominently before us only those parts of the law which were of immediate interest to the practitioners of the time; an exaggerated emphasis is thus laid on minute points of pleading and practice, while some of the weightiest matters of the law are treated as obvious and therefore fall into the background. If anything like a thorough history of "the forms of action" is to be written, the Plea Rolls as well as the Year Books must be examined. The work of turning over roll after roll will be long and tedious, but greater feats of industry have been performed with far less gain in prospect. To give one example of the use of the Plea Rolls, let us recall Darnel's case, the famous case of Charles I's day, about the power of the king and the lords of the council to commit to prison. The question what were the courts to do with a man so committed could not be answered out of the Year Books, it had to be answered out of the Plea Rolls. These rolls contain an exhaustive history of the writ

[1] It is said that the rolls of the Court of Common Pleas for Henry VIII's reign consist of 102,566 skins of parchment.

of *habeas corpus*, the Year Books have little about it, for cases about "misnomer" and the like had been far more interesting to lawyers than "the liberty of the subject." And so it is to be suspected that the new principles of private law which appear in the Year Books of Edward IV—the rise of the action of assumpsit, the doctrine of consideration, the protection of copyholders, the conversion of the action of ejectment into a means of trying title to lands, the destruction of estates tail by fictitious recoveries—that all these and many other matters of elementary importance might be fully illustrated from the Plea Rolls, whereas the Year Books give us but dark hints and unsolved riddles.

The manor becomes steadily of less importance during this period; but that is no reason why the manorial rolls, of which we have now an ample supply, should be neglected; but neglected they have hitherto been. The historian should take account not only of growth but of decay also, and the records of this time should give the most welcome evidence as to the effect of great social catastrophes, the black death, the peasants' revolt, the dissolution of the monasteries, and also as to the formation of what comes to be known as copyhold tenure. And again, turning from country to town, we shall not believe that the development of the law merchant has left no traces of itself until some one has given a few years to hunting for them.

Still more important, at least more exciting, is the history of the jurisdiction of the Council and of the new courts which arise out of it, the Court of Star Chamber, the Court of Chancery. Much has been

recovered, but assuredly much more can be recovered. There are large quantities of Chancery proceedings to be examined; and it is impossible to believe that we shall always be left in our present state of utter ignorance as to the sources of that equitable jurisprudence which in course of time transfigured our English law, be left guessing whether the chancellors trusted to natural reason, or borrowed from Roman law, or merely developed principles of old English law which had got shut out from the courts of common law by the rigours of the system of writs[1].

With a few, and these late exceptions, the text-books of the time are of little value; with the thirteenth

[1] *The Proceedings and Ordinances of the Privy Council from* 1386 *to* 1542 were edited for the Record Commissioners by Nicholas Harris Nicolas (7 vols., 1834–37). There are two well-known monographs, Francis Palgrave, *Essay upon the Original Authority of the King's Council* (1834) and A. V. Dicey, *Essay on the Privy Council* (2nd ed., 1887). *The Calendars of the Proceedings in Chancery in the Reign of Elizabeth*, as published by the Commissioners (3 vols., 1827–32), contain some specimens of earlier proceedings beginning in the reign of Richard II. A calendar of proceedings in Chancery beginning with Richard's reign is in the press. Spence's *Equitable Jurisdiction*, mentioned above, affords much that is of historical value. But quite new ground was broken by L. O. Pike's essay on "Common Law and Conscience in the Ancient Court of Chancery," *Law Quarterly Review*, I, 443, and by O. W. Holmes' daring paper on "Early English Equity," *ibid.* 162. The suggestions thus made must be followed up; and it is believed that the materials for a history of the beginnings of equity are to be found at the Record office in great abundance. It is high time that they should be used. As to the Star Chamber, considering how important, how picturesque a part it played in English history, it is surprising that no very serious attempt should have been made to master the great mass of documents relating to it.

century died the impulse to explain the law as a reasonable system and give it an artistic shape. Still that is no reason why such books as there are should be left in their present dateless, ill-printed or even unprinted condition; the *Old Tenures*, the *Old Natura Brevium*, the *Novae Narrationes* want editors; and towards the end of our period we get some "readings" which should be published, such as Marrow's *Reading on Justices of the Peace*, a work which Fitzherbert and Lambard treated as of high authority. Littleton's *Tenures*, which marks the revival of legal and literary endeavour under Edward IV, has had enough done for it by its great commentator, in some respects more than enough, for the historian will have to warn himself against seeing Coke in Littleton[1]. Needless to say it is a very good book; and the last parts of it, now little read, are a most curious monument of the dying middle ages. They only become really intelligible and lifelike in the light of the Paston Letters and similar evidence, a light which reveals the marvellous environment of violence, fraud and chicane in which an English gentleman lived. Under Henry VIII, Fitzherbert begins the work of summing up our mediaeval law in his *Abridgement* and his *New Natura Brevium*.

[1] Early editions of Littleton's *Tenures* are numerous and some of them are precious; an edition by T. E. Tomlins, 1841, is probably the best. Any one who has heard of Coke upon Littleton has probably also heard of the fine edition of that book made by Francis Hargrave and Charles Butler; their notes, especially Butler's, are of real value even for the mediaeval period. The *Novae Narrationes* were printed by Pynson without date and were published again in 1561; both the *Old Tenures* and the *Old Natura Brevium* were printed by Pynson.

Sir John Fortescue's works give excellent illustrations of several legal institutions, notably of trial by jury, though as a whole they are rather concerned with politics than with law[1].

Here I must stop, without of course intending to suggest that history stops here. The historian of modern law—the historian, let us say, who should choose as his starting point the reign of Elizabeth—would have before him an enormously difficult task. The difficulty would lie not in a dearth but in a superabundance of materials. To trace the development of the leading doctrines at once faithfully and artistically would require not only vast learning but consummate skill, such a combination of powers as is allowed to but few men in a century. But the result might be one of the most instructive and most readable books ever written, one of the great books of the world. However, no one who feels the impulse to undertake such a work will need to be told how to set about it or whither to look for his materials. It is somewhat otherwise as regards the middle ages; those who have seen a little of our records printed and unprinted may be able to give a few acceptable hints to those who have seen less, and it is with some vague hope that the above notes may be of service to beginners that

[1] Fortescue's most famous work *De Laudibus Legum Angliae* was edited with important notes by Selden in 1616, and has since been edited by A. Amos. His writings will be found in the first volume of a luxurious book printed for private circulation by Lord Clermont, *Sir John Fortescue and his Descendants*. His tract on *The Governance of England* has been beautifully edited with an elaborate apparatus by Charles Plummer (1885).

they have been strung together; may they soon become antiquated, even if they are not so already! They should at least convey the impression that there is a great deal to be done for English mediaeval law; much of it can only be done in England, for we have got the documents here; but there is no reason why it should not be done by Americans. We have piles, stacks, cartloads of documents waiting to be read—will some one come over into England and help us[1]?

[1] As I have reason to believe that the difficulty of reading legal MSS. is greatly exaggerated by those who have made no experiment, I may be allowed to say that any one who knows some law and some Latin will find that the difficulty disappears in a few weeks. Of course I am not denying that from time to time problems may arise which only an experienced or perhaps a specially gifted eye can solve, but as a general rule our legal records from the beginning of the thirteenth century downwards are written with mechanical regularity; during the thirteenth century the writing is often beautiful; usually if one cannot read them this is because one does not know law enough, not because the characters are ill-formed or obscure.

POSSESSION FOR YEAR AND DAY[1]

THE respect paid by mediaeval law, French and German, to a possession which has been continued without interruption for year and day has become the centre of a considerable mass of learning and of theories. Here it will be sufficient to refer to two main doctrines[2]. On the one hand it has been asserted that the law of the German tribes which overwhelmed the Roman Empire knew an annual usucapio for land, admitted that the ownership of land could be acquired by peaceful seisin for year and day, with perhaps some saving for the rights of those who were under disability. "At the time when the Salian Franks invaded Gaul they still admitted that a possession prolonged for year and day would suffice to give ownership[3]." When French law becomes articulate in the twelfth and thirteenth centuries this brief

[1] *Law Quarterly Review*, 1889.

[2] Among the books which deal with the matter are the following:—Alauzet, *Histoire de la Possession en droit Français*; Esquirou de Parieu, *Études sur les Actions Possessoires*; Viollet, *Établissements de Saint Louis*, I. 110; Viollet, *Précis de l'Histoire du Droit Français*, 484; Bruns, *Recht des Besitzes*, 352–367; Albrecht, *Die Gewere*; Laband, *Die Vermögensrechtlichen Klagen*; Heusler, *Die Gewere*; Heusler, *Institutionen des Deutschen Privatrechts*, I. 56, II. 66–117.

[3] Viollet, *Précis*, p. 484.

prescription has perished; but it has left many traces of itself. In the twelfth century there are many towns in which possession, or at all events titled possession, for year and day will still bar all adverse claims. A little later we find that according to a very general custom the French possessory remedy, the plaint of novel disseisin (for this term is as well known in France as in England) will only serve to protect a possession that has endured for year and day; possession for year and day will no longer give ownership, but it is required for that seisin which the law protects; a shorter possession if protected at all is only protected by remedies which have their origin in Roman or Canon Law.

There is no need to point out how interesting this theory is that the Germans, or at all events the Franks, started with an annual prescription. Any supposition of their having borrowed it from the ancient Roman usucapio might for several reasons be dismissed, and we should seemingly be brought face to face with a striking similarity between the earliest stages of the two great bodies of law that have ruled the modern world.

On the other hand this theory has been strenuously denied. The barbarians knew no prescription. In course of time they borrowed from Roman Law the prescriptive terms of ten, twenty, thirty years; but it is in another quarter that we must look for the origin of that respect for year and day which was prevalent during the later middle ages. To explain this it is necessary to say that the German conveyance of the later middle ages was an "Auflassung," or "surrender'

effected in court, a proceeding closely analogous to our own "fine of lands." The person who obtained land under such a conveyance was there as here protected after he had quietly possessed the land for year and day. In some customs the protection amounted, as with us, to an extinction of all adverse claims, though there as here there was a saving for the rights of those who were under disability. In other customs after year and day the possessor, though not absolutely safe, had the enormous procedural advantage of being allowed to establish his title by his own oath without oath-helpers. The "Auflassung" seems even to have become the one and only means of conveying land, and the fiction of litigation having gradually dropped away it gave to Germany a system of registered titles such as we shall never obtain without stringent legislation.

Now this in Germany is the most important context of "year and day"; there is no trace of any such general rule as that possession for year and day will give ownership, or that possession not yet continued for that period is unprotected. It takes the action of a court of law to set this term running; the person in whose favour the "Auflassung" is made is put in seisin by the officer of the court and the peace of the court is solemnly conferred upon him and his possession.

That the requirement of litigious proceedings for the purpose of passing the ownership of land was not primitive, seems quite certain. It has been traced to two main causes. In the first place the rights of expectant heirs had to be precluded. Our own classical common law seems to stand alone among

the sister systems as regards what may be called its individualism, its refusal to admit that the family has rights, its assertion that the house-father's land is just his land and that he may do what he likes with it, that he may bequeath all his moveables to a stranger and leave his children penniless, that there is no community of goods between him and his wife. Practically similar results may have been obtained in all countries at least so far as the richer classes were concerned; but what in England was done by means of private settlements, by estates tail, remainders and so forth, was done elsewhere by general rules of law forbidding a man to alienate his land without the consent of his expectant heirs or enabling members of his family to compel a purchaser to resell the land at the price given for it. To get rid of these family rights one needs litigation real or pretended. Then in the second place it seems that in Germany the lords of jurisdiction were more thoroughly successful than they were in England in the endeavour to establish the rule that land within their jurisdiction could not be alienated without their leave, and this even when (to take a distinction which hardly appears in England) they were not lords of the land but merely lords of the jurisdiction. These two causes converted the safest mode of conveyance, an "Auflassung" before the court, into the only mode of conveyance. In England their power was less and, perhaps unfortunately, the extra-judicial feoffment lived on by the side of the judicial fine; but let us notice that during the middle ages one very great mass of English landholders conveyed their lands in court by surrender

into the hands of the lord of the court; now the German for "surrender" is "Auflassung[1]."

The phrase invariably used to describe the space of time which has legal results seems to point to an origin in judicial proceedings. It is not a year but "year and day," "an et jour," "Jahr und Tag." Now in German books this is glossed as meaning one year, six weeks and three days. Various explanations have been given of this, but all seem to point to the fact that the "day" is a "court day." One of the best accredited explanations is that the court is adjourned from six weeks to six weeks and that it sits for three days; the claimant is bound to make his claim at latest at the next session after the lapse of the year; thus as a maximum term he has a year, six weeks and three days[2]. Be this as it may, it is in connection with judicial proceedings that we first hear of year and day; in particular when a defendant in an action of land will not appear the land is seized into the king's hands, and if the contumacy continues for year and day the land is then adjudged to the plaintiff; during

[1] Dr Brunner, *Zur Rechtsgeschichte der Römischen und Germanischen Urkunde*, p. 286, has drawn attention to the importance of our fines and recoveries in the general history of law. Much that is interesting about the "Auflassung" will be found in Bewer, *Sala, Traditio, Vestitura.*

[2] Heusler, *Institutionen*, I. 57. In Leg. Will. Conq. I. 3, we have a period of month and day given. It will be remembered also that a defendant summoned to the king's court had to be waited for during three days—per tres dies expectabitur, Glanv. lib. I. cap. 7. Already in the thirteenth century the prolonged sittings of our king's courts must have made the original meaning of the additional day unintelligible.

the year and day it lies under the king's ban[1]. Now the suggestion is that in this contumacial procedure men saw the possibility of stable and effectual conveyances:—let the purchaser sue the vendor, let the land lie in the king's ban for year and day, then let it be adjudged to the purchaser, let him be put in seisin under the king's peace. According to this theory the reverence paid in the later middle ages to possession prolonged for year and day has its root not in a primitive usucapio, but in the king's ban.

And now let us turn to England and ask whether we have any evidence which bears upon these conflicting theories.

In the first place we have some negative evidence. In all the dooms and land books that come to us from the time before the Norman Conquest there is I believe not only no mention of year and day, but no proof of any limitation or prescription[2]. It seems highly improbable that there was any term, at least any short term, of prescription, otherwise we should surely find some impleaded church relying upon it. Then, to come to later times, the only terms of prescription or limitation that our common law admits (if indeed our "common law" can be said to admit any) are extremely long terms; it is thought no absurdity that an ousted owner and his heirs should have a century or thereabouts within which to recover their

[1] In England the land remained in the king's hand for but fifteen days; Glanv. lib. I. cap. 7.

[2] See the *Harvard Essays in A.-S. law*, p. 253. It is just possible that among ecclesiastics the Roman prescription of thirty years was respected.

land[1], or that the claimant of a prescriptive right in Henry III's time should be expected to assert that he has exercised it ever since the Norman Conquest. Then again these terms never seem to be the outcome of any general notion; they are imposed from time to time by statute or in earlier days by royal ordinance. Then again we never obtain any real acquisitive prescription for land or moveables; the true owner may be deprived of his remedies, but "it is commonly said that a right cannot die[2]." Certainly this does not look as though our law had at any time, however remote, contained the principle that quiet seisin for year and day will give ownership or bar claims. Lastly, when in Henry II's day we get a definitely possessory action for land it protects possession that has not endured for year and day, it will protect the very disseisor himself when he has been on the land for four days[3]. Thus in the main stream of the common law about possession and property there seems no place for year and day.

Still year and day is respected. Twice over Coke has given us a string of rules to illustrate the proposition that the common law has often limited year and day as a convenient time[4]. We will attempt to arrange his instances together with a few that he has omitted.

[1] Ordinance of 1237 in Bracton's *Note Book*, pl. 1217.
[2] Littleton, sec. 478.
[3] *L. Q. R.* IV. 29.
[4] Co. Lit. 254*b*; 5 Rep. 218.

I. *Instances relating to rights of ownership or possession in which there has been no exercise of royal or judicial power.*

(*a*) In Bracton's day it was the opinion of some that the intruder, as distinguished from the disseisor, gained no legally protected possession until after the lapse of a year[1].

(*b*) "By the ancient law," so says Coke following Broke, "if the feoffee of a disseisor had continued a year and day, the entry of the disseisee for his negligence had been taken away." This was not the law of Bracton's day, nor of Littleton's. Conceivably it was the law of some intermediate period, but contemporary proof of this is wanting[2].

(*c*) The effect of a descent cast in tolling an entry can be prevented by the entry and claim of the true owner made within a year and day before the death of the wrongful possessor. But this cannot be very ancient law, for the rule of Bracton's day protects even the disseisor himself[3].

II. *Instances in which there has been an exercise of royal or judicial power or in which the king's rights are involved.*

(*d*) After final judgment in a writ of right strangers had a year and day, reckoned from the execution of

[1] Bracton, f. 160 *b*, 161; *L. Q. R.* IV. 34.

[2] Co. Lit. 237, 254 *b*; *L. Q. R.* IV. 289.

[3] Quiet possession for year and day played a part in the custom of the Cornish miners. Such possession gave the "bounder" a provisional protection. But whether this is very ancient I do not know. See the various Acts of the Stannary Parliaments.

the writ of seisin, for putting in their claims; if they took no advantage of this they were barred.

(*e*) So in case of a fine strangers as well as parties and privies were barred if they made no claim within year and day from the execution of the writ of seisin.

(*f*) After judgment given in an action the plaintiff may obtain a writ of execution within year and day. Only for a year and day is the judgment kept in immediate suspense over the defendant.

(*g*) In the case of an estray if the owner, proclamation being made, does not claim it within year and day, it is forfeited. The right to estrays is a royal right.

(*h*) So in the case of wreck there is no forfeiture until after year and day. The right to wreck is a royal right.

(*i*) A villein dwelling on the ancient demesne cannot be claimed if he has lived there for year and day. This also looks like an outcome of the royal prerogative.

(*k*) The king has year, day and waste of the felon's land. For year and day it is under the king's ban.

(*l*) A protection shall be allowed for year and day and no longer. A protection of course is a royal boon.

(*m*) An essoin for sickness holds good for year and day.

III. *Miscellaneous.*

(*n*) The widow or heir has year and day for an appeal of death. This rule is statutory[1]; earlier law had not allowed any so long a time.

[1] Stat. Glouc. c. 9.

(*o*) There is no murder or manslaughter if the injured man live for year and day after the injury. May not this curious rule, which still has a place in our criminal law, be an outcome of the limitation of a time for an appeal of homicide? If the period began to run from the time when the wound was inflicted[1], then an appeal could never be brought in case the victim lived on for year and day.

Now looking at this medley of rules we shall probably agree that they afford few, if any, materials for the history of the ordinary law about ownership and possession. Our first class of rules is small and does not look ancient; two of the three rules in it are not as old as Bracton, the remaining rule was uncertain in his day.

The rule again which gives claimants a year and a day for asserting their rights after a final judgment or a fine does not seem to be ancient. Bracton very distinctly says that all who are not under disability are bound so soon as the indenture of the fine is delivered to the parties. And he argues that this gives them long enough for the assertion of their rights:—the indenture is not delivered until fifteen days after the compromise has been made in court, so there are fifteen days within which claims can be made, and fifteen days is the time usually allowed for the appearance in court of a defendant who has been summoned. We thus see that the levying of a fine is regarded as a summons to all whom it may concern, and we are enabled to connect this judicial conveyance with the

[1] See 4 Rep. 42 *a*; 2nd Inst. 320.

procedure against contumacious defendants. When a tenant in a real action will not appear the land is seized into the king's hand, and, unless the tenant replevies it within fifteen days, then it will be adjudged to the demandant. So in case of the fine, the true owner has but fifteen days in which to come forward and make his protest. How this time was enlarged from fifteen days to year and day I cannot say; but this happened in the interval between Bracton and *Fleta*[1]. In one way and another therefore the term of year and day seems to have become more and more popular as a term to be set to claims of various sorts and kinds. The further back we look the more restricted is its operation, the more closely does it seem connected with prerogatival rights, or with exercises of royal or judicial power.

It must be confessed however that a very different inference has been drawn by some foreign writers from materials very similar to those that have come before us. Some remains of the old prescription, they argue, are preserved, those chiefly which interest the king or other powerful persons. Thus the rule about estrays is a relic of the old general rule. Once there was no claim for goods which for year and day had remained in the possession of a finder. The king or the lord with regalities set up a claim to the custody of stray cattle and in his favour the rule was still

[1] Bracton, f. 436; *Fleta*, f. 443. See the so-called "Statute" Modus Levandi Finis, *Statutes of the Realm*, I. 214. It is noteworthy that Glanvill does not say that a fine has any effect on the rights of strangers. We may suspect that the law about this was evolved between his time and Bracton's.

operative; after year and day they were his own. Now we ourselves have texts of the twelfth century which seem to take us back to a time when the king's claim to estrays had not yet reached its full dimensions, and yet they mention year and day as a term which bars claims[1]. But according to my comprehension of them they neither lay down nor even suggest the general rule that the loser of goods has no action for them after year and day. The person who after the lapse of that time is to be protected against claims is a person who has claimed goods and had them delivered up to him upon giving security that he will produce them in court if some other demands them. It seems presupposed that the delivery is made to him by a lord who has a court; thus he is not merely a possessor but a possessor who has obtained possession under an exercise of jurisdiction.

So again, to touch for one moment the most controverted point, there are many who would connect the safety of the villein who for year and day has dwelt in a chartered town, with the famous title *De Migrantibus*[2], and there are some who would see in that provision of the *Lex Salica* a direct proof of the primitive German prescription. The "migrans" who has settled in a township contrary to the wish of any of its members becomes safe against them after lapse of a year. In one way or another a rule which had once compelled the folk of the township to put up with the presence of an intruder was twisted so as to

[1] Leg. Will. Conq. I. 5. 6. On this see Jobbé-Duval, *Revendication des Meubles*, 21.

[2] *L. Sal.* 45.

give personal freedom to all who maintained themselves in the town for year and day. But whatever may have been the case in France, in England this rule has a very royal look; it is essentially a *privilegium*; the places in which it holds good are *loca privilegiata*, boroughs on which the king has conferred a special boon, or in later times all the manors of the royal demesne; it is much to the king's interest that his towns and his manors should be peopled[1].

On the whole, then, if we regarded only our common law the thought would probably never strike us that it contained the scattered fragments of an ancient rule under which possession continued for year and day ripened into ownership, or barred the claims of all who were not under disability.

Such is the case in the common law. But we have now to state some early evidence which has hitherto escaped attention. In the first place, there is a passage in the *Leges Henrici Primi* which may seem to imply some general rule to the effect that a person will to some extent or another be prejudiced by suffering year and day to go by without urging his proprietary claims[2]. Then again in the twelfth century

[1] Glanv. lib. v. cap. 5; Bract. 190 *b*; Brit. I. 200; Stubbs, *Introduction to Hoveden*, II. xxviii.

[2] Pueri autem ante XV. annos plenos nec causam prosequantur, nec in judicio resideant. De rebus hereditatis suae interpellatus post XV. annos defensorem habeat, vel idem respondeat, et calumpniam mittat in rebus suis ut nullus eos teneat uno anno et uno die sine contradictione, dum sanus sit et patriae pax. (Leg. Hen. 59, § 9.) The meaning of this seems to be that he who abates upon an infant heir gains none of the advantages of possession until a year and day after the heir has attained full age.

and the first part of the thirteenth some of the English boroughs, and those the most important, had charters which conferred some degree of protection upon a possession of land continued for year and day: at least if that possession had been obtained under a conveyance perfected in the borough court. Proof of this shall be given:—

Newcastle-upon-Tyne. Customs of the reign of Henry I as reported under Henry II.

Si quis terram in burgagio uno anno et una die juste et sine calumnia tenuerit non respondeat calumnianti, nisi calumnians extra regnum Angliae fuerit, vel ubi sit puer non habens potestatem loquendi. (*Acts of Parliament of Scotland*, I. pp. 33, 34; Stubbs, *Select Charters*, pt. III.)

Lincoln. Charter of Henry II.

Concedo etiam eis [civibus meis Lincolniae] quod si aliquis emerit aliquam terram infra civitatem de burgagio Lincolniae, et eam tenuerit per annum et unum diem sine calumnia, et ille qui eam emerit, possit monstrare quod calumniator extiterit in regno Angliae infra annum et non calumniatus est eam, extunc ut in antea bene et in pace teneat eam et sine placito. (*Foedera*, I. 40; Stubbs, *Select Charters*, pt. IV.)

Nottingham. Charter of Henry II.

Et quicunque burgensium terram vicini sui emerit et possederit per annum integrum et diem unum absque calumnia parentum vendentis, si in Anglia fuerint, postea eam quiete possidebit. (*Foedera*, I. 41; Stubbs, *Select Charters*, pt. IV.)

Bury St Edmunds. Statement by the burgesses of their custom in 1192 according to a chronicler of the time.

Burgenses vero summoniti responderunt se esse in assisa regis, nec de tenementis, que illi et patres eorum tenuerunt, bene et in pace, uno anno et uno die, sine calumpnia, se velle respondere

contra libertatem villae et cartas suas. (*Chron. Joc. de Brakel.* p. 56. Cam. Soc.)

London. Statement of custom, probably of the twelfth century.

Item si civis Londoniae terram aliquam per annum et diem sine calumpnia tenuerit, alicui in civitate manenti respondere non debet, nisi qui terram illam post calumpniatus fuerit talis aetatis tunc fuerit quod calumpniari eam nescierit, vel nisi longor [corr. languor?] impediat, aut in patria hac non fuerit. (Libertas Civitatum, Schmid, *Gesetze*, Anh. XXIII.)

Nottingham. Charter of John. 1200.

Et quicunque burgensium terram vicini sui emerit et possederit per annum integrum et diem unum absque calumpnia parentum vendentis si in Anglia fuerint, postea eam quiete possidebit. (*Rot. Cart.* p. 39.)

Derby. Charter of John. 1204.

The same words as in the charter of Nottingham last cited. (*Rot. Cart.* p. 138 *b.*)

Northampton. 1199–1215.

In a writ of right for lands in Northampton the tenant pleads that he has held the land for year and day, "et consuetudo ville est quod qui ita tenuerit non ponatur de cetero in placitum inde, et inde profert cartam domini regis per quam confirmat hominibus de Northantona quod nullus ponatur in placito de tenemento quod teneat infra burgum Northantone nisi secundum consuetudinem ville et ipse tenuit per unum annum et unum diem sine clamio quod ipsi apposuerunt." No judgment. (*Placit. Abbrev.* p. 76.)

York. Bracton's Treatise. 1250–60.

Item consuetudo est in comitatu (?) Eborum quod mulier infra annum a die mortis viri sui petere debet dotem suam, alioquin postmodum non audiretur. (f. 309.)

York. 1226.

Action for dower before justices in eyre. The tenant successfully pleads the following custom;—"et consuetudo civitatis est quod non debet ad tale breve respondere nisi calumpnia inde facta fuit infra annum." (Bracton's *Note Book*, pl. 1889.)

Leges Quatuor Burgorum.

Quicunque tenuerit terram suam per unum annum et unum diem quam fideliter emerit per testimonium vicinorum suorum xii in pace et sine calumpnia qui eam calumpniaverit post unum annum et diem et si fuerit in eadem regione et de etate et ipse infra dictum terminum clamium non moverit super hoc nunquam audietur. Sed si fuerit infra etatem vel extra regnum non debet amittere jus suum cum venerit ad etatem vel repatriaverit. (*Acts of Parliament of Scotland*, i. 22, 23.)

Now a rule which we find in London, York, Lincoln, Nottingham, Derby, Newcastle and the four great Scottish boroughs is a very important rule. I have not been able to find it in municipal charters later than those here cited, and I suspect that it went out of use in the course of the thirteenth century, oppressed by the common law. The Assize of Novel Disseisin in Bracton's day protected even untitled possession against extrajudicial force, so there was no great need for giving special protection to possession continued for year and day.

But what did these civic customs protect and what measure of protection did they give? To take the last point first, it seems fairly clear that they were bars not only to self-help but to judicial proceedings; they acted not as interdicts but as statutes of limitation, they conferred a final and not merely a provisional protection. But did they protect untitled possession if continued for year and day or did they merely protect titled possession? The language in which they are stated is unfortunately vague; and we may not assume that the custom was the same in all places. But the Newcastle custom requires that the possessor shall possess "juste," the Lincoln, Nottingham and Derby customs suppose that he has come to his possession by purchase; the Scottish custom supposes that he has come to his possession by purchase duly perfected in the presence of twelve of his neighbours. Having regard to the common law and to the practice prevalent in the boroughs of conveying tenements in the borough courts, we should not, I think, be unwarranted in believing that a conveyance so perfected was or had been a condition requisite to start the term of limitation, the lapse of which would bar all claims adverse to the possessor. In that case the conveyance before the borough court would be the civic counterpart of the fine levied in the king's court.

In this context we may notice that in 1200 the burgesses of Leicester obtained from the king a charter sanctioning conveyances made in their portmanmoot without any reference to year and day:—all purchases and sales of land in the town of Leicester

duly made in the portmanmoot of the said town are to be firm and stable[1]. Probably this did not give a mere licence to the Leicester folk to make their conveyances in court if they chose to do so, but gave to conveyances so perfected a special sanctity. Probably the main object of such a provision was to preclude the claims of expectant heirs. In the Scottish burghs the rule about year and day seems to have been closely connected with the vendor's obligation of first giving an option of purchase to the members of his family before he sought for a buyer outside the family circle[2], and it is certain that in England at the beginning of the thirteenth century it was still very doubtful how far our law would enable the socager to alienate his land to the disherison of his kinsmen. In the process which made the law of Bracton's day so very different from the law of Glanvill's day, the practice of conveying land in court, here by fine, there by surrender, probably played a large part; the desire for freely alienable land found vent in the use of judicial and quasi-judicial modes of conveyance.

Now it would not be an unheard-of thing for very ancient law to go on lurking in the chartered boroughs after it had been improved away from the country at large. The citizens of London, for example, went on purging themselves with oath-helpers in criminal cases long after less privileged persons had been forced to submit to trial by jury. Still in the face of what I

[1] *Rot. Cart.* 32.

[2] *Acts of Parliament of Scotland*, I. 356.

have called the negative evidence it is hard to believe that we have here the scattered fragments of a primitive English usucapio. I say "English," for the clauses that I have cited are so very similar even in their provoking reticence to clauses contained in many contemporary charters of French towns[1] that quite possibly they are of French parentage. It is indubitable that the privileges of French towns were known and envied in the English boroughs, and from France they may have borrowed this "possession annale." Thus the venue of the problem would be changed from England to France.

The problem is one in which three great countries are concerned and is not to be decided off-hand. But so far as regards our common law the English evidence seems decidedly against the supposition of a primitive prescription or usucapio effected by peaceful possession for year and day, and in favour of the supposition that the effectiveness of this brief term had its origin in exercises of jurisdictional power, in the king's ban or the court's ban. The statements that we get of civic customs are, it must be confessed, vaguer than we could wish; and what is said in the *Leges Henrici* is just enough to stimulate our curiosity. An investigation of the prevalence of the custom of conveying land in the borough courts, or of having conveyances registered in the municipal archives might throw much light on the question. At present we may conjecture that originally the only possession that could become ownership by the lapse of year and

[1] Alauzet, *op. cit.* 47; Parieu, *op. cit.* 56.

day was a possession sanctioned by real or fictitious litigation[1].

[1] In this context allusion has sometimes been made to the Welsh laws, a legal literature of very great interest which is crying aloud for a competent expositor. Now in the later versions of these laws we frequently meet with the term of year and day, and this term seems to serve as a term of limitation for claims of many different kinds, in particular for claims arising out of delicts. But, though I am utterly dependent on Mr Owen's translation, it seems to me fairly clear that the undisturbed possession of land for year and day was no bar to proprietary claims. On the contrary for such claims an enormously long time was open. No man holds his land in safety unless his father, grandfather and great-grandfather held it before him, and even then his safety is not perfect; he may have to share the land with a claimant who has yet older rights, for the right of an owner does not become utterly extinct until eight generations of his descendants have passed away. On the other hand we see that when litigated land has been adjudged to a demandant the lapse of year and day has the effect of barring the rights of the family of his vanquished opponent. (See the passages referred to by Mr Owen in his Index under "Year" and "Day," and then see such passages as Cod. Ven., bk. 2. c. 14, Cod. Gwent., bk. 2. c. 30, §§ 10, 11; Miscellaneous Laws, bk. 9. ch. 27, § 18; bk. 14. ch. 23, §§ 2, 3.)

THE INTRODUCTION OF ENGLISH LAW INTO IRELAND[1]

It is well known that under John and Henry III several ordinances were issued with the object of enforcing English law in Ireland; they are noted in Mr Sweetman's Calendar of Irish Documents. When a change was made in English law a corresponding change was made in Irish law. In searching, however, for early copies of the English *Registrum Brevium*, the register of writs current in the English chancery, I have come across evidence of a measure which seems to have escaped the attention of historians, and yet to have been of considerable importance. Henry III, in 1227, sent over to Ireland a copy of the English register, and ordained that the formulas contained in it should be used in Ireland. A copy of this ordinance is found in the Cottonian MS., Julius D. II, a manuscript which belonged to St Augustine's, Canterbury. It is found on f. 143 b, and runs thus :—

Henricus Dei gracia Rex Anglie, Dominus Hibernie, Dux Normannie et Aquietanie, Comes Andegavie, Archiepiscopis, Episcopis, Abbatibus, Comitibus, Baronibus, Militibus, Libere Tenentibus, et omnibus Ballivis et Fidelibus suis tocius Hibernie salutem. Quum volumus secundum consuetudinem regni nostri Anglie singulis conquerentibus de injuria in regno nostro Hibernie justiciam exhiberi,

[1] *English Historical Review*, July 1889.

formam brevium de cursu quibus id fieri solet presenti scripto duximus inserendam et ad vos transmittendam, ut per ea que ad casus certos et nominatos in scripto isto justicia inter vos per breve et sigillum justiciarii nostri Hibernie teneantur. Teste me ipso apud Cant' decimo die Novembris anno regni nostri xij°, etc.

Upon this there follows a *Registrum Brevium* containing between fifty and sixty writs, beginning with the "writ of right patent." The interest of this is twofold. In the first place we have a solemn and authoritative introduction into Ireland of the English system of procedure. In the second place we have an official copy, or rather a copy of an official copy, of the English Chancery Register of "writs of course (*de cursu*)" from an extremely early date. I say an extremely early date, for at present I have seen no other register so ancient, and know of but two others which can be attributed to Henry III's reign. This would not be the place in which to speak of the importance of so old a formulary in our technical legal history, but the ordinance sending the English writs into Ireland may be of more general interest.

I am in duty bound to add that, to all seeming, Henry III was not at Canterbury on 10 Nov. 1227. He was there on 30 and 31 Oct., but on 5 Nov. he was at Rochester, and from 6 to 11 Nov. he was at Westminster. Also I must add that the ordinance is not on the patent roll or the close roll for the year, nor, as I gather from Mr Sweetman's calendar, on any other extant roll. This fact may be due partly to the length of the registrum which would have filled several membranes of parchment, partly to the fact that there was no good in enrolling formulas already current in

the English chancery. As to the date, I can only guess either that the transcriber wrote "decimo" (in letters, not figures) in mistake for some other word[1], or that the copying of the writs took some days, and that the date of the ordinance was left in blank until the registrum was ready for transmission to Ireland. It will be observed that the king was at Canterbury within ten days or a week of the date thus given, and that the document is found in a Canterbury book. I cannot pretend to skill in palaeography, but the hand-writing of the part of the Cottonian MS. that is in question seems to me nearly as old as the transaction which it records, while that the register belongs to the early years of Henry's reign is, as I think, very clear indeed from internal evidence.

[1] Possibly the mistake arose from the numeral "1°" being read as "10."—Ed. *E. H. R.*

THE SURNAMES OF ENGLISH VILLAGES[1]

ONE of the great difficulties that has to be met if we attempt to picture to ourselves free village communities upon English soil lies in the fact that the vill or township of historic times has, as such, no court. I say "vill or township," for we have long ago come to use these words as synonyms. Mediaeval Latin was in this respect a more precise language than that which we now use, for it distinguished between the *villa* and the *villata*, between the *town* and the *township*, between the geographical area and the body of inhabitants. I am far from saying that this distinction was always observed, still it was very generally observed: the *villa* is a place, the *villata* a body of men. If a crime takes place in the *villa* of Trumpington, the *villata* of Trumpington ought to apprehend the criminal, and may get into trouble if it fails to perform this duty. Our present use of words which fails to mark this distinction seems due to our having allowed the word *town*, the English equivalent for *villa*, to become appropriated by the larger *villae*, by boroughs and market towns, while no similar restriction has taken place as regards the word *township*. Thus

[1] *The Archæological Review*, Nov. 1889.

Trumpington, we say, is not a town, it is a vill or township, and as nowadays few, if any, legal duties lie upon the inhabitants of a *villa* as such, we use the word *township* chiefly, if not solely, to denote a certain space of land, without even connoting a body of inhabitants with communal rights and duties. It is noticeable that in France also the word *ville*, which formerly was equivalent to our *vill* or *township*, has become equivalent to our *town* in its modern sense. I may add that, as a general rule, the modern "civil parish" may be taken to represent the vill or township of the later middle ages. The story of how it lost its old name and acquired a new one is somewhat complicated, involving the history of the poor-law. But the rough general result is that the old vill is the district now known for governmental purposes as "a civil parish."

But this by the way. Our present point is that the vill or township of historic times, or at least of feudal times, has as such no court. Why we must insert the cautious words "as such" will be obvious. The vill may well be a manor, and the manor will have a court. We may say somewhat more than this, for though in law there is no necessary connection between manor and vill, still in fact we find a close connection. Very often manor and vill are conterminous, and, when this is not the case, the manor is often found to lie within the limits of a single vill. And the further back we go the closer seems the connection, the commoner is it to find that vill and manor coincide. The reason why the connection seems to grow closer as we go backwards is, I take it,

this: that men were free to create new manors for a considerable time after it had become impossible for them to create new vills. The vill had become a governmental district not to be altered save by the central government. But, close though the connection may be, the vill and the manor are, if I may so speak, quantities of different orders. We may even be tempted for a moment to say that the vill is a unit of public law, the manor a unit of private law; the vill belongs to police law, the manor to real property law. But though there would be some truth in such sayings as these, we must reject them. The very essence of all that we call feudalism is a denial of this distinction between public and private law, an assertion that property law is the basis of all law. And turning to the matter now before us, we have only to repeat that the manor has a court, in order to show that the manor cannot be treated as merely an institute of what we should call private law.

Well, the difficulty to which I have alluded is this, that the township or vill has, as such, no court. In all the Anglo-Saxon dooms there seems no trace of the court of the township. The hundred is the lowest unit that has a tribunal; the "township moot," if it exists, is not a tribunal. But it is very hard to conceive a "village community" worthy of the name which has no court of its own. When we look at the village communities, if such we may call them, of the feudal age, when we look at the manors, we see that the court and the jurisdiction therein exercised are the very essence of the whole arrangement. All disputes among the men of the manor about the lands of the

manor can be determined within the manor. Were this not so the manor would fall to pieces, and when in course of time it ceases to be so the manor becomes insignificant—is no longer in any real sense a community. A village community that cannot do justice between its members is not much of a community; its customs, its by-laws, its mode of agriculture, it cannot enforce; to get them enforced it must appeal to a "not-itself," to the judgment of outsiders, of jealous neighbours who will have little care for its prosperity or for the maintenance of its authority over its members. Our English evidence as to pre-feudal times seems, at least on its surface, to show that "the agricultural community," or township, is no "juridical community," by which I mean that it has no power *jus dicendi*; the hundred is the smallest "juridical community." This is a real difficulty, and it is apparently compelling some of us to believe that the township never was a "free village community"; that from the first the force that kept it together, that gave it its communal character, was the power of a lord over serfs, a power which in course of time took the mitigated form of jurisdiction, but which had its origin in the relation between slave and slave-owner.

Now I cannot but think that some evidence about these things might yet be discovered in that most wonderful of all palimpsests, the map of England, could we but decipher it; and though I can do but very little towards the accomplishment of this end, I may be able to throw out a suggestion (not, it must be confessed, a very new one) which may set more competent inquirers at work. That suggestion, to

put it very briefly, is this: that there may have been a time when township and hundred were identical, or rather—for this would be the better way of putting it—when the hundred, besides being the juridical community, was also an agricultural community. For this purpose I will refer to some evidence which seems to show that the vill of ancient times was often a much larger tract of land than the vill of modern times; that the area belonging to an agricultural community was not unfrequently as large as the area of some of our hundreds.

An English village very commonly has a double name, or, let us say, a name and a surname; it is no mere Stoke, but Stoke d'Abernon, Stoke Mandeville, Bishop's Stoke. These surnames often serve to mark some obvious contrast, as between Great and Little, in the west country between Much and Less, between Upper and Lower, Higher and Nether, Up and Down, Old and New, North and South, East and West; sometimes the character of the soil is indicated, as by Fenny and Dry; sometimes the surname is given by a river, often by the patron saint of the village church. Often, again, it tells us of the rank of the lord who held the vill; King's, Queen's, Prince's, Duke's, Earl's and Sheriff's, Bishop's, Abbot's, Prior's, Monks', Nuns', Friars', Canons', White Ladies', Maids', and their Latin equivalents, serve this purpose. Often, again, we have the lord's family name, d'Abitot, d'Abernon, Beauchamp, Basset, and the like; sometimes it would seem his Christian name, as in Hanley William and Coln Roger. In all this there is nothing worthy of remark, for if a place has started with a name

so common as Stoke, Stow, Ham, Thorpe, Norton, Sutton, Newton, Charlton, Ashby, or the like, then sooner or later it must acquire some surname in order that it may be distinguished from the other villages of the same name with which the country abounds. It is not to our present purpose to point out that a good deal of history is sometimes involved in a very innocent-looking name; that, for example, the beck which gives its name to Weedon Beck is not in Weedon but in Normandy, still less to dwell on such curiosities as Zeal Monachorum, Ryme Intrinseca, Toller Porcorum, Shudy Camps and Shellow Bowells.

But very often we find two or more contiguous townships bearing the same name and distinguished from each other only by what we call their surnames. Cases in which there are two such townships are in some parts of England so extremely common as to be the rule rather than the exception. If, for example, we look at the map of Essex we everywhere see the words Great and Little serving to distinguish two neighbouring villages. Cases in which the same name is borne by three or more adjacent townships are rarer, but occur in many counties. Thus, in Herefordshire, Bishop's Frome, Castle Frome, Canon's Frome; in Worcestershire, Hill Crome, Earl's Crome, and Crome D'Abitot; in Gloucestershire, Coln Dean, Coln Rogers, Coln St Alwyn's; in Wiltshire, Longbridge Deverill, Hill Deverill, Brixton Deverill, Monkton Deverill, Kingston Deverill, also Winterbourne Dantsey, Winterbourne Gunner, Winterbourne Earls. Two patches of villages in the county of Dorset bear this same name of Winterbourne: in one place we find

Winterbourne Whitchurch, Winterbourne Kingston, Winterbourne Clenston, Winterbourne Stickland, Winterbourne Houghton; in another, Winterbourne Abbots and Winterbourne Steepleton. In the same county is the group of Tarrant Gunville, Tarrant Hinton, Tarrant Launceston, Tarrant Monkton, Tarrant Rawstone. On the border of Berkshire and Hampshire lie Stratfield Mortimer, Stratfield Turgis, and Stratfield Saye. Essex is particularly rich in such groups; close to Layer Marney, Layer de la Hay, and Layer Bretton, are Tolleshunt Knight's, Tolleshunt Major, and Tolleshunt Darcy; in the same county are High Laver, Little Laver, and Magdalen Laver; Theydon Gernon, Theydon Mount, Theydon Bois; also (and this is perhaps the finest example) High Roding, Roding Aythorpe, Leaden Roding, White Roding, Margaret Roding, Abbots' Roding, Roding Beauchamp, and Berners Roding. In Suffolk we find Bradfield St George, Bradfield St Clare, and Bradfield Combust; Fornham St Martin, Fornham All Saints, Fornham St Genevieve; while six neighbouring villages bear the name South Elmham, and can be distinguished from each other only by means of their patron saints.

That, taken in the bulk, these surnames are not primaeval is very obvious. There is no need to point out that many of them cannot have been bestowed by heathens, that they imply a great ecclesiastical organization, with its bishops, abbots, priors, monks, nuns, churches, steeples, crosses, and patron saints, for it is plain enough that many others are not so old as the Norman Conquest. Indeed, many of the family names which have stamped themselves on the map of England

do not even take us back to the Conquest: they are the names not of the great counts and barons who followed Duke William and shared the spoil, but of families which rose to greatness on English soil in the service of the King of England; the Bassets, for example, are men who leave their mark far and wide. Ewias Harold and Stoke Edith in Herefordshire seem to tell of very ancient days (D. B., I. 183, 186); but such instances are rare. On the whole the inference that the map suggests is that these surnames of our villages did not become stereotyped before the end of the thirteenth century. And this is borne out by the usage of that time; one spoke then not simply of Weston Mauduit, Maisey Hampton, Eastleach Turville, but of Weston of Robert Mauduit, Hampton of Roger de Meisy, Eastleach of Robert de Tureville; a change of lord might still cause a change of name. The surnames of Prince's Risborough and Collingbourn Ducis can hardly belong even to the thirteenth century.

If now we turn to Domesday Book, not only do we see that many of these surnames are of comparatively recent date, but also we shall begin to suspect that many of our villages cannot trace their pedigrees far beyond the Norman invasion. In general, where two neighbouring modern villages have the same name, Domesday does not treat them as two. Let us look at the very striking case of the various Rodings or Roothings which lie in the Dunmow hundred of Essex. Already six lords have a manor apiece "in Rodinges"; but Domesday has no surnames for these manors: they all lie "in Rodinges." It is so with the

various Tolleshunts in the Thurstable hundred: there are many manors "in Tolleshunta." It is so with the numerous Winterbournes, with the Tarrants, with the Deverills. Now it might be rash to argue that the governmental geography of the Confessor's day treated the whole valley of the Roding as an undivided unit, that the whole of Tolleshunt formed one township, the whole of Deverill another; there may have been many townships as well as many manors "in Rodinges," though they had not yet acquired names, or officially recognised names. In some cases we seem to see the process of fission or subdivision actually at work. Domesday does give us a few surnames, but they are of a curious kind; by far the commonest are "Alia," and "Altera." Thus the two adjacent villages in Huntingdonshire which were afterwards known as Hemingford Abbot's and Hemingford Gray appear as Emingeforde and Emingeforde Alia. So we find Odeford and Odeford Alia, Pantone and Pantone Alia, and so forth. This clumsy nomenclature forcibly suggests that the two Hemingfords were already two, but had not long before been one. People are beginning to allow that Hemingford is not one village, but two villages; as yet, however, they can only indicate this fact by speaking of Hemingford and "the other Hemingford," "Hemingford No. 2."

Now these facts seem to suggest that in a very large number of cases the territory which was once the territory of a single township or cultivating community has, in course of time, perhaps before, perhaps after the Norman Conquest, become the territory of several different townships; or, to put it another way,

that the township of the later middle ages is by no means always the representative of a primitive settlement, but is, so to speak, one of several coheirs among whom the lands of the ancestor have been partitioned. We need not, of course, believe that the phenomenon has in all cases the same cause. From the first, some of these settlements may have borne double names; a number of settlements along a winter-bourne may have borne the name of the stream, and have been distinguished from each other as the king's town on the winter-bourne, the monk's town on the winter-bourne, and so forth. This may have been so, though Domesday does not countenance any such supposition; but, at any rate, it is difficult to imagine that this is the correct explanation of any large number of instances. We can hardly believe, for example, that six different bodies of settlers sat down side by side, each calling its territory "South-Elm-Ham." The object of giving a name to a district is to distinguish it from other districts, but more especially from such as are in close proximity to it. We can hardly believe that, on a space of ground which had only one name, there had always been two or more different communities, each with its own fields and its own customs.

We thus come to think of the township—or if that term be open to objection, I will say, the lowest nameable geographical unit—of very ancient times as being in many cases much larger than the vill or township of the later middle ages, or our own "civil parish." In many cases we must throw three of these vills together in order to get the smallest area that had a name, and was conceived as a whole. We thus

seem to make the vill approach the size of a hundred. But what is the size of a hundred? This question may well remind us of the story of the witness who referred to "the size of a piece of chalk" as to a known cubic measure. The size of the hundred as it has come down to us may vary from 2 square miles to 300. But it is well known that the large hundreds have, generally speaking, all the appearance of being more modern than the small hundreds. It is to those counties that were the first to be settled by German invaders, to Kent, and Sussex, and Wessex, that we must go for our small hundreds. The Kentish hundred is quite a small place; there are several instances in which it contains but two parishes, and therefore (for I think that this inference may be drawn as regards this part of England) but two vills: indeed, if I mistake not, there is a case in which the hundred contains but one parish, and another in which it contains but part of a single parish. There are many hundreds in the south of England which hold but six, five, four parishes.

Thus, as we look backwards, we seem to see a convergence between the size of the township and the size of the hundred, and even were the convergence between them so slight that they would not meet unless produced to a point which lies beyond the limits of history and beyond the four seas, we shall thus be put upon an inquiry which might lead to good results. It seems, for example, a possible opinion that, though if we take any of our manorial courts and trace back its history, we shall not be able to trace it further than the age of feudalism or of incipient

feudalism, shall never find that court existing as a court without a lord, still there may well have been a time when the agricultural community, the community which had common fields, had also a communal court, a court constituted by free men, and a court without a lord, a court represented in later days by the court of a hundred. Into such speculations I cannot venture, but the map of England suggests them[1].

[1] Speculations of this kind are also suggested by Lamprecht's *Deutsches Wirthschaftsleben*, and by Kemble's theory of the "mark." Of course I do not mean that the now existing hundreds of middle and northern England were ever agrarian communities; they may well from the first have been mere administrative and jurisdictional divisions, like our modern county court districts and petty sessional divisions, the model for such divisions having been found in the south of England, where already the hundred had lost its economic unity and become a jurisdictional division containing several townships or agrarian communities.

NORTHUMBRIAN TENURES[1]

In the thirteenth century there might be found in Northumbria—by which name I intend to include our five northernmost counties—certain tenures of land bearing very ancient names; there were still thegns holding in thegnage and drengs holding in drengage. These tenures, though common enough in the north, seem to have given the lawyers at Westminster a great deal of trouble by refusing to fit neatly into that scheme of holdings—frankalmoign, knight's service, serjeanty, socage, villeinage—which was becoming the classical, legal, scheme. Were they military tenures or were they not? They had features akin to those of serjeanty, other features akin to those of socage; nor were there wanting yet other features which according to some generally accepted rules would have been deemed to be marks of villeinage. I propose to collect here a little of what may be learnt about them.

And in the first place let us remark that in Northumbria the duty of military service occasionally appears under a very antique name; it is still "the king's utware." When a man is making a feoffment, it is of course a very common thing that besides reserving some service to be done to himself, he should also stipulate that the

[1] *English Historical Review*, Oct. 1890.

feoffee should discharge the service which the land owes to any overlords that there may be, and in particular the service, usually military service, that it owes to the king. Such a stipulation is, we may say, the medieval equivalent for the clause common in modern leases which throws on the tenant the burden of rates and taxes. So the feoffor stipulates for rent, or it may be for prayers, *pro omni servicio salvo regali servicio*, or *salvo forinseco servicio*; for, as Bracton explains, the service which was due from the tenement to the king while it was in the feoffor's hands is "forinsec service" as between the feoffor and the feoffee; it, so to speak, stands outside and is foreign to the bargain that they are making[1]. On the other hand, the feoffor may undertake that he himself will see to the discharge of this forinsec service. Now in Northumbrian charters, instead of reading about "royal service" or "forinsec service," we frequently read of the king's "utware":—thus one gives land *liberam et quietam ab auxilio et ab omni alia consuetudine excepta uthware quae ad dominum Regem pertinet*[2]—*libere et quiete nominatim a servicio Regis quod dicitur utware*[3]—*et a servicio Regis quod dicitur Wtware*[4]. Sometimes as between feoffor and feoffee it is the one of them, sometimes it is the other of them, who is to be answerable for the "utware." On

[1] Bracton, f. 36: "et ideo forinsecum dici potest quia sit [*corr.* fit] et capitur foris sive extra servitium quod sit [*corr.* fit] domino capitali." Note that a tenant's *dominus capitalis* is his *immediate* lord.

[2] *Rievaulx Cartulary* (Surtees Soc.), p. 215.

[3] *Newminster Cartulary* (Surtees Soc.), p. 19.

[4] *Newminster Cartulary*, pp. 86, 87, 118, 119.

meeting with such clauses our thoughts will at once go back to the well-known fragments of ancient English law, which teach us the rights of the thegn who had five hides to the king's utware, and of the ceorl who was so rich that he had five hides to the king's utware[1]. That this term had once referred to military duty there seems no doubt, and I think that it must have the same meaning in the charters of the twelfth and thirteenth centuries. It is a northern equivalent for *regale servicium* or *forinsecum servicium*, and though these terms were wide enough to cover other services besides military service, though they would for example cover the duty of doing suit to the communal courts, still the pleadings of the thirteenth century constantly put before us scutage as the typical royal and forinsec service, the incidence of which feoffors and feoffees have to settle by their agreements. Even in the fourteenth century the drengage tenants of the bishop of Durham were still nominally liable to do "outward," though whether they well knew what this meant may perhaps be doubted[2].

Another term frequently meets us which demands some explanation since it has become a progenitor of myths, namely, "cornage." Every one knows Littleton's tale about the tenants by cornage in the marches of Scotland, who are bound to wind their horns when they hear that the Scots will enter the realm[3]. Obvi-

[1] Schmid, *Gesetze*, Anh. v. 3; Anh. VII. 2, § 9.

[2] Bp. Hatfield's *Survey* (Surtees Soc.), p. 9: *et facit outeward in episcopatu quantum pertinet ad iiij. partes unius dringagii*; p. 10: *et faciunt oughtward quantum pertinet ad iiij. partes j. dringagii.*

[3] *Tenures*, sec. 156.

ously it is an idle tale; one glance at the Boldon Book will teach us that. We cannot suppose that vast masses of men held by this horn-blowing tenure; but they paid cornage. It will be shown hereafter that near two centuries before Littleton's day, the origin of the payment had become obscure, and that the Northumbrians had already invented another fable about it, quite as marvellous as that which Littleton repeated. A passage in the one extant Pipe Roll of Henry I's day will direct our eyes to a more hopeful quarter. The see of Durham is vacant and the custodian of the temporalities accounts to the king for 110*l.* 5*s.* 5*d.* *de cornagio animalium episcopatus*[1]. A charter of Henry I is pleaded in John's day by which the king gives land which belonged to certain of his drengs to Hildred of Carlisle, "rendering to me yearly the *gablum animalium* as my other free men both French and English who hold of me in chief in Cumberland render it[2]." Often in northern charters we read of *neutegeld et horngeld.* In 1200, Gilbert fitz Roger fitz Reinfred held land in Westmoreland and Kendal by paying 14*l.* 6*s.* 3*d.* per annum of neutegeld. He obtained the king's charter commuting his service into that of one knight[3]. In 1238 a Cumbrian tenant holds by cornage *quod Anglice dicitur horngeld*[4]. Cornage, horngeld, neutgeld, beasts' gafol, must in all probability have originally been a payment of so much per horn, or per head for the beasts which the tenant kept and turned out on the common pasture. But we only

[1] *Pipe Roll*, 31 Hen. I, p. 131.

[2] *Plac. Abbrev.* p. 67. The printed book has *Tablum animalium.*

[3] *Rot. Cart.* p. 50.

[4] Bracton's *Note Book*, pl. 1270.

know it as a fixed sum, a sum which does not vary from year to year; very commonly a township as a whole is liable to pay a lump sum for cornage. Name and thing were known in Normandy also. Delisle gives an instance from 1451: Jean du Merle says that in his land of Briouse he has a right called cornage, that is to say, so much for every beast[1]. A much earlier instance may be found in a charter of 1099 by which Richer de Laigle grants the monks of St Evroul freedom from cornage, passage, and toll[2]. The interest of Littleton's fable does not lie within the fable itself, for that belongs to a very common class of antiquarian legends[3], but in the necessity for it. We only know cornage as a fixed and substantial money rent; as such it appears even in surveys of the fourteenth century; but according to Littleton tenure by cornage is not reckoned as a mode of socage, it is accounted sometimes a tenure by grand serjeanty, sometimes a tenure by knight's service[4]. How can this be?

We turn to the fate of the northern thegns and drengs. Thegns, of course, are to be found in all parts of Domesday Book; but we have special information as to certain thegns who held of the king in the land between the Ribble and the Mersey. Here the thegn is generally described as holding a *manerium*—one of them holds six *maneria*—though the hidage of their

[1] *Études sur la condition de la classe agricole en Normandie*, p. 65.

[2] Appendix to Prevost's edition of *Ordericus Vitalis*, vol. v. p. 195.

[3] See in *Whitby Cartulary* (Surtees Soc.), I. 129, Mr Atkinson's very interesting note about the duty of *horngarth*.

[4] Littleton, *Tenures*, sec. 156.

manors is small. They pay a rent of 2 ores per carucate; "by custom" they, "like the villani," make houses for the king, and fisheries, and inclosures, and buck-stalls (*stabilituras*) in the woods, and on one day in August they send their reapers to reap the king's crops; the heir pays forty shillings for his father's land; if one of them wishes to quit the king's land he must pay forty shillings, and may then go where he pleases; the criminal tariff applicable to them is in some respects unusually mild; they attend the shiremoot and the hundredmoot. They seem bound to obey the orders of the serjeant of the hundred when he bids them go upon the king's service—this probably implies military duty—but if they make default they only pay a fine of four shillings. In close contact with these thegns we find a group of "drengs"—a name rare in Domesday Book—they hold a manor apiece, but of their service we have no particulars[1]. The tenure of these Lancashire thegns, if it is continued, will certainly provide a pretty puzzle for lawyers.

Next in the Boldon Book we may read much of the bishop of Durham's drengs. The typical dreng is described as feeding a dog and a horse, going to the bishop's great chase with two greyhounds and five cords, doing suit of court and carrying messages (*sequitur placita et vadit in legationibus*); sometimes he does boon works with all his men[2].

We soon come upon entries which, when read together, are perplexing. In Henry I's time the

[1] Domesday, I. 269 b.

[2] *Ibid.* IV. *e.g.* pp. 574, 580, 581, 583.

guardian of the temporalities of Durham, after accounting for the cornage of beasts and the *donum* of the knights, accounts for what is due *de tainis et dreinnis et smalemannis inter Tinam et Teodam*[1]. Are not the *smalemanni* of Durham the compeers of the *minuti homines* of Yorkshire and other counties? In Henry II's reign an account is rendered of "the aid of the boroughs and vills and drengs and thegns" of Northumberland[2]. Some years earlier the knights and thegns of the same county had joined in a *donum*[3]. Under Richard I the thegns and drengs of Northumberland paid tallage[5]. Under Henry III the thegns of Lancashire paid fifty marks to be quit of the tallage that had been imposed upon them[4]. A mandate of 1205 speaks of the serjeanties, thegnages, and drengages of the honour of Lancaster that have been alienated[5]. In John's reign thegns and drengs of Westmoreland and Northumberland paid fines to save themselves from military service in Normandy[6]; and this was early in the reign, while the law of the land was still respected. But a tenant who is bound to attend the king's banner even in Normandy, and who is subjected to tallage when he is at home, is not he a living contradiction in terms? But what shall we say of a tenant who must pay a fine when his daughter marries, and whose heir will be in ward to the lord? Is not this an amazing confusion of tenures, of the noblest with the basest, of chivalry with servility?

[1] *Pipe Roll*, 31 Hen. I, p. 101.
[2] Madox, *Exch.* I. 130.
[3] *Ibid.* 698.
[4] *Ibid.* 417.
[5] *Rot. Cl.* I. 55.
[6] Madox, *Exch.* I. 659.

Opinion fluctuates. In 1224 a general summons for military service was issued for the siege of Bedford, then occupied by Fawkes of Breauté. The sheriff of Cumberland was forbidden to distrain Richard of Levinton, since he did not hold of the king in chief by military service, but held by cornage only[1]. A few years later we hear of a tenant who holds by cornage, and is bound to follow the king against the Scots, leading the van when the army is advancing, bringing up the rear during its return[2]. This looks like an ancient trait, for at the time of the Conquest there were men on the Welsh march who were bound to a similar service, to occupy the post of honour when the army marched into Wales or out of Wales[3]. Among the documents which have been published under the title *Testa de Neville* are some important entries. One which seems to belong to Edward I's time mentions a number of tenants by cornage in Cumberland, and then adds, "All these tenants by cornage shall go at the king's command in the van of the army in the march to Scotland, and in the rear on its return." Some of them are considerable persons holding entire vills[4]. In Northumberland, we are told, the barony of Hephale was held by thegnage until King John commuted the thegnage into a knight's fee[5]. John's charter we have; the holder of the barony had formerly paid the king fifty shillings *nomine thenagii*[6]. We read of men who hold whole vills in thegnage, and who yet pay merchet

[1] *Rot. Cl.* i. 614.
[2] Bracton's *Note Book*, pl. 1270.
[3] Domesday, i. 179.
[4] *Testa*, pp. 379–381.
[5] *Testa*, p. 393.
[6] *Rot. Cart.* p. 51.

and heriot. Comparing two documents, we find that in the thirteenth century the distinction between thegnage and drengage is but little understood. One John of Halton holds three vills, Halton, Claverworth, and Whittington, in drengage (another account says thegnage), of the king; he pays forty shillings a year, pays merchet and aids, and does all customs belonging to thegnage[1]. Often the Northumbrian tenant in drengage or thegnage pays cornage, and must do *truncage*, i.e. must carry timber to Bamborough castle—a relic, is it not, of that *arcis constructio* which was a member of the *trinoda necessitas*[2]? Sometimes it is distinctly said that his services have not been changed since the days of William the Bastard. In Lancashire, also, there are many men who hold in thegnage; the duties mentioned are the payment of money rents and the finding of one judge (*judicem*), seemingly for the hundred and county courts. In passing, we notice a Lancashire entry about a serjeanty, which consists in blowing a horn before the king when he enters or leaves the county[3]:—are men already beginning to dabble in etymology and to seek an origin for cornage?

By comparing one of the entries with the Hundred

[1] *Testa*, pp. 389, 393.

[2] The *Newminster Cartulary*, p. 269, contains an interesting charter by Edgar, son of Earl Gospatric; he confirms to his sister a gift, made by his father, of land to be held in frankmarriage, *exceptis tribus serviciis, videlicet, communis exercitus in com*[*itatu*] *et cornagio et commune opus castelli in com*[*itatu*]. Here, we may say, is a modern version of the old clause about the *trinoda necessitas*. By a charter of King John the lands of the Abbey of Holmcoltram are freed from "castelwerks"; *Monasticon*, v. 506.

[3] *Testa*, p. 409.

Roll of 1275, we get the result that, in the opinion of some, drengage is free socage. A certain Henry of Millisfen holds Millisfen in chief of the king. One account of his tenure is that he holds in drengage, paying thirty shillings rent, doing *truncage* to Bamborough, paying tallage, cornage, merchet of sixteen shillings, heriot of sixteen shillings, relief of sixteen shillings, and forfeit of sixteen shillings; he ploughs once a year with six ploughs, reaps for three days with three men, owes suit of mill and pannage[1]. Elsewhere his services are described in much the same way, though merchet and heriot are not mentioned, and he is said to hold in free socage[2].

All this is extremely puzzling at Westminster. There the question takes this shape: Shall the lord have wardship and marriage of tenants in drengage and tenants in thegnage? Wardship and marriage have become extremely important things; service in the army by reason of tenure is fast becoming an archaism, for the time for distraint of knighthood and commissions of array is at hand. In 1238–9, it was decided that the wardship of the land of Odard of Wigginton belonged to the king, for Odard held of the king by serjeanty, to wit, that of going to Scotland in the van of the king's army and returning in the rear; "besides, he paid cornage[3]." In or about 1275, the barons of the Exchequer certified that a man, lately dead, held of the king in chief the vill of Little Rihull in Northumberland by a rent of twenty shillings, and a payment of fourteen pence for cornage, and that they

[1] *Testa*, p. 389. [2] *Rot. Hund.* II. 18.

[3] Bracton's *Note Book*, pl. 1270.

could not find that the king had ever had wardship of any of this man's ancestors; but this proved little, for no minority had occurred for some while past. They add, "Of all your tenants in chief by cornage in Cumberland and Westmoreland wardship and marriage are due to you; but we have not yet discovered whether they are due to you of those who hold of you by cornage in Northumberland[1]." Then in 1278 a case, which evidently was regarded as very difficult, came before the justices of the bench, and afterwards before the king's council. Robert de Fenwick held two manors in Northumberland of Otnel de l'Isle *in drengagio*. Agreement was made between them that the service of drengage should be remitted, and that Fenwick should hold of Otnel, rendering an annual rent of one hundred shillings, and doing whatever forinsec service was due from the said manors. The question was whether this tenure gave wardship in chivalry, to which the answer was that it did not. All depended on the nature of the "forinsec service" (if any) that Fenwick had to do. The jurors were asked what this forinsec service was. They replied, cornage and fine of court (*finis curiae*). Questioned as to what they meant by this, they told a wonderful story. Cornage and court fine, said they, are payments made to the king by the suitors of the county, hundred, and baronial courts for the remission of certain royal rights. A sum of fifty pounds a year is paid in respect of cornage (seemingly by some group of suitors, for the payment is a heavy one) to be quit of the following custom, namely, that if a man be impleaded and do not "defend"

[1] *Cal. Geneal.* 501.

(i.e. deny) the plaint word by word he shall be at once convicted. For "fine of court" fifty pounds was paid to the king twice in seven years for freedom from the following custom, namely, that the king's bailiff should come and sit in the baron's court and hear the pleas, and that so soon as the suitors should do anything against the law and custom of the realm, the king's bailiff should amerce them. The case was heard by eight justices and some other members of the council. They held that drengage is *certum servitium et non servitium militare*, also that cornage and fine of court are *certa servitia et non servitium militare*[1]. That the origin of cornage had been forgotten seems pretty plain. About the winding of horns there is no word[2].

The later history of these once common tenures might be an interesting theme. Probably many of them fell into the evergrowing mass of free socage; a few, by aid of the fable of the hornblowers, may have been still regarded as serjeanties, or as military tenures, at a time (and this occurred long before Littleton's day) when the military tenures were no longer military, except in name and in legal tradition. Again, it may be strongly suspected that many of the tenures in drengage went to swell the mass of "customary free-

[1] *Coram Rege Roll*, Pasch. 6 Edw. I, No. 37, m. 14d., No. 38, m. 7; imperfectly reported in *Plac. Abbrev.* p. 194.

[2] In a charter of Gospatric, son of Orm, for Holmcoltram, as given in the *Monasticon*, v. 609, the grantor undertakes to do for the monks *omne forense et terrenum servicium quodcunque ad dominum regem pertinet, scilicet de Noutegeld et Ondemot.* Noutegeld is probably the same as *cornage*; what *ondemot* may be I cannot guess, though it must be a moot of some kind; is it simply the hundred-moot?

holds" which appear in the north of England. In Bishop Hatfield's *Survey*, the tenants *in dringagio* are kept apart from the *libere tenentes* on the one hand, and from the *bondi* on the other. Indeed it might, I believe, be shown that the successors of these thegns and drengs went on doing their military, but not knightly, service in the Tudor age long after a summons of the feudal array had become a mere name. It was thus that in 1577 the council of the North spoke of certain tenants of the dean and chapter of Durham: "The said tenants be bounde by the custome of the countreye, and the orders of the borders of Englande annenst Scotlande to serve her majesty, her heirs and successors at everie tyme, when they be commanded in warrelike manner upon the fronteres or elsewhere in Scotlande by the space of fyftene daies without waiges[1]." And the tenants, who were disputing with their lords whether they had a right to the renewal of their lifehold estates, insisted on this same military feature of their tenure, namely, "serveing the Quene's Majestie and her noble progenitors upon the borders of Skotland at the burneinge of the Beken, or upon comaundment from the Lord Warden with horse and man upon their oune charges, by the space of fiftene daies at every time accordinge to the laudable use and custome of tennant right their used[2]." It looks as if the king's *utware* had outlived knight's service; but these tenants failed in their endeavour to establish a laudable use and custom of tenant right,

[1] *Rolls of the Halmotes of the Prior and Convent of Durham* (Surtees Soc.), p. xxxviii.

[2] *Ibid.* p. xliii.

and seem ultimately to have sunk into the position of mere tenants for life without right of renewal.

However it is rather of early than of late times that I would here speak. In Northumbria we seem to see the new tenure by knight's service, that is by heavy cavalry service, superimposed upon other tenures which have been, and still are in a certain sort, military. In Northumbria there are barons and knights with baronies and knights' fees; but there are also, thegns and drengs holding in thegnage and drengage, doing the king's *utware*, taking the post of honour and of danger when there is fighting to be done against the Scots. But as with the Lancashire thegns of Domesday Book, so with these thegns and drengs of a somewhat later day, military service is not the chief feature of their tenure—in a remote past it may have been no feature of their tenure, rather their duty as men than their duty as tenants—they pay substantial rents, they help the king or their other lord in his ploughing and his reaping, they must ride on his errands. They even make fine when they give their daughters in marriage; they, these holders of whole manors and of whole vills, of whose unfreedom there can be no talk, pay merchet. They puzzle the lawyers because they belong to an old world which has passed away. Perhaps Northumbria is hardly the part of England to which we should have looked for the most abundant relics of this old world; but surely it is only as such that we can explain the thegnage and drengage of the twelfth and thirteenth centuries.

THE HISTORY OF THE REGISTER OF ORIGINAL WRITS[1]

I.

De Natura Brevium, Of the Nature of Writs,—such is the title of more than one well-known text-book of our mediæval law. Legal Remedies, Legal Procedure, these are the all-important topics for the student. These being mastered, a knowledge of substantive law will come of itself. Not the nature of rights, but the nature of writs, must be his theme. The scheme of "original writs" is the very skeleton of the Corpus Juris. So thought our forefathers, and in the universe of our law-books, perhaps in the universe of all books, a unique place may be claimed for the *Registrum Brevium,*—the register of writs current in the English Chancery. It is a book that grew for three centuries and more. We must say that it grew; no other word will describe the process whereby the little book became a big book. In its final form, when it gets into print, it is an organic book; three centuries before, it was an organic book. During these three centuries its size increased twenty-fold, thirty-fold, perhaps fifty-fold; but the new matter has not been just mechanically added to the old, it has been assimilated by the old; old and new became one.

[1] *Harvard Law Review*, Oct. 15, 1889.

It was first printed in Henry VIII's reign by William Rastell. Rastell's volume contained both the Register of Original Writs and the Register of Judicial Writs. The former is dated in 1531; at the end of the latter we find accurate tidings—"Thus endyth thys booke callyd the Register of the wryttes oryggynall and judiciall, pryntyd at London by William Rastell, and finished the xxviii day of September in the yere of our lorde 1531 and in the xxiii yere of the rayne of our soverayn lord kyng Henry the eyght." Whether this book was ever issued just as Rastell printed it I do not know; what I have seen is Rastell's book published with a title-page and tables of contents by R. Tottel, in 1553. In 1595 a new edition was published by Jane Yetsweist, and in 1687 another, which calls itself the fourth, was printed by the assigns of Richard and Edward Atkins, together with an Appendix of other writs in use in the Chancery and Theloall's Digest. In 1595 the publisher made a change in the first writ, substituting "Elizabetha Regina" for "Henricus Octavus Rex"; the publisher of 1687 was not at pains to change Elizabeth into James II. In other respects, so far as I can see from a cursory examination of Rastell's book (which I am not fortunate enough to possess), no changes were made; the editions of 1595 and 1687 are reproductions of the volume printed in 1531, and the correspondence between them is almost exactly, though not quite exactly, a correspondence of page for page.

Coke speaks of the Register as "the ancientist book of the law[1]." In no sense can we make this

[1] Preface to 9 Rep.

saying true. But to ask for its date would be like asking for the date of one of our great cathedrals. In age after age, bishop after bishop has left his mark upon the church; in age after age, chancellor after chancellor has left his mark upon the register. There is work of the twelfth century in it; there is work of the fifteenth century, perhaps of the sixteenth, in it. But even this comparison fails to put before us the full ineptitude of the question, What is the date of this book? No bishop, no architect, however ambitious, could transpose the various parts of the church when once they were built; he could not make the crypt into a triforium; but there was nothing to prevent a reforming chancellor from rearranging the existing writs on a new plan; from taking "Trespass" from the end of the book and thrusting it into the middle. No; to ask for the date of the Register is like asking for the date of English law.

When we take up the book for the first time we may, indeed, be inclined to say that it has no arrangement whatever, or that the principle of arrangement is the principle of pure caprice. But a little examination will convince us that there is more to be said. Every now and again we shall come across clear traces of methodic order, and probably in the end we shall be brought to some classification of the forces which have played upon the book. The following classification may be suggested: (1) Juristic logic; (2) practical convenience; (3) chronology; (4) mechanical chance. Let me explain what I mean. We might expect that the arrangement of such a work would be dictated by formal jurisprudence; we might expect that the main

outlines would be those elementary contrasts of which every system of law must take notice,—real, personal —petitory, possessory—contract, tort. Again, knowing something of the English writs, we might expect to find those which begin with "Præcipe" falling into a class by themselves; or, again, to find that those which direct a summons are kept apart from those which direct an attachment; or, again, to find that writs of "Justicies," *i.e.*, writs directing the sheriff to do justice in the county court, are separated from writs destined to bring the defendant into the king's own courts. Well, in part we may be disappointed; but not altogether: formal jurisprudence has had something to do with the final result, though not so much as might be expected. The printed book begins, and every MS. that I have seen, whether it comes from Henry III's day or Henry VI's, begins with the writ of right. Now, there is logic in this; for whatever actions are "personal," whatever acts are "possessory,"—and different ages hold different opinions about this matter,—there can be no doubt that the action begun by writ of right is "real" and "petitory" or "droiturel." Our Register then begins with the purest type of a real and droiturel action. And the logic of jurisprudence has left other marks, especially near the end of the book, where we find Novel Disseisin, Mort d'Ancestor, Cosinage and Writs of Entry, following each other, in what we shall probably call their "natural order." Still, such logic will not, by any means, explain the whole book. It would be quite safe to defy the student of "general jurisprudence" to

find Trespass, or Covenant, or *Quare Impedit*, by the light of first principles.

Then, again, practical convenience has had its influence. The first twenty-nine folios of the printed Register are taken up by the Writ of Right, and other writs which have generally collected around that writ. Then a new section of the book begins (f. 30–71); it is devoted to writs which the modern jurist would describe as being of the most divers natures; but they all have this in common, that in some way or another they deal with ecclesiastical affairs and the clerical organization. The link between this group and that which it immediately succeeds is (f. 29 b) the Writ of Right of Advowson. It is a Writ of Right; but having once come across the advowson it is convenient to dispose of this matter once and for all, to introduce the Assize of Darrein Presentment, which is thus torn away from the other possessory assizes, the *Quare Impedit*, the *Quare Incumbravit*, the *Juris Utrum*, and so forth. This brings us into contact, if not conflict, with the church courts; so let us treat of Prohibitions to Court Christian, whether these relate to advowsons, land, or chattels, and while we are about it we may as well introduce the *De excommunicato capiendo*, and so forth; then we shall have done with ecclesiastical affairs. Here, to use the terms that I have ventured to suggest, we see "practical convenience" getting the better of "juristic logic"; or, to put it in other words, matter triumphing over form. But form's turn comes again. We have done with the church; what topic should we turn to next? The answer is, "Waste." But why waste, of all topics

in the world? Because, until the making of a certain statute, duly noticed in our Register, the action of waste was an action on a royal prohibition against waste[1]. "Prohibition" is the link which joins "waste" to "ecclesiastical affairs."

Yet another principle has been at work. A section in the middle of the book is devoted to *Brevia de Statuto*, writs that are founded on comparatively modern statutes. What keeps this group of writs together is neither "form" nor "matter," but chronology; they are recent writs, for which neither logic nor convenience has found a more appropriate place. In short, we have here an appendix. But it is an appendix in the middle of the book. We can hardly explain its appearance there without glancing at the MSS.; but even without going so far we can still make a guess. When these statutory writs have been disposed of, we almost immediately (f. 196b) come upon what seems a well-marked chasm. Suddenly the Novel Disseisin is introduced, and then for a long while logic reigns, and we work our way through the possessory actions. If we find, as we may find, a MS. which has several blank leaves before the Novel Disseisin, which honours the Novel Disseisin with an unusual display of the illuminator's art, we have made some way towards a solution of the problem. At one time the book was in mechanically separate sections, and the end of one of these sections was a convenient place for a statutory appendix.

After all, however, it is improbable that we shall ever be able to explain in every case why a particular

[1] Stat. Westm. II., c. 14.

writ is found where it is found, and not elsewhere. The *vis inertiæ* must be taken into account. Writs collected in the Chancery; now and again an enterprising Chancellor or Master might overhaul the Register, have it recopied, and in some small degree rearranged; but the spirit of a great official establishment, with plenty of routine work, is the spirit of leaving alone; the clerks knew where to find the writs; that was enough.

The MS. materials for the history of the Register are abundant. The Cambridge University Library possesses at least nineteen Registers, some complete, some fragmentary; the number at the British Museum is very large. Over the nineteen Cambridge Registers I have cast my eyes. They are of the most various dates. In speaking about their dates it is necessary to draw some distinctions. In the first place, of course, it is necessary to distinguish between the date of the MS. and the date of the Register that it contains, for sometimes it is plain that a comparatively modern hand has copied an ancient Register. In the second place, as already said, it is useless to ask the date of a Register, or of a particular Register, if thereby we mean to inquire for the date when the several writs contained in it were first issued, or first became current; the various writs were invented in different reigns, in different centuries. The sense that we must give to our inquiry is this: at some time or another the official Register of the Chancery was represented by the MS. now before us; what was that time? It will be seen, however, that the question in this form implies an assumption which we may not be entitled to make,—the assumption that our MS.

fairly represents what at some particular moment of time was the official Chancery Register. I have as yet seen no MS. which on its face purported to be an official MS., or a MS. which belonged to the Chancellor or any of his subordinates. In very many cases the copy of the Register is bound up in a collection of statutes and treatises, the property of some lawyer or of some religious house. Often an abbey or priory had one big volume of English law, and in such volumes it is common to find a *Registrum Brevium*. Such volumes were lent by lawyer to lawyer, by abbey to abbey, for the purpose of being copied, and it is clear that a copyist did not always conceive himself bound to reproduce with mechanical fidelity the work that lay upon his desk. Thus, many clerks are quite content that the names of imaginary plaintiffs and defendants should be represented by A and B, while another will make "John Beneyt" a party to every action, and suppose that all litigation relates to tenements at Knaresborough. We have not to deal with the dull uniformity of printed books; no two MSS. are exactly alike; every copyist puts something of himself into his work, even if it be only his own stupidity. Thus, settling dates is a difficult task. Sometimes, for example, a MS. which gives the Register in what, taken as a whole, seems a comparatively ancient form, will just at a few places betray a knowledge of comparatively modern statutes. Gradually, however, by comparing many MSS., we may be able to form some notion of the order in which, and the times at which, the various writs became recognized members of the *Corpus Brevium*.

It will be convenient to mention here that one of the most obvious tests of the age of a Register is to be found in the wording of those writs which expressly mention a term of limitation. There are three such writs; namely, the Novel Disseisin, the Mort d'Ancestor, and the *De nativo habendo*. Now, at the beginning of Henry III's reign (1216), the limiting period for the Novel Disseisin seems to have been the last return of King John from Ireland, but in 1229, or thereabouts, there was a change, and Henry's first coronation at Westminster became the appointed date[1]; the Mort d'Ancestor was limited to the time which had elapsed since Richard's coronation. The Statute of Merton (1236), or rather, as I think, an ordinance of 5th Feb., 1237, fixed Henry's voyage into Brittany as the period for the Novel Disseisin, and John's last return from Ireland as the period for the Mort d'Ancestor and *De Nativo*[2]. Statute of Westminster the First (1275, cap. 39) named for the Novel Disseisin Henry's first voyage into Gascony, for the Mort d'Ancestor and for the *De Nativo* Henry's coronation[3]. As no further change was made until Henry VIII's day, this test is

[1] This change I infer from the cases in Bracton's *Note Book*. On 18 July, 1222, a writ was sent to Ireland, fixing Richard's death as the period for the Mort d'Ancestor, in order to assimilate Irish to English law. See Sweetman's *Calendar of Irish Documents*, vol. I., p. 160.

[2] Bracton's *Note Book*, vol. I., p. 106; vol. III., p. 230. Compare the Irish writ given in *Statutes of the Realm*, I., p. 4. The Statute of Merton in its printed form mentions not Brittany, but Gascony.

[3] As regards the Novel Disseisin the change, if any, was but nominal; the first "voyage into Gascony" of the Statute of 1275 was "the voyage to Brittany" of the ordinance of 1237. In 1230 Henry went to Brittany, and thence to Gascony.

applicable only to the very earliest Registers. For Registers of the fourteenth century, however, we can use a somewhat similar criterion; when they mention Henry III, as they call him *pater noster*, or *avus*, or *proavus noster*. But, good though such tests may be, they are by no means infallible. A man copying an already ancient Register might well be tempted to tamper with phrases that were obviously obsolete; and, again, we shall have cause to doubt whether even in the Chancery itself a new statute of limitations always sets the clerks on promptly overhauling their ancient books and making the necessary corrections; great is the force of official laziness. Still, these writs which mention periods of limitation are the parts of the Register which first attract the critic's eye.

But there is yet another difficulty. Are we justified in assuming that there always, or ever, was in the Chancery, some one document which bore the stamp of authority, and which was *the* Register for the time being? I doubt it. The absolutely accurate officialism to which we are accustomed in our own day is, to a large extent, the product of the printing press. The cursitors and masters of the mediæval Chancery had no printed books of precedents. It is highly probable that each of them had his MS. books; that these books were transmitted from master to master, from cursitor to cursitor, and that they differed much from each other in details[1]. To have prevented them from differing would have been a laborious and a

[1] The "Cursitores," or "Clerici de cursu," were the clerks who issued the writs of course. The name of Cursitor street still marks the site of their ancient home. As to their duties, see *Fleta*, p. 78.

needless task. This thought will be brought home to us by several passages in the printed book. In the first place, it is full of notes and queries: the writer expresses his doubts as to the best way of formulating this or that writ; he tells us what some think, what others think, what some do, and what others do; occasionally he speaks to us in the first person, says *credo* and *je croye*, and even points out that this Register differs from other registers[1]. It is in this way that we may explain the somewhat capricious selection of writs that the printed book presents. It naturally includes all the common forms that are in daily use; but it includes also many forms of a highly specialized kind,—forms which set forth the facts of cases which have happened once, but are by no means likely to happen

[1] Thus, f. 3 b, "quaere comment le brief serra fait ou si le brief gyst"; f. 6 b, "quibusdam videtur quod debeat scribi in istis brevibus etc."; f. 9, "sapientes et jurisperiti dicunt"; f. 10 b, "secundum quosdam...sed alii dicunt"; f. 16, "et est contra registrum"; f. 27 b, "secundum quosdam fiant duo brevia"; f. 29 b, "secundum quosdam"; f. 97 b, "Nota quod non debet dici in brevi predicto *specialem auctoritatem ad hoc habentium* prout in quibusdam registris invenitur"; f. 108 b, "Nota per Thomam de Newenham; tamen alii clerici de cursu contradicunt"; f. 120 b, "Tamen quaere ... per plusors sages dit est"; f. 121 b, "Les Maistres de la Chancerie ne voudrient agreer a cest clause"; f. 133, "Nota quidam addunt in istis tribus brevibus, etc."; f. 134 b, "Vide de breve Statutum W. 2. c. 14 pro ista materia quia hic male reportatur"; f. 183 b, "Nota secundum quosdam...et ideo quaere inde"; f. 172 b, "Je croye que son brief nest pas le pire"; f. 184 b, "Credo quod istud breve vacat"; f. 200, "Ascuns gents dirent—"; f. 208 b, "In breve de post disseisina non dicatur *tam de illis*, etc., secundum Escrick"; f. 243 b, "Mes le brief...est le meillour come cest register voet"; f. 269, "Ista clausula...non continetur in statuto sed additur per quosdam jurisperitos."

again. The Chancery undoubtedly had some power in itself to devise such "writs upon the special case"; not unfrequently it was ordered to make a writ suited to the very peculiar circumstances of a case which had been brought before the Council, or before the Parliament, just because none of the common writs would meet it[1]. Of such "*brevia formata*" we get a selection, but only a selection. Some are preserved because they will be useful as precedents, others, as it seems to me, because they are curiosities and not likely to form precedents[2]. In many quarters we see more signs of private enterprise than of official redaction. A considerable number of specially worded writs bear the name of Parning,—a number out of all proportion to the brief two years during which that famous common lawyer held the great seal. He had the good fortune, we may suppose, to have some industrious clerk for an admirer; his predecessors and successors were less lucky[3]. I greatly

[1] The necessity for specialized writs is often noticed in the endorsements on petitions to Parliament; *e.g.*, in those of 14 Edw. II, Ryley's *Placita*, p. 408, "Habeat breve novæ disseisinæ in suo casu"; p. 409, "Adeat Cancellarium et habeat ibi breve in suo casu"; p. 412, "Habeat breve de conspiratione formata [conformatum] in suó casu"; p. 423, "Habeat breve de conspiratione in Cancellaria in casu suo formandum"; p. 421, "Habeant brevia suis casibus conveniencia." So in the Register we find writs issued by order of the Council; *e.g.*, f. 64, "per consilium"; f. 114, a writ founded on a Parliamentary petition; f. 124, "per consilium"; f. 125, "per consilium."

[2] F. 64 b, "Istud attachiamentum est notabile valde"; f. 224, "Nota quod istud breve sigillatum fuit et quassabille ut dicebatur pro veritate."

[3] Parning appears on f. 13 b, 16 b, 35, 69, 99 b, 100 b, 132, 136; in some other cases, though he is not named, we can tell, from the

doubt, then, whether we have in strictness a right to speak about *the* Register of a given period, as though there were some one document exclusively or preëminently entitled to that name; rather we should think of *the* Register as a type to which diverse registers belonging to diverse masters and clerks more or less accurately conformed. About common matters these manuscripts agreed; about rarities and curiosities there was difference, and room for difference. There was no great need for a perfectly stereotyped uniformity; the fact that a writ was penned, and that it passed the seal, was not a fact that altered rights or secured the plaintiff a remedy; it still had to run the gauntlet in court, and might ultimately be quashed as unprecedented and unlawful. It is clear, indeed, that the granting of specially worded writs was regarded as an important matter, which required grave counsel and consideration; the masters were consulted as a body; sometimes it would seem as though the opinion of the justices was taken before the writ issued[1]. A chancellor, a master,

date of the writ, that it belongs to his chancellorship. He is the only Chancellor that appears prominently. A certain Herleston appears in three places, f. 49, 80 b, 261; f. 261, "Hoc breve concessum fuit...per cancellarium Lescrop et W. de Herleston,"—*i.e.* (as I understand it) this writ was granted by the Chancellor, G. le Scrope, the Chief Justice, and W. de Herleston; the date of this writ seems to be 19 Edward III. Herleston was a Master in Chancery under Edward III. So, again, one Thomas of Newenham gets mentioned as a maker of writs; he seems to have been a Master under Edward III and Richard II; apparently we owe to him a writ against a vendor of a blind horse, who warranted it sound; see f. 108, 108 b, 151 b.

[1] *Reg. Brev. Orig.*, f. 78 b, "Et les maistres W. de Aym. [Ayremine, Master of the Rolls?] et autres" expressed an opinion

even a cursitor, cannot have liked to see his writs quashed; and, though writs were quashed very freely, as the Year Books witness, still, if I mistake not, it will be found that in most cases the fault lay rather with the plaintiff or his advisers than with the Chancery; he had got an inappropriate writ, but not one that was in any respect contrary to law. Any notion that the Chancery was a Romanizing institution, that the learning of the masters was the learning of civilians, is rudely repelled by the Register. Whatever academic training in Roman and canon law the masters may have had, they were English lawyers daily engaged in watching the development of English law in English courts, in reading the Year Books, and in "writing up" decisions in the margins of their Registers. Still, to return to my point, the granting of a newly worded writ was no judicial act; to grant one which could not be maintained was no act of justice; it might be a very proper experiment.

The Register of which I am speaking is the Register of Original Writs. The printed book contains also a Register of Judicial Writs. The difference between Original Writs and Judicial Writs is generally known. Roughly speaking we may put it thus: An original writ is a writ whereby litigation is commenced; its type

about a writ which does not commend itself to the annotator; f. 121 b, "Les Maistres de la Chancerie ne voudrient agreer a cest clause"; f. 131 b, "Ceux brefs furent enseales per tants les sages de la chancerie, per assent des serjeants le Roy et autres sages asses" [Nota quod hoc verbum *asses* non est verbum Anglicum sed verbum Franciscum]; f. 200, "Istud breve fuit concessum de assensu W[illelmi] de T[horpe] capitalis justiciarii et aliorum justiciorum de banco et clericorum de cancellaria."

is a common writ of trespass or debt, whereby the sheriff is directed to compel the defendant to appear in court and answer the plaintiff; on the other hand, a judicial writ is a writ issued during the course of an action, either before or after judgment; thus, the re-summons of one already summoned, a *venire facias* for jurors, a *fieri facias*, an *elegit*,—these may be taken as types of judicial writs. But, in strictness, we are hardly entitled to bring into our definitions any particularization of the character of the writs. The technical distinction seems to have been a simpler one: the original writ issues out of the Chancery, the judicial issues out of a Court of Law; we can say no more. It sometimes happens that the same writ can be obtained in the Chancery or in the Common Pleas; in term time one gets it from the court, in vacation one goes to the Chancery; such a writ will, therefore, have its place in both Registers, the Original and the Judicial[1]. And very many of the documents which find a place in the former cannot be described as writs originating litigation; they relate to litigation that has been already begun. A tenant in an action begun by writ of right puts himself on the grand assize while yet the action is in the court baron or county court; the writ summoning the electors of the grand assize will issue out of the Chancery, and we must look for it in the Register of Original Writs. The same Register contains numerous writs evoking litigation from the local courts,—writs of *pone, certiorari, recordari facias*, and so forth. But, further, the fully developed *Registrum Brevium Originalium* contains great masses of

[1] *Reg. Brev. Orig.*, f. 32, 69 b.

documents which neither originate nor evoke litigation,—pardons, protections, safe-conducts, licenses to elect bishops and abbots, orders for the election of coroners and verderers, letters whereby the king presents a clerk, fiscal writs addressed to the Barons of the Exchequer, writs to escheators, and so forth, in rich abundance; even letters to foreign princes, begging them to do justice to Englishmen, find a place in the collection[1]. Many of these formulas, it may be, were never known as *brevia originalia*, and some were not *brevia* at all; still, it would be very difficult to say where the original writs left off, for a great deal of what we might call fiscal and administrative work was done under quasi-judicial forms, and by the use of quasi-judicial machinery. The Exchequer, according to our ideas, was half law court and half financial bureau. The collection of the revenue, the management of the king's demenses and feudal rights, were carried on by means of writs, inquests, verdicts, very similar to those which determined the rights of litigants. And happy it may be for us that no stricter separation was made between ordinary law and administrative law. Our present point, however, must be merely that all this great mass of miscellaneous matter is collected into the Register of Original Writs, and thus gets mixed up with the formulas of ordinary litigation. The later the MS. of the Register the larger is the proportion which the administrative documents bear to the writs which originate or evoke litigation, and, as we shall see hereafter, the general scheme of the book had become fixed at a time when it was still chiefly made up of writs sub-

[1] *Reg. Brev. Orig.*, f. 129.

serving the process of litigation between subject and subject.

These things premised, it may be allowed me to make a few remarks about the early history of the Register.

It is highly probable that so soon as our kings began to interfere habitually with the ordinary course of justice in the communal and feudal courts, and by means of writs to draw matters into their own court, the clerks of the chancery began to collect precedents of such writs, and it well may be that some of the formulas that they used were already of high antiquity[1]. But the careful reader of Mr Bigelow's *Placita* will, as I think, be led to doubt whether before the reign of Henry II there was anything that could fairly be called a *Registrum Brevium*, and the student of Maddox's Exchequer will be inclined to hold that there were no writs that could be obtained "as of course" (*de cursu*) by application to subordinate officials. Nothing was to be had for nothing; the price of writs was not fixed, and every writ was, in the terms of a later age, "a writ upon the special case." Before the end of Henry's reign there had been a great change, though the practice of selling royal aid (theoretically it was rather "aid" than "justice" that was sold) was by no means at an end. Already when Glanvill wrote there were many writs drawn up "in common form"; so drawn up, that is, as to cover whole classes of disputes. Let us follow him in his treatment of them. Not impossibly he took them up in the order in which they

[1] Brunner, *Entstehung der Schwurgerichte*, p. 78, compares the *breve de recto* with the Frankish *indiculus communitorius*.

occurred in an already extant Chancery Register, and, as we shall see hereafter, the arrangement of the Register in much later times conforms, as regards some of its main outlines, to the arrangement of Glanvill's treatise.

In his first book he begins (cap. 6) with the *Præcipe quod reddat* for land, which he treats as the normal commencement of a petitory action. In the second book we have (cap. 8, 9) the writs of peace granted when a tenant has put himself on the grand assize; then (cap. 11) the writ summoning the electors of the grand assize, and (cap. 15) the writ summoning the recognitors. The third book, on warranty, does not give us any "original" writ. In the fourth book (cap. 2) occurs the Writ of Right of Advowson, the Writ (cap. 8) *Quo advocato se tenet in ecclesia*; a Prohibition (cap. 13) to ecclesiastical judges against meddling with a cause touching an advowson, and (cap. 14) a summons on breach of such a Prohibition. The fifth book, on serfage, gives us (cap. 2) the *De libertate probanda*. The sixth book turns to dower, and contains (cap. 5) the Writ of Right of Dower, a writ of *Pone* (cap. 7) for removing the case from the county court, the Writ (cap. 15) of Dower *unde nihil habet*, and the Writ (cap. 18) of Admeasurement of Dower. The seventh book, on inheritance or succession, has (cap. 7) the Writ *Quod stare facias rationalem divisam*, and (cap. 14) the writ to the Bishop, directing an inquiry into bastardy. In the eighth book comes (cap. 4) the Writ *de fine tenendo*, and several writs (cap. 6, 7, 10), *Quod recordari facias*, "evocatory writs" we may call them. In the ninth we have (cap. 5) the Writ *De*

homagio capiendo, the Writ of Customs and Services (cap. 9), a writ against a tenant who has encroached upon his lord (cap. 12), and the Writ *De rationalibus divisis* (cap. 14). The tenth book gives us the Writ of Debt (cap. 2), the Writ *De plegio acquietando* (cap. 4), a writ for a mortgage creditor calling on the debtor to pay (cap. 7), a writ calling on the mortgagee to render up the land (cap. 9), a writ calling in the warrantor of a chattel (cap. 16). From the eleventh book we gather only a writ announcing the appointment of an attorney. In the twelfth book we come to the Writs of Rights, strictly so called (*brevia de recto tenendo*), and a number of writs empowering the sheriff to do justice; namely, the *Ne injuste vexes* (cap. 10), the *De nativo habendo* (cap. 11), a Writ of Replevin (cap. 12, 15), a Writ of Admeasurement of Pasture (cap. 13), a *Quod permittat* for easements (cap. 14), a Writ *De rationalibus divisis* (cap. 16), a Writ *Quod facias tenere divisam* (cap. 17), a Writ of *Justicies* for the return of chattels unlawfully taken by a disseisor, and a few other miscellaneous writs, including a Prohibition to Court Christian against meddling with lay fee. In the thirteenth book come the possessory assizes. The fifteenth gives a hasty sketch of criminal business.

Glanvill's scheme of the law, or rather his scheme of royal justice, might, as it seems to me, be displayed by some such string of catchwords as the following: "Right" (*i.e.*, proprietary right in land), "Church," "Liberty," "Dower," "Inheritance" or "Succession," "Actions on Fines," "Lord and Tenant," "Debt," "Attorney," "Justice to be done by feudal lords and sheriffs," "Possession," "Crime." Now, some of the

main lines of this "*legalis ordo*," if I may use that term, keep constantly reappearing in the later history of the Register. At all events, two poles are fixed, —the *terminus a quo*, the *terminus ad quem*; we are to begin with "Right"; to end with "Possession." The reappearance of this scheme in the Register of later days is the more remarkable, because Bracton did not adopt it; as is well known, he begins with "Possession," and ends with "Right." We may make a further remark, which will be of use to us hereafter. Glanvill's twelfth book is most miscellaneous, and at one point resolves itself into a string of writs, which are given without note or comment. The idea which keeps the book together is that of justice done, not by the King's court, but by lords and sheriffs, in pursuance of royal writs. Such a tie is likely to be broken in course of time. Thus, the "Writ of Right Patent," the writ commanding a lord to entertain a proprietary action, is likely to find its proper place by the side of the *Præcipe quod reddat*, especially when Magna Charta has sanctioned the rule that a *Præcipe* is only to be issued when the tenant holds immediately of the king[1]. And so, again, the writs commanding the sheriff to do justice, writs of "*Justicies*," or "*Justifices*," will hardly be kept together by this bond; but in course of time,

[1] Originally a Writ of Right is so called, because it orders the feudal lord to do full right to the demandant, *plenum rectum tenere*; and in this sense, the *Præcipe quod reddat* is no Writ of Right. But when possessory actions have been established in the King's court, "right" is contrasted with "seisin," and all writs originating proprietary actions for land, including the *Præcipe in capite*, come to be known as Writs of Right. This has been remarked by Brunner, *Schwurgerichte*, p. 411.

as the king's own court extends, its sphere will fall into various subordinate places; thus, for example, "Debt by Justicies in the county court" will become an appendix or a preface to "Debt in the Bench."

The arrangement of Glanvill's book is, however, sufficiently well known, and therefore, without further reflection upon it, I will pass on to describe the earliest *Registrum Brevium* that I have seen. Happily it is one to which we can affix a precise date, namely, the 10th of November, 1227. It is found in a MS. at the British Museum (Cotton, Julius D., II, f. 143 b),—a book that once belonged to the monks of St Augustine's, Canterbury. It forms a schedule annexed to a writ of Henry III, bearing the date just given, and directed to the people of Ireland. That writ recites that the king desires that justice be done in Ireland according to the custom of his realm of England, and states that for this purpose he is sending a formulary of the writs of course (*formam brevium de cursu*), and wills that they be used in the cases to which they are applicable. The writ was issued at Canterbury, and to this fact we probably owe its lucky preservation in a Canterbury book. The Register that it gives is about forty years younger than Glanvill's treatise, and affords the means of measuring the growth of law during an important period,—the period of the Great Charter. I will briefly describe its contents.

It begins with three Writs of Right (1, 2, 3), and we learn that these writs can only be had "*sine dono*"; that is, without payment, when the land demanded is but half a knight's fee or less, or the service due from it does not exceed 100 shillings, or, being a burgage

tenement, the rent or the value of the buildings does not exceed 40 shillings a year. Then follows (4) the *Præcipe in capite*. Then (5) the *Novel Disseisin*, the period of limitation being stated as "*post ultimam transfretacionem nostram de Hibernia in Angliam*[1]"; and as an appendix to this we have (6) the Novel Disseisin of Common, and (7) the Assize of Nuisance, with variations. Next comes (8) the Mort d'Ancestor; the period of limitation is said to be *postquam coronacionem H. patris nostri*[2]. Then come (9) the assize of Darrein Presentment, (10) Prohibition to the bishop against admitting a parson, (11) Writ ordering a bishop to disencumber the church when he has admitted a parson contrary to such Prohibition, (12) Mandamus to a bishop to admit a presentee, (13) Writ of Right of Advowson, (14) Prohibition to ecclesiastical judges, (15) Writ against ecclesiastical judges who have disobeyed the Prohibition. This ecclesiastical group being finished, we find next (16) the Writ of Peace for a tenant who has put himself on the grand assize, and (17) a writ for the election of the grand assize. And here we have an interesting note: "*Et notandum quod in hac assisa non ponuntur nisi milites et debent jurare*

[1] This must be a blunder; it should have been "post ultimam transfretacionem patris nostri de Hibernia in Angliam."

[2] Here again there must have been some carelessness. The date referred to is the coronation of Henry II, the present king's grandfather. The mistake would seem to be due not to the monastic copyist, but to the Chancery clerk who drew up the document sent to Ireland, and was not careful to change into "avi" the "patris" which stood in a formula of John's reign, from which he was copying. See Sweetman's *Calendar of Irish Documents*, pp. 37, 160.

precise quod veritatem dicent non audito illo verbo quod in aliis recognitionibus dicitur scilicet a se nescienter." Unless I am traducing the copyist, something must have gone wrong with these last words. They were French, but he took them for Latin. In the grand assize the recognitor must swear, in an unqualified way, that he will tell the truth; while in all other recognitions he may add "a son ascient"; that is, "according to his knowledge." A small group of writs relating to dower (18, 19, 20) come next. Then follows (21) the *Juris Utrum*, which, it is remarked, lies either for the clerk or for the layman[1]. Next (22) comes the Attaint which can be brought against recognitors of Novel Disseisin, Mort d'Ancestor, Darrein Presentment, but not against the recognitors of the Grand Assize. Then (23) we have an action on a fine, "*Præcipe A. quod teneat finem*," and (24) the action of *Warrantia Cartæ*. Writs of Entry are represented by but two specimens: the first is (25) Entry *ad terminum qui præteriit*, the second (26) is *Cui in vita*. Then we find (27) *quod capiat homagium*, (28) writs for sending knights to view an essoinee, and (29) to hear a sick man appoint an attorney. On these follow (30) the *De nativo habendo*, (31) the *De libertate probanda*, (32) the *De rationabilibus divisis*, and (33) the *De superoneracione pasturæ*. We pass to criminal matters, and get (34) the writ to attach an appellee to answer for robbery, rape, or arson, with a note that in case of homicide the appellee is to be attached, not by gage and pledge,

[1] This was a moot point in Bracton's day. Pateshull allowed the laymen the assize, but afterwards changed his mind. Bracton thinks this a change for the worse. Bract., f. 285 b.

but by his body; as a sequel to this comes (35) the *De homine replegiando*. We return to civil matters, and find (36) the Writ of Services and Customs, and (37) the *Ne injuste vexes*. Then comes (38) Debt and Detinue. The only writ that falls under this head is a *Justicies*, and not, like Glanvill's Writ of Debt, a *Præcipe*; and there is this further difference, that the remarkable words, "*et unde queritur quod ipse ei injuste deforciat*," which occur in Glanvill's writ, and make it look so very like a Writ of Right, have disappeared. The supposed debt in the Irish Register is one of 20 shillings, and we have this important note: "In the same fashion a writ is made for a charter, '*quam ei commisit*,' or for a horse or for chattels to the value of 40 shillings, '*sine dono*' [*i.e.*, without any payment to the king], for if the debt or price exceeds 40 shillings the words must be added: '*accepta ab eo* [the plaintiff] *securitate de tercia parte de primis denariis ad opus Regis.*'" In Ireland, at all events, the king will only become a collector of debts for the modest commission of $33\frac{1}{3}$ per cent.

To this succeeds (39) a Prohibition to ecclesiastical judges against dealing with lay fee, and (40) a writ to compel them to answer for breach of such a prohibition. Next occurs (41) a writ directing the sheriff not to suffer an infant to be impleaded, and (42) a *Recordari facias* applicable to a case in which a tenant has vouched an infant. Then we have (43) a *Justicies de plegio acquietando* for a debt of forty shillings or less; "*non habebit ultra xl. sol. sine dono.*" Then comes (44) a writ forbidding the sheriff to distrain R., or permit him to be distrained, to render ten marks to N., for which he is neither principal debtor, nor pledge; but "this writ does

not run in privileged cities, or where the debtor is the king's debtor." Another writ (45) forbids the sheriff to distrain R. for money promised to the king "for right or record," *i.e.* for money promised in consideration of the king's aid in litigation, if, without his own default, he has not got what he stipulated for. Another writ (46) forbids the sheriff to distrain a surety when the principal debtor can pay; but this writ is not to be issued when the debt is one that is due to the king. Then (47) comes a writ of Mesne by way of *Justicies*, and (48) the *De excommunicato capiendo.* Upon this follows (49) covenant "*si quis conventionem fecerit alibi quam in curia domini Regis cum vicino suo qui eam infringere voluerit de aliqua terra vel tenemento ad terminum si exitus illius tenementi non excesserint per annum xl. solidos*"; the writ is a *Justicies* "*quod teneat conventionem.*" We have then (50) a Writ of Dower, and (51) a Writ of Waste against a dowager. Miscellaneous writs follow: (52) a *Venire facias* for an assize; (53) a *Pone ad peticionem petentis*; (54) a summons for a warrantor; (55) a writ to inquire of the bishop touching the marriage of a woman claiming dower; (56) a writ directing a view of the land demanded.

So ends the Irish Register, an important document. It brings out very forcibly the king's position as a vendor of justice, or rather, as we have said, of "aid." We must, as it seems to me, believe, until the contrary be shown, that we have here a fairly correct representation of the writs that were current in England in 1227; the writs that were "of course" and to be had at fixed prices; but some may have been omitted as inapplicable to Ireland.

Before making further comments, let us turn to an English *Registrum*, which, so far as I can judge, must be of very nearly the same date as this Irish *Registrum*. It is found in a Cambridge MS. (Ii. vi. 13), and may, I think, be safely ascribed to the early years of Henry III's long reign; for I can see no trace in it of the Statute of Merton. The book contains a copy of Glanvill's treatise, which is followed by a *Registrum*, and of this we will note the contents. I add references to Glanvill's treatise, and to the Irish Register; the latter of these I will designate by the symbol "Hib." while the Cambridge MS., now under consideration, I shall hereafter refer to as CA.

1. Writ of right addressed "Roberto de Nevill"; with several variations. (Glanv. XII. 2; Hib. 1.)

2. Writ of right "*de rationabili parte.*" (Glanv. XII. 5.)

3. *Præcipe in capite.* (Glanv. I. 6; Hib. 4.)

4. *Pone;* this will only be granted to a tenant "*aliqua ratione precisa vel de majori gratia.*" (Hib. 53.)

5. Writs of peace when tenant has put himself on grand assize. (Glanv. II. 8, 9; Hib. 16.)

6. Writ summoning electors of grand assize, "*et nota quod in hac assisa non ponuntur nisi milites et precise jurare debent.*" (Glanv. II. 11; Hib. 17.)

7. *De recordo et judicio habendo.*

8. *Procedendo* in writ of right.

9. Respite of writ of right so long as tenant is "*in servicio nostro in Pictavia vel in Wallia cum equis et armis per preceptum nostrum.*" Respites (Hib. 41) where a tenant or vouchee is an infant.

10. *Warrantia cartæ.* (Hib. 24.)

11. Entry "*ad terminum qui preteriit.*" (Cf. Glanv. X. 9; Hib. 25.)

12. Entry "*cui in vita.*" (Hib. 26.)

13. *De homagio capiendo.* (Glanv. IX. 5; Hib. 27.)

14. Novel disseisin[1]; limitation "*post ultimum reditum domini J. patris nostri de Hybernia in Angliam.*" (Glanv. XIII. 33; Hib. 5.)

15. Novel disseisin of pasture; same limitation. (Glanv. XIII. 37; Hib. 6.)

16. Mort d'Ancestor[2]; limitation "*post primam coronacionem R. Regis avunculi nostri.*" (Glanv. XIII. 3, 4; Hib. 8.)

17. *De nativo habendo*[2]; same limitation. (Glanv. XII. 2; Hib. 30.)

18. *De libertate probanda.* (Glanv. V. 2; Hib. 31.)

19. *De rationabilibus divisis.* (Glanv. IX. 14; Hib. 32.)

20. *De superoneratione pasturæ.* (Hib. 33.)

21. Replevin. (Glanv. XII. 12, 15.)

22. *De pace regis infracta;* writ to attach appellee by gage and pledge in case of robbery or rape. (Hib. 34.)

23. *De morte hominis;* writ to attach appellee by his body. (Hib. 34.)

24. *De homine replegiando.* (Hib. 35.)

25. Services and customs; a "*justicies.*" (Glanv. IX. 9; Hib. 36.)

26. *Ne injuste vexes.* (Glanv. XII. 10; Hib. 27.)

27. Debt; a "*justicies*"; "*reddat B. x. sol. quos ei debet ut dicit, vel cartam quam ei commisit custodiendam.*" (Glanv. X. 2; cf. XII. 18; Hib. 38.)

28. Prohibition to ecclesiastical judges against entertaining a suit touching a lay fee. (Glanv. XII. 21; Hib. 39.)

29. Similar prohibition to the litigant. (Glanv. XII. 22.)

30. Prohibition in case of debt or chattels, "*nisi sint de testamento vel matrimonio.*"

31. Attachment for breach of prohibition. (Hib. 40.)

32. *De plegiis acquietandis.* (Glanv. X. 4; Hib. 43.) Also (32 *a*) a writ forbidding the sheriff to distrain the surety while the principal debtor can pay. (Hib. 46.)

33. Mesne. (Hib. 47.)

34. Aid to knight lord's son or marry his daughter.

35. *De excommunicato capiendo.* (Hib. 48.)

36. Covenant; *justicies;* "*de x. acris terre.*" (Hib. 49.)

[1] I believe that this writ would have been antiquated after 1229.

[2] These writs seem older than 1237.

37. Writ announcing appointment of attorney.

38. Writ to send knights to hear sick man appoint attorney. (Hib. 29.)

39. Writ sending knights to view essoinee. (Hib. 28.)

40. Darrein presentment. (Glanv. XIII. 19; Hib. 9.)

41. Prohibition in case touching advowson. (Glanv. IV. 13; Hib. 14.)

42. Writ of right of advowson. (Glanv. IV. 2; Hib. 13.)

43. Writ to bishop for admission of presentee. (Hib. 12.)

44. *Quare incumbravit.* (Hib. 11.)

45. Attachment for breach of prohibition. (Glanv. IV. 14; Hib. 11.)

46. Dower "*unde nihil habet.*" (Glanv. VI. 15; Hib. 18.)

47. Dower "*de assensu patris.*" (Hib. 19.)

48. Dower in London.

49. *Juris utrum.* (Glanv. XIII. 24; Hib. 20.)

50. Attaint; the assize was taken "*apud Norwicum coram H. de Bargo, justiciario nostro*[1]." (Hib. 22.)

51. *De fine tenendo;* the fine made "*tempore domini J. patris nostri.*" (Glanv. VIII. 6; Hib. 23.)

52. *Quare impedit.*

53. Writ of right of ward in socage.

54. Writ of right of ward in chivalry.

55. Assize of nuisance; vicontiel or "little" writ of nuisance; limitation "*post ultimum reditum domini J. Regis patris nostri de Hybernia in Angliam.*" (Cf. Glanv. XIII. 35, 36; Hib. 7.)

56. *Ne vexes abbatem contra libertates.*

57. *Quod permittat* for estovers; a *justicies.*

58. *Quod faciat sectam ad hundridum vel molendinum.*

[1] This seems a reference to an eyre of 1222.

II.

In a former number of this *Review* I have been permitted to draw attention to some materials for the early history of our common law which have been too long neglected, namely, ancient Registers of Original Writs. I then described two such Registers. One of them (which I refer to as Hib.) seems to be the Register that was sent to Ireland by royal order in 1227; while the other (which I call CA.) seems to be of almost even date, to be, that is, some forty years younger than Glanvill's, some thirty years older than Bracton's, treatise.

When we compare these two Registers together, the first remark that occurs to us is, that in substance they are very similar, while in arrangement they are dissimilar. From this we may draw the inference that the official Register in the Chancery had not yet crystallized; or, to put the matter in another way, that very possibly different officers in the Chancery had copies which differed from each other. Indeed, the official Register of the time may not have taken the shape of a book, but may have consisted of a number of small strips of parchment filed together and easily transposed. There is a certain agreement between them even in arrangement. Both have "Right" in the forefront, and occasionally give us the same writs in the same order. One instance of such correspondence is worthy of note, for it will become of interest to us hereafter. The following seems to be, for some reason or another, an established sequence: *De nativo habendo,*

De libertate probanda, *De rationalibus divisis*, *De superoneratione pasturæ*, Replevin, *De pace regis infracta* (writs for the arrest or attachment of appellees), *De homine replegiando*, Services and Customs. Traces of this sequence will be found even when the Register, having increased in bulk fifty times over, gets printed in the Tudor days. The writs are arranging themselves in groups: a Writ of Right cluster, an Ecclesiastical cluster, a Liberty and Replevin cluster. But many questions are very open. Shall the Writs of Entry precede or follow the Assizes? Shall they be deemed proprietary or possessory?

Taking our two Registers together, we can form an idea of the writs which were "of course" in the early years of Henry III; and these we may contrast with the writs which Glanvill gives us from the last years of Henry II. On the whole, we can record a distinct advance of royal justice; but there have been checks and retrogressions. The Writ of Right, properly so called, the *Breve de recto tenendo*, which commands the feudal lord to do justice, has taken the place of the simple *Precipe quod reddat* as the normal commencement of a proprietary action for land. This is a victory of feudalism consecrated by the Great Charter. Again, in Glanvill's day the jurisdiction over testamentary causes had not yet finally lapsed into the hands of the church; twice (VII. 7, XII. 17) he gives us a writ (*quod stare facias rationabilem divisam*) whereby the sheriff is directed to uphold the will of a testator. This writ we miss in the Registers; the state has had to retreat before the church. We are so apt to believe that in the history of the law all has been for the best, that it is

well for us to notice this unfortunate defeat,—for unfortunate it assuredly was, and to this day we suffer the evil consequences which followed from the abandonment by the king's courts of all claim to interfere with the distribution of a dead man's chattels. On the other hand, we see that the triumph of feudalism is more apparent than real; it has barred the high road, but royal justice is making a flank march. Glanvill (x., 9) has a writ which lies for a mortgagor against a mortgagee; or rather, we ought to say for a gagor against a gagee, when the term for which the land was gaged has expired. The alteration of a few words in this will turn it into a writ of entry *ad terminum qui præteriit*[1]. Such a writ of entry is given by our two Registers, and they also give the writ *cui in vita* applicable for the recovery of land alienated by a married woman. Curiously enough they do not give the writ of entry *sur disseisin*; though we happen to know that already in 1205 this writ, lying for a disseisee against the heir of the disseisor, had been made a writ of course[2]. This is by no means the only sign that the copies of the Register which got into circulation did not always contain the newest improvements. Still, here we see that a foundation has been laid for that intricate structure

[1] The development can be seen in Palgrave's *Rot. Cur. Reg.*, I. 341, "in quam non habuit ingressum nisi quia predicta B. ei commisit ad terminum qui preteriit"; II. 37, "quam pater A. invadiavit B. ad terminum qui preteriit"; II. 211, "quam ipse invadiavit C. patri predicti B. ad terminum qui preteriit," etc.

[2] *Rot. Pat.*, I. 32, contains a writ of this kind, with the note: "Hoc breve de cetero erit de cursu." Even from Richard's reign we have "in quam ecclesiam nullum habet ingressum nisi per ablatorem suum." *Rot. Cur. Reg.*, I. 391.

of writs of entry which will soon be reared. It is very doubtful whether Glanvill knew the procedure by way of attaint for reversing the false verdict of a petty assize; but we find this securely established in our Registers.

Another noteworthy advance is to be seen in the actions which we may call contractual. The *Warrantia Cartæ* is in use, and so is the Writ of Covenant. We may doubt whether there is as yet any writ as of course which will enforce a covenant not touching land. The typical covenant of the time is what we should call a lease; but Glanvill (x. 8) told us that the king's court was not in the habit of enforcing "*privatas conventiones*" agreements, that is, not made in its presence and unaccompanied by delivery of possession. Debt and Detinue are still provided for chiefly by writs of *Justicies*, directing trial in the county court. "Debt in the Bench" seems, as yet, no writ of course, and the Irish Register shows us that, at least across St George's Channel, one had to pay heavily even for a *Justicies*. The excuse for such exaction, of course, was that no writ was necessary for the recovery of a debt in a local court; royal interference was a luxury. Lastly, we will notice that, as yet, we hear nothing of Account and nothing of Trespass.

The next Register that I shall put in is found in a Cambridge MS. I shall hereafter refer to it as CB. (kk., v. 33). Like the last, it is bound up with a Glanvill, and this, I may remark, is in favour of its antiquity. Edwardian Registers are generally accompanied, not by Glanvill, but by Hengham, or Fet Assavoir or Statutes. On the whole, we may, as I

believe, safely attribute this specimen to the middle part of Henry III's reign, to the period between the Statute of Merton (1236) and the Statute of Marlborough (1267), and I am inclined to think it older than the Provisions of Westminster (1259). In the following notes of its contents I will give references to the "Pre-Mertonian" Register CA., which I described on a former occasion :—

"*Incipiunt Brevia de Causa Regali.*"

1. Writ of right with many variations. (CA. 1.)
2. Writ of right *de rationabili parte.* (CA. 2.)
3. *Ne injuste vexes.* (CA. 26.)
4. *Præcipe in capite.* (CA. 3.)
5. Little writ of right *secundum consuetudinem manerii.*
6. Writs of peace when tenant has put himself on grand assize. (CA. 5.)
7. Writ summoning electors of grand assize, with variations. (CA. 6.)
8. [1]Writ of peace when tenant of gavelkind has put himself on a jury in lieu of grand assize, and writ for the election of such a jury.
9. *Pone* in an action begun by a writ of right. (CA. 4.)
10. [2]*Mort d'ancestor,* with limitation "*post primam coronacionem Ricardi avunculi nostri.*" (CA. 16.)
11. *Quod permittat* for pasture in the nature of Mort d'ancestor, with a variation for a partible inheritance.
12. *Nuper obiit.*
13. [3]Novel Disseisin, with limitations "*post ultimum reditum J. Regis patris nostri de Hibernia in Angliam.*" (CA. 14.) Novel Disseisin of pasture. (CA. 15.)

[1] The privilege of having a jury instead of a grand assize was granted to the Kentish gavelkinders in 1232. *Statutes of the Realm,* 1. 225.

[2] The form seems older than 1237.

[3] This form seems older than 1237.

14. [1]Assizes of Nuisance: some being vicontiel, with limitation "*post primam transfretacionem nostram in Britanniam.*" (CA. 55.)

15. Surcharge of pasture. (CA. 20.)

16. *Quo jure* for pasture.

17. Attaint in *Mort d'ancestor* and Novel Disseisin. (CA. 50.)

18. Perambulation of boundaries.

19. [2]Writ of Escheat: claimant being entitled under a fine which limited land to husband and wife and the heirs of their bodies, the husband and wife having died without issue.

20. Darrein presentment. (CA. 40.)

21. Writ of right of advowson. (CA. 42.) A curious variation ordering a lord to do right touching an advowson; the writ is marked "*alio modo sed raro.*"

22. *Quare impedit.* (CA. 52.)

23. Prohibition to Court Christian touching advowson. (CA. 41.)

24. Attachment against judges for breach of such prohibition. (B. 45.)

25. *Ne admittas personam.*

26. Mandamus to admit parson. (CA. 43.)

27. Dower *unde nihil habet.* (CA. 46.)

28. Dower *ad ostium ecclesiæ.*

29. Dower in London. (CA. 48.)

30. Dower against deforceor.

31. Writ of right of dower.

32. *Warrantia cartæ.* (CA. 10.)

33. *De fine tenendo:* a fine has been made "*tempore J. Regis patris nostri.*" (CA. 51.)

34. *Juris utrum* for the parson. (CA. 49.)

35. *Juris utrum* for the layman. (CA. 49.)

36. Entry, the tenant having come to the land *per* a villan of the demandant.

37. Entry *ad terminum qui preteriit:* the tenant having come to the land *per* the original lessee. (CA. 11.)

[1] This form seems newer than 1237.

[2] This is called a Writ of Escheat; but it closely resembles the Formedon in the Reverter of later times.

38. Entry, the tenant having come to the land *per* one who was guardian.

39. Entry *cui in vita.* (CA. 12.)

40. Entry, the land having been alienated by dowager's second husband.

41. Entry sur intrusion.

42. Entry *ad terminum qui preteriit* for an abbot, the demise having been made by his predecessor.

43. Entry *sine assensu capituli.*

44. Escheat on death of bastard.

45. Entry sur disseisin for heir of disseisee, the defendant being the disseisor's heir.

46. Entry when the land has been given *in maritagium.*

47. Entry for lord against guardians of tenant in socage who are holding over after their ward's death without heir.

48. Entry for reversioner under a fine.

49. Writ of intrusion.

50. *Quod capiat homagium.* (CA. 13.)

51. False imprisonment: "*ostensurus quare predictum A. imprisonavit contra pacem nostram.*"

52. Robbery and rape: "*ostensurus de robberia et pace nostra fracta*, vel *de raptu unde eum appellat.*" (CA. 22.)

53. Homicide: "*attachiari facias B. per corpus suum responsurus A. de morte fratris sui unde eum appellat.*" (CA. 23.)

54. *De homine replegiando.* (CA. 24.)

55. *De plegiis acquietandis:* "*justifices talem quod...acquietet talem.*" (B. 32.)

56. *De plegio non stringendo pro debito:* do not distrain pledge while principal debtor can pay. (CA. 32 a.)

57. *Quod permittat* for estovers: "*justifices A. quod...permittat B. rationabilem estoverium suum in bosco suo quod in eo habere debet et solet.*" Variation for right to fish: "*justifices A. quod permittat B. piscariam in aqua tali quam in eadem habere debet et solet.*" (CA. 57.)

58. Debt: "*justifices A. quod...reddat B. xij. marcas quas ei debet,*" vel "*catallum ad valenciam xii. marcarum quas* (sic) *ei injuste detinet sicut racionabiliter monstrare poterit quod ei debeat, ne amplius,*" etc. (CA. 27.)

59. Debt and Detinue before the king's justices. "*Precipe A. quod...reddat B. xij. marcas quas ei debet et injuste detinet* vel *catallum ad valenciam x. marcarum quod ei detinet, et nisi fecerit...summone ...quod sit coram justiciariis nostris...ostensurus quare non fecerit.*"

60. Replevin. (CA. 21.)

61. Suit to mill: "*justifices A. quod faciat B. sectam ad molendinum...quam facere debet et solet.*" (CA. 58.)

62. Customs and services: "*non permittas quod A. distringat B. ad faciendum sectam...vel alias consuetudines et servicia que de jure non debet nec solet.*"

63. Customs and services: sheriff is not to distrain B. for undue suit to county or hundred court, etc.

64. Customs and services: "*justifices A. quod...faciat B. consuetudines et recta servicia, que ei facere debet,*" etc. (CA. 25.)

65. Customs and services, by *precipe*: "*precipe A. quod faciat B. consuetudines et recta servicia.*"

66. Waste: "*non permittas quod A. faciat vastum...de domibus ...quas habet in custodia,* vel *quas tenet in dotem,*" etc.

67. Waste: attach A. to answer at Westminster why he or she has wasted tenements held in guardianship or in dower, "*contra prohibicionem nostram.*" (Hib. 51.)

68. [1]*De nativo habendo:* let A. have B. and C. his "natives" and fugitives who fled since the last return of our father King John from Ireland. (CA. 17.)

69. *De libertate probanda.* (CA. 18.)

70. *De racionabilibus divisis.* (CA. 19.)

71. *De recordo et racionabili judicio.* Let A. have record and reasonable judgment in your county court in a writ of right. (CA. 7.)

72. Annuity: "*justifices A. quod...reddat B. x. sol. quos ei retro sunt de annuo redditu,*" etc.

73. *Ne vexes.* Do not vex, or permit to be vexed, A. or his men contrary to the liberties that he has by our or our ancestor's charter, which liberties he has used until now. (CA. 56.)

74. Wardship in socage: "*justifices A. quod...reddat B. custodiam terre et heredis C.,*" etc. (CA. 53.)

[1] This form seems newer than 1237.

75. Wardship in chivalry, the guardian claiming the land: "*justifices*," etc. Variation when the guardian is claiming the heir's person. (CA. 54.)

76. Aid to knight son or marry daughter: "*facias habere A. racionabile auxilium.*" (CA. 34.)

77. Covenant: "*justifices A. quod...convencionem...de tanto terre.*" (CA. 36.)

78. Sheriff to aid in distraining villans to do their services.

79. Prohibition against impleading A. without the king's writ. "*R. vic. sal. Precipimus tibi quod non implacites nec implacitari permittas A. de libero tenemento suo in tali villa sine precepto nostro vel capitalis nostri justiciarii.*"

80. *Ne quis implacitetur qui vocat warrantum qui infra aetatem est.* (CA. 9.)

81. *Ne quis implacitetur qui infra aetatem est.* (CA. 9.)

82. *Quod permittat:* "*justifices A. quod...permittat B. habere quendam cheminum*," etc., vel "*habere porcos suos ad liberam pessonam*," etc.

83. Account: "*justifices talem quod...reddat tali racionabilem compotum suum de tempore quo fuit ballivus suus*," etc.

84. Mesne: "*justifices A. quod...acquietet B. de servicio quod C. exigit ab eo...unde B. qui medius est*," etc. (CA. 33.)

85. *De excommunicatis capiendis.* (CA. 35.)

86. Prohibition to ecclesiastical judges against holding plea of chattels or debt "*nisi sint de testamento vel matrimonio.*" (CA. 30.)

87. Prohibition to the party in like case.

88. Attachment on breach of prohibition. (CA. 31.)

89. Prohibition in cases touching lay fee. (CA. 28.)

90. *Recordari facias*, a plea by writ of right in your county court.

91. [1] *Quare ejecit infra terminum. Breve de termino qui non preteriit factum per W. de Ralee:* "*Si A. fecerit te securum*, etc.... *summone*, etc., *B.* etc., *ostensurus quare deforciat A. tantum terre... quam D. ei demisit ad terminum qui nondum preteriit infra quem*

[1] Bracton, f. 220, notices this writ as a newly invented thing. He recommends, however, another form, which is a Precipe quod reddat; but the above is the form which ultimately prevailed. *Reg. Brev. Orig.*, f. 227.

terminum predictus (*D*) *terram illam predicto B. vendidit occasione cujus vendicionis predictus B. ipsum A. de terra illa ejecit ut dicit*," etc.

92. [1] "*Breve novum factum de communi assensu regni ubi de morte antecessorum deficit.*" This is the writ of cosinage.

93. *De ventre inspiciendo.*

94. [2] "*Novum breve factum per W. de Ralee de redisseisina super disseisinam et est de cursu.*" Sheriff and coroners are to go to the land and hold an inquest, and if they find a redisseisor to imprison him.

95. [3] "*Novum breve factum per eundem W. de averiis captis et est de cursu.*" After a replevin and pending the plea, the distrainor has distrained again for the same cause..."*predictum A. ita per misericordiam castiges quod castigacio illa in casu consimili timorem prebeat aliis delinquendi.*"

96. "*De attornato faciendo in comitatibus, hundredis, wapentachiis de loquelis motis sine breve Regis.*" A writ founded on cap. 10 of the Statute of Merton. Variation when the suit was due to a court baron.

97. Prohibition to ecclesiastical judges in a suit touching tithes.

98. Writ directing the reception of an attorney in an action. (CA. 37.)

99. *Precipe in capite.* (CA. 3.)

100. Writs directing sheriff to send knights to view an essoinee and hear appointment of attorney. (CA. 38, 39.)

101. Writ to the bishop directing an inquest of bastardy, the plea being one of "general bastardy."

102. Writ of entry sur disseisin, the defendant having come to the land *per* the disseisor.

103. *Quod permittat* for common by heir of one who died seised.

104. *Quare duxit uxorem sine licencia. Quare permisit se maritari sine licencia.*

105. [4] *Monstraverunt,* for men of ancient demesne.

[1] Another of Raleigh's inventions, which we may ascribe to the year 1237. Bracton's *Note Book*, pl. 92.

[2] Given by Stat. Mert., cap. 3.

[3] This is given by Bracton, f. 159.

[4] This will hereafter be attracted into the "Writ of Right group" by the Little Writ of Right for men of the Ancient Demesne.

106. Removal of plea from court baron into county court on default of justice.

107. Surcharge of pasture; "*summone...B. quod sit...ostensurus quare superhonerat pasturam.*" (CA. 20.)

108. Patent appointing justices to take an assise.

109. Prohibition to ecclesiastical judges against entertaining a cause in which B. (who has been convicted of disseising A.) complains that A. has "defamed his person and estate."

110. *De odio et hatia.*

111. Writ of extent. Inquire how much land A. held of us *in capite.*

112. Mainprise, where inquest *de odio et hatia* has found for the prisoner.

113. Writ of seisin for an heir whose homage the king has taken.

114. Writ of inquiry as to whether the king has had his year and a day of a felon's land.

115. *Warrancia diei*, sent to the justices.

116. Extent of land of one who owes money to the Jews.

117. Prohibition against prosecuting a suit touching advowson in Court Christian.

118. Writ to bishop directing an inquiry when bastardy has been specially pleaded: "*inquiras utrum A. natus fuit ante matrimonium vel post.*"

119. Writ announcing pardon of flight and outlawry.

120. Writ permitting essoinee to leave his bed. Dated A. R. 33.

121. Abbot of N. has been enfeoffed in N. by several lords who did several suits to the hundred court. You, the sheriff, are not to distrain the abbot for more suits than one "*quia non est moris vel juri consonum quod cum plures hereditates in unicum heredem descenderint vel per acquisicionem aliquis possideat diversa tenementa quod pro illis hereditatibus aut tenementis diversis, ad unicam curiam fiant secta diversa.*" Dated A. R. 43[1].

[1] In 1258–9 suit of court was a burning question. The Provisions of Westminster (cap. 2) laid down the rule, that when a tenement which owes a single suit comes to the lands of several persons, either by descent or feoffment, one suit and no more is to be due from it. This writ deals with the converse case in which several parcels of

Our first observation would be, that the Register has quite doubled in bulk since we last saw it; and our second should, as I think, be, that chronology has had something to do with the arrangement of the specimen that is now before us. The last two formulas are dated, and probably constituted no part of the Register that was copied, but were added to it, having been transcribed from writs lately issued. But leaving these two last formulas out of sight, I think that the last thirty writs or thereabouts are, for the most part, new writs tacked on by way of appendix to the older Register. The line might be drawn between No. 90 and No. 91. The latter of these, the very important *Quare ejecit infra terminum*, is expressly ascribed to William Raleigh, Bracton's master, whose judicial activity came to an end in 1239. Then, No. 92, the Writ of Cosinage, is "*breve novum*," and we know that this was conceded by a council of magnates in 1237, and was penned by Raleigh[1]. Then again, No. 94 is attributed to Raleigh. It is the Writ of Redisseisin, given by the Statute of Merton. The last of this group of "Actiones Raleghanæ" (if I may use that term) deals with the recaption of a distress pending the action of replevin; in spirit it is allied to the Redisseisin[2]. The next writ, No. 96, is given by the Statute of Merton. The prohibition in tithe suits, No. 97, is the centre of a burning ques-

land, each owing a suit to the same court, come into one hand, and it lays down the rule that in this case also one suit is to be due.

[1] Bracton's *Note Book*, pl. 1215.

[2] The printed Registrum, f. 86, says, "istud breve fuit inventum secundum provisiones de Merton." But the Provisions of Merton, as we have them, contain nothing but distress.

tion; and so is No. 118, the writ directing the bishop to say whether a child was born before or after the marriage of its parents. One may be surprised to find this writ at all, after the flat refusal of the bishops given at the Merton Parliament. Of the other writs in this part of the *Registrum*, we may, I think, say that they form an appendix, and are not too carefully made, since some of them appeared in the earlier part of the formulary. Others may be writs newly invented, or old writs that have only of late become "writs of course." The *Monstraverunt* for men of ancient demesne, a writ of critical importance in the history of the English peasantry, is no new thing; but very possibly, until lately, it could not be obtained until the matter had been brought under the king's own eye, or at least his chancellor's eye. The same may, perhaps, be said of the equally important *De odio et hatia*.

In the next place, we see one of the causes at work, which, in the course of time, swells the Register of Original Writs to its great bulk. A group of what we may call fiscal or administrative writs have obtained admission among the writs by which litigation is begun. At present it is small; it includes two writs for "extending" land, and a writ directing livery to an heir whose homage the king has taken; in course of time it will become large.

But turning to the formulas of litigation, we see already a large variety of writs of entry; though as yet the tale is not complete for writs "in the *post*" have not yet been devised, and would perhaps be resented by the feudal lords. The Assize of Mort d'Ancestor is now supplemented by *Nuper obiit* and Cosinage. We

see signs of growth in the department of Waste. We have something very like a Formedon. Annuity and Account have been added to the list of personal actions, but Trespass is yet lacking.

A few words about Trespass: The MS. registers that I have seen, fully bear out the opinion that has been formed on other evidence as to the comparatively recent origin of this action[1]. Glanvill has nothing that can fairly be called a writ of Trespass. His nearest approach to such a writ is "*Justicies*," ordering the sheriff to compel the return of chattels taken "unjustly and without judgment"; but the chattels have been taken in the course of a disseisin, and the plaintiff has already succeeded in an Assize[2]. In later days we do not find this writ; its object seems to have been obtained by the practice of giving damages in the Assize[3]. But already, in John's reign, we find a few actions which we may call actions of trespass. In some of these, where there has been asportation or imprisonment, the true cause of action in the royal court seems to be that which our forefathers knew as the "ve de naam"; "vetitum naami"; the refusal to deliver chattels or imprisoned persons upon the offer of a gage and

[1] I am happy in being able to refer to what is said on this point by "J. B. A." in *Harvard Law Review*, ii. 292. [See also *Harvard Law Review*, iii. 29.—Ed.] Of course Trespass (transgressio) was well enough known in local courts. "Trespass" and "Debt" were the two great heads of their civil jurisdiction.

[2] *Glanv.*, xii. 18; xiii. 39.

[3] Bracton, f. 179 b. "Item ad officium (vicecomitis) pertinet quod faciat tenementum reseisiri de catallis, etc., quod hodie aliter observatur, quia quaerens omnia damna post captionem assisae recuperabit."

pledge,—a cause of action which had definitely become a plea of the crown[1]. Also, it is in some instances a little difficult to distinguish an action of Trespass from an appeal of felony. Just the dropping out of a single word might make all the difference. Thus, on a roll of Richard's reign A. is said to appeal B., C., and D., for that they came to his land with force and arms, and in robbery ("felony" is not mentioned) and wickedly, and in the king's peace carried off his chattels, to wit turves; whereupon B. defends the felony and robbery, and says that he carried off the turves in question from his own freehold[2]. Attempts were made to use the appeal of felony as an action for trying the title to land,—a very summary action it would have been. But the court of John's reign would not suffer this[3]. On the rolls of the first half of Henry III's reign actions of Trespass appear, but they are still quite rare. The advantages of an action in which one can proceed

[1] *Rot. Cur. Reg.* ii. 34, "A. optulit se versus B. de placito transgressionis." Ibid. 51, "A. queritur quod B. vi sua asportavit bladum de sex acris terre quas disracionavit in curia Dom. Regis (but here the recovery of the land in the king's court is a special reason for its interference). Ibid. 120, "A. queritur quod B. dominus suus cum vi et armis prostravit boscum et cum forcia frequenter asportat ad domum suam, et quadrigas suas cum forcia in bosco suo de W. capit et adhuc unam illorum habet et detinet injuste." Ibid. 169, "A. queritur quod B. et C. intraverunt in terram suam de X. vi et armis et in pace Regis et averia sua ceperunt et ten" (*corr.* contra) "vadium et plegium tenuerunt." Ibid. 260, "A. queritur quod Episcopus Donelmensis cepit eum et imprisonavit et eum retinuit injuste quousque ipsum redemit et eum contra vadium et plegium retinuit."

[2] *Rot. Cur. Reg.* i. 38.

[3] *Selden Society*, vol. 1. pl. 35, "appellum de pratis pastis non pertinet ad coronam regis."

to outlawry are apparent[1], but something seems to be restraining plaintiffs from bringing it. The novelty of the procedure is shown by the uncertainty of the courts as to its scope, particularly when the action relates to land, and title is pleaded by the defendant. We actually find an action of trespass leading to a grand assize. If title is to be determined at all in such an action, it must be determined with all the solemnity appropriate to a Writ of Right[2]. Bracton, however, who unfortunately has left us no account of this action, shows a reluctance to allow this writ "*quare vi et armis*" to be used for the purpose of recovering land[3], and a little later we find it repeatedly said that a question of title cannot be determined by such a writ[4]. So late as Edward II's reign it was necessary to assert

[1] Bracton's *Note Book*, pl. 85.

[2] *Rot. Cur. Reg.* ii. 120, "A. queritur quod B. dominus suus cum vi et armis prostravit boscum et cum forcia frequenter asportat ad domum suam...B. dicit quod A. non tenet vel tenere debet boscum illum de eo...A. ponit se in magnam assisam utrum ipse jus majus habeat tenendi de eo boscum vel ipse in dominico. Et B. similiter." Bracton's *Note Book*, pl. 835, "A. queritur quod B., C., et D. vi et armis et contra pacem Dom. Regis fuerunt in piscaria ipsius A...et E. (vocatus ad warrantiam) venit...et dicit...quod ipse debet piscari in eadem piscaria cum ipso A., et dicit quod antecessores sui ibi piscari solent et debent et piscati sunt scil. tempore Henrici Regis avi....A. dicit quod predecessor suus fuit seisitus de piscaria illa que fuit separabile suum...E. ponit se in magnam assisam."

[3] Bracton, f. 413.

[4] *Placit. Abbrev.* 142 (38 Hen. III), "Et quia uterque dicit se esse in seisina de uno et eodem tenemento et non potest per hoc breve de jure tenementi inquiri." Ibid. 162 (1 Ed. I), "Et quia liberum tenementum non potest per hoc breve de transgressione terminari."

against a decision to the contrary that in an action *de bonis asportatis* the judgment must be merely for damages and not for a return of the goods[1].

But meanwhile, Trespass had become a common action. This, on the evidence now in print, seems to have taken place suddenly at the end of the "Baron's war." In the *Placitorum Abbreviatio* we suddenly come upon a large crop of such actions for forcibly entering lands and carrying off goods, and in very many of these the writ charges that the violence was done "*occasione turbacionis nuper habitæ in regno.*" This may suggest to us that in order to suppress and punish the recent disorder, a writ which had formerly been a writ of grace, to be obtained only by petition supported by golden or other reasons, was made a writ of course,—an affair of every-day justice. Such MS. registers as I have seen seem to favour this suggestion. I have seen no register of Henry III's reign which contains a writ of Trespass, and it is not to be found even in all registers of his son's reign.

[1] *Placit. Abbrev.* 346 (17 Ed. II), "In hujusmodi brevi de transgressione secundum legem," etc., "dampna tantum adjudicari et recuperari debeant."

III.

Let us pass on to a new reign. Registers of Edward I's time are by no means uncommon. I believe that we have at Cambridge no less than seven which, in the sense defined above, may be ascribed to that age, and there are many at the British Museum. The most meagre of them is far fuller than those Registers of Henry III's reign of which we have spoken. To give an idea of their size I may mention a MS. at the Museum (Egerton 656), in which the writs are distributed into groups of sixty; there are seven perfect groups followed by a group which contains but fifty-one members; thus in all there are four hundred and seventy-one writs. This increase in size is of course largely due to the legislative activity of the reign, and this course makes the various specimens differ very widely from each other in detail. Still I think that I have seen enough to allow of my saying that very early in the reign the general arrangement of the Register had become the arrangement that we see in the printed book. A Register of Edward's day is distinctly recognizable as being the same book that Rastall published under the rule of Henry VIII. Not to lose myself in details about statutory writs, I will draw attention to one principle which may help towards a classification of these Edwardian Registers. That principle is expressed in the question—Does Trespass appear at all, and if so where? There are specimens

which have no Trespass; there are others which have Trespass at the end, in what we may regard as an appendix; there are others again which have Trespass in its final place, namely, in the very middle of the book.

Next I will give a short description of a specimen which I am disposed to give to the earliest years of Edward I. It is contained in a Cambridge MS. (Ee. i. 1) which I will call CC, and the following notes of its contents may be enough. For the purpose of making its scheme intelligible I have supposed it to consist of various groups of writs and have given titles to those groups, but it will be understood that the MS. gives the writs in an unbroken series, a series unbroken by any headings or marks of division.

1. *The Writ of Right Group.* This includes the Writ of Right; Writ of Right *de rationabile parte*; Writ of Right of Dower; *Praecipe in capite*; Little Writ of Right; Writs of Peace, and writs summoning the Grand Assize or Jury in lieu of Grand Assize; writ for viewing an essoinee; writs announcing appointment of attorney; *Warrantia diei; Licencia surgendi; Pone; Monstraverunt.*

2. *The Ecclesiastical Group.* Writ of Right of Advowson; Darrein Presentment; *Quare impedit; Juris utrum;* Prohibition to Court Christian in case of an advowson; Prohibition to Court Christian in case of chattels or debts; Prohibition against Waste[1]; Prohibi-

[1] The reason why Waste gets enclosed in this ecclesiastical group is obvious; the action of Waste is, or has lately been, an action on a prohibition.

tion in case of lay fee. Then follow seven specially worded prohibitions introduced by the note "*Ostensis formis prohibicionum que sunt de cursu patebit inferius de eis que sunt in suis casibus formate et sunt de precepto.*" After these come the *De Excommunicato capiendo* and other writs relating to excommunicates.

3. *The Replevin and Liberty Group.* Replevin; a writ directed to the coroners where the sheriff has failed in his duty is preceded by the remark "*primo inventum fuit pro Roberto de Veteri Ponte*"; *De averiis fugatis ab uno comitatu in alium; De averiis rescussis; De recaptione averiorum; Moderata misericordia; De nativo habendo*, the limitation is "*post ultimum reditum Domini J. Regis avi nostri de Hibernia in Angliam*"; *De libertate probanda;* Aid to distrain villans; *De tallagio habendo; De homine replegiando; De minis*, i.e. a writ conferring a special peace on a threatened person[1]. *De odio et atia* (with the remark that the clause beginning with *nisi* was introduced by John Lexington, Chancellor of Henry III).

4. *The Criminal Group.* Appeal of felony evoked from county court by *venire facias*; writ to attach one appealed of homicide by his body; writs to attach other appellees by gage and pledge.

5. *A Miscellaneous Group. De corrodio substracto; De balliva forrestarii de bosco recuperanda; Quod attachiet ipsum qui se subtraxit a custodia; Quod nullus*

[1] A. has complained that he is threatened by B. therefore "prefato A. de prefato B. firmam pacem nostram secundum consuetudinem Anglie habere facias, ita quod securus sis quod prefato A. de corpore suo per prefatum B." etc. It is a writ directing the sheriff to take security of the peace.

implacitetur sine precepto Regis. Various forms of the *Quod non permittat* and *Quod permittat* for suit of mill, etc.

6. *Account.* Account against a bailiff ("*Et sciendum est quod filius et heres non habebit hoc breve super ballivum domini* [corr. *antecessoris*] *sui, set ut dicitur executores possunt habere hoc breve super ballivum tempore quo fuit in obsequio defuncti*"; it proceeds to give a form of writ for executors in the king's court and then adds, "*Et hoc breve potest fieri ad placitandum in comitatu. Verumptamen casus istorum duorum brevium mere pertinet ad curiam cristanitatis racione testamenti*").

7. *Group relating chiefly to Easements and the duties of neighbours.* Aid to knight eldest son; *De pontibus reparandis—muris—fossatis; De curia claudenda; De aqua haurienda; De libero tauro habendo; De racionabile estoverio; De chimino habendo; De communa,* with variations; Admeasurement of pasture; *Quo jure; De racionalibus divisis; De perambulacione; De ventre inspiciendo.*

8. *Mesne, Annuity, Debt, Detinue, etc. De medio; De annuo redditu; De debito* (only two writs of debt, one a *precipe,* the other a *justicies;* the former has "*debet et detinet,*" the latter "*detinet*"); *Ne plegii distringantur quamdiu principalis est solvendus; De plegiis acquietandis; De catallis reddendis;* (Detinue by *precipe* and by *justicies*); *Warrantia cartae.*

9. *Writs of Customs and Services.*

10. *Covenant and Fine.* The covenant in every case is "*de uno messuagio.*"

11. *Wardship. De custodia terre et heredis; De corpore heredis habendo; De custodia terre sine corpore; Aliter de soccagio.* "*Optima brevia de corpore heredis racione concessionis reddende* [sic] *executoribus alicui defuncti.*"

12. *Dower.* Dower *unde nihil; De dote assensu patris; De dote in denariis; De dote in Londonia; De amensuracione dotis.*

13. *Novel Disseisin.* Novel disseisin, the limitation is "*post primam transfretacionem domini H. Regis anni*[1] [sic] *nostri in Brittanniam*"; *De redisseisina;* Assize of nuisance; Attaint.

14. *Mort d'Ancestor,* and similar actions. Mort d'Ancestor (no period of limitation named); Aiel; Besaiel ("*Multi asserunt quod hoc breve precipe de avio et avia tempore domini H. Regis filii Regis Johannis per discretum virum dominum Walterium de Mertone*[2] *tunc secretarium clericum et prothonotorium* [sic] *cancellarie domini Regis et postmodum cancellarium primo fuit adinventum quia propter recentem seisinam et possessionem et discrimina brevis de recto vitandum ab omnibus consiliariis et justiciariis domini Regis est approbatum et justiciariis demandatum quod illud secundum sui naturam placitent*"); Cosinage; *Nuper obiit* ("*Et hoc breve semper est de cursu ad*

[1] The occurrence of this word which may be a corruption of "avi" is not sufficient to make us doubt that in substance this Register belongs to Edward I's reign; though possibly a feeble attempt to "bring it up to date" may have been made at a later time.

[2] Walter of Merton seems here to get the credit which on older evidence belongs to William of Raleigh.

bancum in favorem petentis seisinam quod antecessor petentium habuit de hereditate sua et similiter ut vitentur dilaciones periclose que sunt in breve de recto").

15. *Quare ejecit infra terminum*, ascribed to Walter Merton[1]; Writs of Escheat.

16. *Entry and Formedon.* Numerous Writs of Entry, the degrees being mentioned (no writ "in the *post*"); Formedon in the Reverter; and a very general Formedon in the Descender[2].

17. *Miscellaneous Group.* License to elect an abbot; petition for such license; form of presenting an abbot elect to the King; pardons; grants of franchises; a very special writ for R. de N. impleaded in the court of W. de B.; *De languido in anno bissextili* (concerning an essoin for a year and a day in leap year); *Breve de recapcione averiorum post le Pone; Quod non fiat districtio per oves vel averiis* [sic] *carucarum; Ne aliquis faciat sectam ad comitatum ubi non tenetur; Ne faciat sectam curie ubi non tenetur;* some specially worded Prohibitions.

In substance this MS. seems to represent the Register as it stood in the very first years of Edward I. I do not think that any of the statutes of his reign have

[1] Here again Merton seems to be obtaining undue fame at the expense of Raleigh.

[2] "Praecipe R. quod juste," etc., "reddat H. unam virgatam terre...quam W. dedit M. et que post mortem ipsius M. ad prefatum H. descendere debet per formam donacionis quam prefatus W. inde fecit predicto M. ut dicit, et nisi fecerint," etc. What I have seen in this and other Registers favours the belief that there was a Formedon in the Descender before the Statute de Donis. See Co. Lit. 19a; Challis, *Real Property*, 69.

been taken into account, and doubt whether even the Statute of Marlborough (1267) has yet had its full effect. There is no Writ of Entry "in the *post*," and some writs about distress and suit of court founded on statutes of Henry III still remain unassimilated in a miscellaneous appendix. The character of that appendix provokes the remark that the copyists of the Register may often have picked and chosen from among the miscellaneous forms of the Chancery those which would best suit the special wants of themselves or their employers. The *congé d'élire*, for example, looks out of place, and the petition for such a license still more out of place; but this is a monastic manuscript and these formulas were useful in the abbey.

I said above that Glanvill's scheme of the law, or rather his scheme of royal justice, might be displayed by some such string of catch-words as the following: "Right" (that is proprietary right in land), "Church," "Liberty," "Dower," "Inheritance or succession," "Actions on Fines," "Lord and Tenant," "Debt," "Attorney," "Justice to be done by feudal lords and sheriffs," "Possession," "Crime." Now I will venture the suggestion that the influence of his book is apparent on the face of the Register (CC) and all the later Registers. It begins with "Right" while it puts "Possession," a title which now includes the Writs of Entry as well as the Assizes, at the very end. After "Right" comes "Church," and after "Church" comes "Replevin and Liberty," a title the unity of which is secured by the fact that when a man is wrongfully deprived of his liberty he ought to be replevied. The middle part of the Register is somewhat chaotic, and so

it always remains; but it is really less chaotic than it may seem to some of us, whose heads are full of modern notions. We seem indeed to be carried backwards and forwards across the line which divides "personal" and "real" actions; Account, Annuity, Debt, Detinue, and Covenant are intermixed with actions founded on feudal dues and actions founded on easements, writs for suit of mill, suit of court, repair of bridges, actions of Mesne, actions of Customs and Services. The truth, as it seems to me, is that the line between "real" and "personal" actions as drawn in later books, is, at least when applied to our medieval law, a very arbitrary line. For example, there is an important connection between an action in which a surety sues the principal debtor (*de plegio acquietando*) and an action of Mesne, in which the tenant in demesne sues the intermediate lord to acquit or indemnify him from the exaction of the superior lord; this connection we miss if we stigmatise "Mesne" as a "real action" just because it has something to do with land. The action of Debt, again, is founded on *debet*; but so is the action for Customs and Services, at least in some of its forms. However I am not concerned to defend the Register.

In Edward I's day, partly it may be under the influence of Glanvill's book, it has become an articulate body. It will never hereafter undergo any great change of form, but it will gradually work new matter into itself. Such new matter will for a while lie undigested in miscellaneous appendixes, but in course of time it will become an organic part of the system. I will mention the most striking illustration of this process.

Hitherto we have never come across that action of

Trespass which is to be all important in later days, and it seems to me a very noteworthy fact that there are Registers of Edward I's day that omit this topic. It gradually intrudes itself. First we find it occupying a humble place at the end of the collection among a number of new writs due to Edward's legislative zeal. Thus, to choose a good example, there is in the Cambridge Library a MS. (Ll. iv. 18) containing a Register which is very like that (Ee. i. 1) which we have last described. But when it has done with the Writs of Entry, it turns to Formedon, gives writs in the Reverter, Descender, and Remainder, and a number of specially worded writs of Formedon which bear the names of the persons for whom they were drawn:—we have Bereford's formedon, Mulcoster's, and Mulgrave's; clearly the Statute of Westminster II is in full operation. Then upon the heels of Formedon treads Trespass. It is a simple matter as yet, can be represented by one writ capable of a few variations—*insultum fecit et verberavit, catalla cepit et asportavit arbores crescentes succidit et asportavit, blada messuit et asportavit, separalem pasturam pastus fuit, uxorem rapuit et cum catallis abduxit.* Trespass disposed of, we have Ravishment of Ward; *Contra formam feffamenti; Ne quis destringatur per averia carucae;* Contribution to suit of court; Pardons; Protections; *De coronatore eligendo; De gaola deliberanda; De deceptione curiæ; cessavit per biennium; carta per quam patria de Ridal disafforestatur; Breve de compoto super Statutum de Acton Burnell,* and so forth and so forth in copious disorder. The whole *Registrum* fills fifty-two folios, of which no less than the last fourteen are taken up by the unsyste-

matized appendix. Another MS. (Ll. iv. 17) gives a Register of nearly the same date, perhaps of somewhat earlier date, for it does not contain the new Formedons. This again has an unsystematized appendix, and in that appendix Trespass is found. The place at which it occurs may be thus described:—the part of the Register that has already become crystallized, the part which ends with the Writs of Entry, having been given, we have the following matters: Pardon; License to hunt; Grants of warren, fair, market; *De non ponendo in assisam*, Writ on the Statute of Winchester; Leap year; Inquests touching the King's year and day; Contribution; Beau pleader; Trespass; Gaol delivery; Intrusion; *congé d'élire; Quo Warranto;* Trespass again; Writ on the Statute of Gloucester; Mortmain; Trespass again (*pro cane interfecto*); *ne clerici Regis compellantur ad ordines suscipiendos*,—as variegated a mass as one could wish to see. Other MSS. of the same period have other appendixes with Trespass in them. They forcibly suggest that the Register was falling into disorder, the yet inorganic part threatening to outweigh the organic.

There came a Chancellor, a Master, a Cursitor with organizing power; Trespass could no longer be treated as a new action; a place had to be found for it, and a place was found. It may be that this was done under Edward I: certainly in his son's reign it seems an accomplished fact. What was the place for Trespass? If the reader will look back at our account of the Register which we have called CC, he will find that we have labelled the third group of writs as "Replevin and Liberty," the fourth group as "Criminal." The

connection between Replevin and Liberty is obvious, it is seen in the writ *De homine replegiando*, the writ for replevying a prisoner. The transition from Liberty to Crime is meditated by the writ *De odio et atia*, a writ for one who says that he is imprisoned on a false accusation of crime. Now when the time has come for taking up Trespass into the organic part of the Register, this was the quarter in which its logical home might be found. It was naturally brought into close connection with "crime." Throughout the Middle Ages Trespass is regarded as a crime; throughout the Year Books the trespasser is "punished"; and it is a very plausible opinion that the earliest actions of trespass grew out of appeals of felony; they were, so to speak, mitigated appeals, appeals with the "*in felonia*" omitted, but with the "*vi et armis*," and the "*contra pacem*" carefully retained. Already in the Register that I have called CB, a writ of false imprisonment has come in immediately before the writ for attaching an appellee. Then, in CC, a writ *De minis* has forced its way into the "Replevin and Liberty Group" so as to precede the writs against an appellee. This writ *De minis*, commanding the sheriff to confer the king's peace, the king's "grith" or "mund" we may say, on a threatened person, and to make the threatener find security for the peace is the herald of trespass: *De minis—De transgressione*, this becomes a part of our "*legalis ordo*."

The result in the fully developed Register is curious, showing us that the arrangement of the book is the resultant of many forces. Let us see what follows Waste. We have the *De homine replegiando*, then the Replevin of chattels, then, returning to men deprived of liberty, the *De nativo habendo*, and the *De libertate*

probanda; these naturally lead to the writ ordering the sheriff to aid a lord in distraining his villans. There follows the *De scutagio habendo*. Why should this come here? Because in older times villanage had suggested tallage; this had been the place for a *De tallagio habendo*, and then tallage had suggested scutage. Then in the printed Register we have the *De minis*; and then an action against one who has given security for the peace and has broken it by an assault, brings upon us the whole subject of Trespass, which with its satellites now fills some forty folios, some eighty pages. And then what comes next? Why, *De odio et atia*; we are back again at that topic of "Liberty and Replevin" whence we made this long digression. Meanwhile these criminal writs, these writs for attaching appellees which originally attracted Trespass to their quarter of the Register, have disappeared as antiquated, since persons accused of felony now get arrested without the need of original writs.

Similar measures were taken for writing into appropriate places the result of the legislation of Edward I; but the formation of new writs was constantly providing fresh materials. Some of these found a final resting-place at the very end of the Register, but for most of the statutory writs, a home was found in the middle. The occurrence of the Assize of Novel Disseisin marked the beginning of a new and logically arranged section of the work, a section devoted to Possession. It is between Dower and Novel Disseisin that the newer statutory writs are stored.

As already said, the printed Register is full of notes and queries. Many of these are ancient, some as old as the reign of Edward I. Speaking broadly one may

say that the Latin notes are ancient, the French notes comparatively modern. Some of them must have been quite obsolete in the reign of Henry VIII; but the "*vis inertiae*" preserved them. When once they had got into MSS. they were mechanically copied.

During the whole of the fourteenth century the Register went on growing, and by the aid of MSS. we can still catch it in several stages of its growth. Some of these MSS. show a Register divided into chapters, and thus make it possible for us to perceive the articulation of the book. As the printed volume gives us no similar aid, I will here set out the scheme of a Register which I attribute to the reign of Richard II. It is contained in a Cambridge MS. (Ff. v. 5). In the right-hand column I give the catch-words of its various chapters; in the left-hand column I refer to what I take to be the scheme of CC, the Register from the beginning of Edward I's reign, of which mention has already been made.

1. The Writ of Right Group.	i.	*De recto.*
	ii.	*De recto secundum consuetudinem manerii.*
	iii.	*De falso judicio.*
	iv.	*De attornato generali; Protectiones.*
	v.	*De attornatis faciendis.*
2. The Ecclesiastical Group, including Waste.	vi.	*De advocatione; De ultima presentacione; Quare impedit; juris utrum.*
	vii.	*De prohibitione.*
	viii.	*Consultationes.*
	ix.	*De non residentia; De vi laica ammovenda*, etc.

		x.	[1]*Ad jura regia.*
		xi.	*De excommunicato capiendo*, etc.
		xii.	*De vasto.*
3.	Replevin and Liberty Group.	xiii.	Replevin generally and *De homine replegiando.*
		xiv.	Trespass and Deceit (*transgressio in deceptione*).
		xv.	[2]Error.
[4.	Criminal Group dissolved.]	xvi.	*Conspiratio; De odio et atia.*
5.	[Miscellaneous Group. See cap. xix.]		
6.	Account.	xvii.	Account.
		xviii.	Debt and Detinue.
7.	Easements, Neighbourly Duties, etc.	xix.	*Secta ad molendinum; curia claudenda; Quod permittat*, etc.; *Quo jure;* Admeasurement of pasture; Perambulation; *Warrantia cartae; De plegiis acquietandis.*
8.	Mesne, Annuity, Debt, Detinue.	xx.	Annuity; Customs and Services; Detinue of Charters; Mesne.
9.	Customs and Services.		
10.	Covenant and Fine[3].	xxi.	Covenant.
11.	Wardship.	xxii.	Wardship.

[1] A group of especially stringent prohibitions called out by papal and ecclesiastical aggression.

[2] The topic of Error is suggested by Trespass, just as the topic of False Judgment is suggested by "Right."

[3] The action on a fine by original writ has disappeared, because fines are now enforced by *Scire Facias*. This is noted in the printed Register, f. 169.

12.	Dower.	xxiii.	Dower.
		xxiv.	[1]*Brevia de Statuto* (Modern Statutory Actions).
		xxv.	*De ordinatione contra servientes* (Actions on the Statute of Labourers).
13.	Novel Disseisin.	xxvi.	Novel Disseisin.
		xxvii.	*De recordo et processu mittendo* (Writs ancillary to the Assizes).
14.	Mort d'Ancestor, and similar writs.	xxviii.	Mort d'Ancestor.
		xxix.	Aiel, Besaiel, *Nuper Obiit*, etc.
15.	*Quare ejecit.*	xxx.	*Quare ejecit; De ejectione firmæ.*
16.	Entry.	xxxi.	Entry *ad terminum qui preteriit.*
		xxxii.	Entry, *Cui in vita.*
		xxxiii.	Intrusion.
		xxxiv.	Entry for tenant in dower.
		xxxv.	Cessavit.
		xxxvi.	Formedon.
		xxxvii.	*De tenementis legatis.*
17.	Miscellaneous group.	xxxviii.	[2]*Ad quod damnum.*
		xxxix.	*De essendo quieto de theolonio.*
		xl.	*De libertatibus allocandis.*
		xli.	*De corrodio habendo.*
		xlii.	*De inquirendo de idiota; De leproso amovendo*, etc.

[1] Here come two chapters of statutory appendix.

[2] Here begins a long appendix, consisting mainly of documents that may be called administrative.

xliii.	Presentations by the king, etc.
xliv.	*De manucaptione et supersedendo.*
xlv.	*De profero faciendo; De mensuris et ponderibus.*
xlvi.	*De carta perdonacionis se defendendo.*
Appendix.	*De indempnitate nominis.* Statutory writs; *Decies tantum*, etc.

A Register from the end of the fourteenth century is in point of form the Register that was printed in Henry VIII's day. If I might revert to my architectural simile, I should say that the cathedral as it stood at the end of Richard II's reign was the cathedral in its final form; some excrescent chantry chapels were yet to be built, but the church was a finished church and was the church that we now see. In the printed book we can detect but very few signs of work done under Tudor or even Yorkist kings, and though the Lancastrian Henries have left their mark upon it, still that mark is not conspicuous. I should guess that the last occasion on which any one went through the book with the object of adding new writs and new notes occurred late in the reign of Henry VI[1]. On the other hand we constantly find references to decisions of Richard II's time, and there are many signs that the book was revised and considerably enlarged in the middle of Edward III's reign; allusions to decisions given between the tenth and twentieth years of the last-named

[1] *Reg. Brev. Orig.* f. 12, 31, 58, 288, 289 b, 291, 308, show work of Henry VI's reign.

king are particularly frequent, and we read more of Parning than of any other chancellor. This is a curious point. Robert Parning, as is well known, was one of the very few laymen, one of the very few common lawyers, who, during the whole course of medieval history held the great seal. He held it for less than two years; he became chancellor in October, 1341, and died in August, 1343; yet during this short period he stamped his mark upon the Register. The policy of having a layman (a "layman," that is, when regarded from the ecclesiastical not the legal point of view) as chancellor was very soon abandoned; few if any laymen were endowed with the statecraft and miscellaneous accomplishments required of one who was to act as "principal secretary of state for all departments." But within the purely legal sphere, as manager of the "*officina brevium*," a great lawyer who had already been chief justice may have found congenial work. After all, however, it may be chance that has preserved his name in the pages of the Register; just in his day some clerk may have been renovating and recasting the old materials and thus have done for him what some other clerk a century earlier did for William Raleigh.

During the fifteenth century the Register increased in bulk, but except in one department there seem to have been but few additions made to the formulas of litigation; the matter that was added consisted, if I mistake not, very largely of documents of an administrative kind,—pardons, licenses to elect and other licenses, letters presenting a clerk for admission, writs relating to the management of the king's estates, writs for putting the king's wards in seisin, and so forth, lengthy

formulas which conceal what I take to be the real structure of the Register. As a final result we get some seven hundred large pages, whereas we started in Henry III's day with some fifty or sixty writs capable of filling some ten or twelve pages. The department just mentioned as exceptional is of course the department of Trespass. Here there has been rapid growth; but I do not think that the printed book can be taken as fairly representing the law of the time when it was printed, namely 1531. It draws no line at all between "Trespass" and "Case." The writs that we call writs of "Trespass upon the special Case" are mixed up with the writs which charge assault, asportation, and breach of close, and are very few. Writs making any mention of assumpsit are fewer still, and I think that there is but one which makes the non-feasance of an assumpsit a ground of action[1]. I should suppose that the practice of bringing actions by bill without original writ checked the accumulation of new precedents in the Chancery, and it seems an indubitable fact that the invention of printing had some evil as well as many good results; men no longer preserved and copied and glossed and recast the old manuscripts. But when all is said it is a remarkable thing that a Register which certainly did not contain the latest devices should have been printed in 1531, reprinted in 1595, and again reprinted in 1687. The consequence is that Trespass to the last appears as an intruder. No endeavour has been made to reduce the writs that come under that head to logical order. The forces which have deter-

[1] *Reg. Brev. Orig.* f. 109 b, a writ against one who has "assumed" to erect a stone cross and has not done it.

mined the sequence of these writs seem chiefly those which I have called "chronology" and "mechanical chance"; as new writs, as they were made, were copied on convenient margins and inviting blank pages. There has been no generalization; the imaginary defendant is charged in different precedents with every kind of unlawful force, with the breach of every imaginable boundary, with the asportation of all that is asportable, while the now well-known writs against the shoeing smith who lames the horse, the hirer who rides the horse to death, the unskilful surgeon, the careless innkeeper, creep in slowly amid the writs which describe wilful and malicious mischief, how a cat was put into a dove-cote, how a rural dean was made to ride face to tail, and other ingenious sports. It would be interesting could we bring these Registers to our aid in studying the process whereby Trespass threw out the great branch of Case, and Case the great branch of Assumpsit; but the task would be long and very difficult, because the Registers are so many, and unless we compare all of them our means of fixing their dates are few and fallible. Of course, if the task concerned the history of Roman law it would be performed; but we are fully persuaded, at least on this side of the Atlantic, that our own forefathers were not scientific.

REMAINDERS AFTER CONDITIONAL FEES[1]

If I venture to criticise a passage in Mr Challis's admirable book on the Law of Real Property, it is not with the intention of disputing anything that he says about the law as it now is, but merely in the interests of antiquarianism. With good warrant, as it seems, he lays down the rule that there cannot be a remainder after a conditional fee. He admits that there is "a somewhat obscure passage in Bracton" to the contrary, but thinks that "the clear and reiterated opinion of Lord Coke, which has the advantage of being manifestly in accordance with general principle, is more than sufficient to outweigh the opinion of Bracton; especially as the latter does not seem to be aware that his opinion, if true, would be a remarkable anomaly" (p. 64). This, we may all agree, is sound legal reasoning; but as to the mere historical question whether, before the passing of the *De Donis*, remainders were limited after conditional fees, I make no doubt that Bracton was right, for such remainders were common enough.

Perhaps the practice of creating them might be traced back even into John's reign. There is a fine of 1192 by which Bartholomew grants land to Mary for her life; after her death it is to "revert" to her son

[1] *Law Quarterly Review*, Jan. 1890.

Hugh or (*vel*) to his heirs begotten on an espoused wife, and if he shall die without an heir begotten on an espoused wife, it is to "revert" to Stephen, brother of Hugh or (*vel*) his heirs (Hunter, *Fines*, Vol. i. p. 34). It was not all at once that men distinguished between "reverting" and "remaining," and we had better lay but little stress on this very early document with its somewhat ambiguous "vel." But before the end of Henry III's reign we may find instances which leave nothing to be desired in the way of precision. At some date before 1269, as is found by an inquest *post mortem*, one *W* gave lands to *T* and the heirs begotten by him, but so that if he should die without an heir begotten by him, then they should remain to his brother *L* and the heirs begotten by him; and if *L* should die without an heir of his body in the lifetime of his sisters *C* and *D*, then they should remain to *C* and *D* and their heirs (Roberts, *Calendarium Genealogicum*, 137). Here is a "strict settlement" made in 1256:—a fine is levied by which land is recognised to be the right of Warin, to hold of Wymund and his heirs to Warin and the heirs of his body; and after his death, if he shall die without issue, to Wymund (No. 2) and the heirs of his body; and after his death, if he shall die without issue, to Reginald and the heirs of his body; and after his death, if he shall die without issue, to Richard and the heirs of his body; and after Warin, Wymund (No. 2), Reginald, and Richard shall die without issue, then the lands shall revert to Wymund (No. 1) and his heirs (*Feet of Fines, Devon*, Hen. III, No. 492).

Having seen a few such settlements, I took up at random a parcel of fines belonging to Edward I's reign,

all earlier than the *De Donis*, namely, a parcel of Hertfordshire fines. Among the first fifty, no less than five contained remainders subsequent to conditional fees. In some cases there are several successive remainders. In some cases it is difficult to say whether the remainders are not contingent; difficult, because we know little about the early history of "the rule in Shelley's case." Take this for example:—To *A*, and *B* his wife, and his son *C*, and the heirs of the body of *C*; but if *C* shall die without an heir of his body, then the lands shall remain to the other heirs whom *A* shall beget on *B*, and if *B* shall die without an heir begotten by *A*, then to the other heirs of *A*. Or again:—To Roger and Nicholas and the heirs of the body of Nicholas, but if he shall die without an heir of his body, or if the heirs whom he shall have begotten shall die without heirs of their bodies (*de se*), then the lands shall remain to the nearest heirs of Roger. Or again:—To Thomas for life, and after his death to John and the heirs of his body; but if he shall die without an heir of his body, or if the heirs whom he shall beget shall die without heirs of their bodies (*de se*) *in the lifetime of Adam and Joan his wife*, then to Adam and Joan and the heirs whom Adam shall beget upon Joan. Or once more:—To Gilbert and the heirs of his body; but if he shall die without an heir of his body, *Agnes living*, then to Agnes for life, and after her death to Simon and the heirs of his body; and if he shall die without an heir of his body, then to Joan and the heirs of her body; and if she shall die without an heir of her body, then to the right heirs of Gilbert (see *Feet of Fines, Hertfordshire*, Edw. I, Nos. 4, 10, 25,

35, 42, 118, 127). It may well be doubted whether the conveyancers of this age were fully alive to the distinction that we draw between vested and contingent remainders. I am inclined to think that if asked they would have said that every remainder after a conditional fee must be contingent. The almost invariable phrase with which they introduce such remainders is "et si forte contigerit," and no phrase could more clearly "import a contingency" than this does. Doubtless they had still many things to learn, but certainly they had learnt that there might be a remainder after a conditional fee.

In passing, I may remark that the "feet of fines" at the Record Office will prove invaluable, if the history of conveyancing is ever to be minutely written. They are precisely dated, well preserved, and admirably arranged, and I think that for the earlier members of the series we may even claim some authoritative value. In Edward I's time they had to be read solemnly in court before at least four justices, and though we must not argue that the court in any way guaranteed the validity of the limitations, still we shall have some difficulty in believing that documents thus publicly brought into open court habitually contained limitations of a kind utterly unknown to the law; they must at least have been very well known to the justices.

One of the most curious instances is that of a settlement made in 1278 by Thomas Weyland, who was already a justice of the Common Pleas and in the same year became Chief Justice. He is famous among our justices because he committed felony and abjured the realm. He held a manor of the Earl of Gloucester.

By fine he recognised this to one Geoffrey of Ashley, who thereupon granted it back to Thomas, Margery his wife and Richard his son, to hold to Thomas, Margery and Richard and the heirs of the body of Richard, so that Thomas and Margery should hold it of the chief lords of the fee during their lives, and after their deaths it should remain to Richard and the heirs of his body to be held of the right heirs of Thomas; and if it should happen that Richard should die without an heir of his body, then it should remain to the heirs male of Thomas begotten on Margery to be held of the right heirs of Thomas; and if it should happen that the said heirs begotten of Thomas should die without heirs of their bodies (*de se*), then it should remain to the right heirs of Thomas to be holden of the chief lords of the fee. This remarkable settlement came before the courts. After Weyland's felony and abjuration, the Earl of Gloucester made a determined effort to upset it, contending that he was entitled to an escheat. The case was so important and unprecedented that it was heard before the whole council, the justices of both benches and the barons of the exchequer, who finally after many doubts, which are stated on the Parliament Roll, upheld the fine (Rolls of Parliament, I. 66). The validity of the remainders was not the point in question, for the wife of the fallen justice was yet living, and the argument for the earl was, to put it shortly, that the settlement was a fraud, a covinous attempt to deprive the lord of his feudal dues; but still we here see what a judge of the Common Pleas thought that he could do in 1278; not only could he create remainders after conditional

fees, but he could play some tricks with tenures which seem very odd to us who have the happiness of living under *Quia Emptores*[1].

"It is an indubitable fact," says Mr Challis "that by the common law there did exist a *formedon en reverter* for the benefit of the donor, as is expressly stated in the statute *De Donis*; while there did not exist a *formedon en remainder* in respect of conditional fees." But really there are two facts here: the former, the existence of the *formedon en reverter* is indubitable, while the latter, the non-existence of the *formedon en remainder* seems to me extremely doubtful. Certainly that writ was not expressly given by the statute, and no word in the statute implies that it is wanted. There are so many yet extant copies of the Registrum Brevium as it stood before the *De Donis*, that I should not like to speak confidently as to their contents. But even suppose we grant that there was as yet no "writ of course" suited to this case, this would prove but little, for in Henry III's reign the Chancery held itself very free to issue "brevia formata," writs adapted to special cases. Thus throughout the reign writs of trespass are occasionally found; but there seems to be strong evidence that they did not become "writs of course" until the last years of the reign. I cannot but believe that the conveyancers of the time knew their own business, and were not devising futilities when they limited remainders after conditional fees. The fines upon which I place reliance are obviously not the work of laymen, but of trained lawyers, and at the very least

[1] My attention was drawn to this case by Mr Cyprian Williams.

they prove "a general opinion in the profession" that such remainders were sanctioned by law.

It may be allowed me to add that our use of the word "remainder" is apt to suggest a false view of history. It may seem to us that a remainder is what remains when a smaller estate has been deducted from a larger. Were this the origin of the term it would be difficult to explain why we do not give the name "remainder" to reversions; for surely a reversion is what remains when a smaller estate has been deducted from a larger. But if we look at the documents of the thirteenth century we soon see that the word "remanere" did not express any such notion of deduction or subtraction. The regular phrase is that "after the death of *A*," or "if *A* shall die without an heir of his body," then "the said land" or "the said tenements shall remain to *B*," that is, shall await, shall abide for, shall stand over for, shall continue for, *B*. We may compare the then common phrase "loquela remanet," the parol demurs, the action stands over until some one is of age or some other event happens; or, to use a form of speech not yet forgotten, the action "is made a remanet." The term "remainder" does not therefore at this time serve to express that quantitative conception of "an estate" which is so remarkable a feature in the real property law of a somewhat later time, the conception that an estate has size, that, for example, a fee tail is larger than a life estate but smaller than a fee simple, that small estates may be "carved" out of larger estates. There seems to me to be no proof that such an idea had ever entered the head of Bracton or of any contemporary lawyer. They had not even the

terms in which to express it. In Bracton's mouth the word *status*, so far from being equivalent to the *estate* of our real property law, has no reference to proprietary rights, but means personal condition, means that which modern lawyers, having appropriated *estate* for another use, are once more obliged to call *status*. As the art of conveyancing develops, as new kinds of limitation are devised, we can see the word *status* and its French and English equivalents changing their meaning; instead of speaking simply of the land which their ancestors held, men are obliged to speak of their ancestors' estate (*status*) in the land, and more and more the word gets involved in those complexities of the land law which "the estates of the realm" suffer to exist. It may therefore be doubted whether even Mr Challis would succeed in convincing Bracton that his opinion about remainders was "a remarkable anomaly"; at least he would have to begin with some instruction in the very rudiments of the law. If he began by speaking of "the quantum of an estate in fee," the benighted old gentleman would, I fear, reply that a *feodum* is not a *status*, and that neither a *feodum* nor a *status* can be said to have quantity. The calculus of estates has not yet been invented.

THE "PRAEROGATIVA REGIS[1]"

DR E. F. HENDERSON has raised[2] an interesting question, and one which, if I am not mistaken, has never received that full discussion which it deserves. What is the date and what is the nature of the document which passes under the title "Praerogativa Regis"? It used to be printed as a statute of the seventeenth year of Edward II. This, as I believe, was due to a mere accident. The lawyers of the later middle ages in their manuscripts drew a line between the "Statuta Vetera," which ended with the end of Edward II's reign, and the "Statuta Nova," which began with the beginning of Edward III's reign. Between the two, like an apocrypha between the two testaments, they inserted a group of documents about the date and the character of which they were uncertain, and among these documents the "Praerogativa Regis." Then, when the time for printing had come, the position in which these documents were found gave rise to the inference that they were statutes of some year late in the reign of Edward II. Now to this inference there is an objection which seems insuperable. A statute of Edward II's reign—an important statute,

[1] *English Historical Review*, April, 1891.

[2] *Ibid.* v. 753 (October, 1890).

if statute it were—would be upon the statute roll; but the "Praerogativa Regis" is not upon the statute roll, but has to be discovered in mere private manuscripts. Therefore I can agree with Dr Henderson when he rejects this date, but when he would make the document in question a statute of Henry III's reign then I most respectfully differ from him. It seems to me no statute, but a tract written by some lawyer in the early years of Edward I. May I be allowed to say a few words in defence of this opinion?

In the first place, throughout the whole document there is no word of command, nothing about "ordaining" or "establishing," nothing about "I" or "we," no reference to the quarter from which it proceeds. It is just an objective statement of the king's rights; the king shall have this, the king shall have that. Was ever any other English statute couched in such a form? I think not. Another question: Does any other statute condescend to tell stories? Here we have a story about the heirs of John of Monmouth (c. 14), and another story about the widow of Anselm Marshall (c. 15). But let us look at the matter more closely, taking as our guides Bracton, who wrote somewhere about 1255, Britton and Fleta, who wrote somewhere about 1290.

The first seven chapters afford me no matter for remark, save that in the fourth there is mention of "King Henry, father of King Edward." How Dr Henderson would deal with this passage I cannot guess; perhaps he regards it as an interpolation, for he can hardly endow Henry III with a spirit of prophecy. To my mind this passage tells us plainly that the document was written after Henry's death,

and also, though less plainly, that it was written during the life of his son.

The eighth and ninth chapters deal with alienations made by the king's tenants in chief and state a doctrine intermediate between that of Bracton on the one hand and that of Britton and Fleta on the other. It would be long to discuss this matter minutely, but the subjoined references[1] will show that while in Bracton the king's claim to check the alienations made by his tenants in chief goes hardly beyond the well-known provision of the charter of 1217, Britton has nearly and Fleta has quite arrived at the broad principle of later law—namely, that no tenant in chief of the crown can alienate the whole or any part of his tenement without the king's consent. Now in this respect our "Praerogativa" stands nearer to Bracton than to Fleta. No one who holds of the king in chief *by military service* may alienate *the greater part* of his land without royal licence; "but this is not wont to be understood" concerning "members and parcels of the same lands." Raising by the way the question whether statutes often tell us what "is wont to be understood," I here find a reason for saying that this document lies between Bracton and Fleta.

The eleventh chapter introduces a very curious topic, the king's rights in the lands of "natural fools." I believe that of these very valuable rights there is no trace in Bracton[2]; on the other hand Britton and Fleta know them well[3], and so far as my knowledge goes they begin to appear in the reign of Edward I. But,

[1] Bracton, f. 169*b*, 395; Britton, I. 222; Fleta, p. 178.

[2] See Bracton, f. 420*b*.

[3] Britton, II. 20; Fleta, p. 6.

further, Britton has a tale to tell of them, and a tale that I have never seen properly explained[1]. Speaking of a somewhat technical point in the law of guardianship, he touches on a case in which the lord, who otherwise would be guardian, is deprived of his usual rights by the fact that the heir is a natural fool. This rule, he says, was laid down by Robert Walrond, with the common assent of the magnates of the land, "and in his heir and the heir of his heir the statute first took effect." Robert Walrond, of course, is the person of that name who, as a royal judge and royal favourite, played a considerable part in "the misrule of Henry III." He pronounced the sentence of Winchester which disinherited the rebellious barons, and became rich with the spoil of those whom many regarded as national heroes and martyrs. He died in or about 1272. Coke, who did not know the fact that I am going to state, supposed that Britton's story related to a certain section in the statute of Marlborough (1267), which has to do with wardship, but nothing to do with idiots, and therefore he concocted a fable telling how the biter was bit, how the statute procured by Walrond nullified a certain device whereby Walrond had tried in his own case to evade the law of wardship[2]. I say that Coke concocted a fable, for the simple truth is this: that Walrond left an heir who was an idiot, and that this heir left an heir who was an idiot. That is what Britton means. The king's rights in the lands of idiots have their origin in some statute or ordinance issued on the advice of Walrond, and this first took effect in his heir and the

[1] Britton, I. 243.

[2] *Second Inst.* 109, a comment on Stat. Marlb. c. 6.

heir of his heir. I am not sure that Britton thought that the biter had been bit. It may be that Walrond foresaw that his heir would be an idiot; he had no children, and his brother's son, his heir presumptive, was, in Britton's language, "un soot." He may deliberately have preferred that his land should fall into the hands of his good friend the king rather than that it should fall into the hands of his lords, some of whom, like enough, had been his mortal enemies. For this was coming to be the choice; if an idiot was to be treated as an infant, then the idiot holding by military tenure would be in life-long wardship to his lord. Better the king than the lord[1].

Fleta also treats the king's profitable guardianship of idiots as the outcome of a recent statute[2]. Formerly, he says, the "tutores" of idiots used to be the guardians of their lands; this was in accordance with principle, for idiots are *quasi* infants; but many were thus disinherited, and therefore it was provided by common consent that the king should have the wardship of all born fools. There can, therefore, in my opinion, be little doubt that about this matter there was legislation in which Robert Walrond took part, and we

[1] I cannot pretend to any skill in genealogies, but the story seems to be this: In 1 Edw. I (1272–3) Robert Walrond was dead; his heir was Robert the son of his brother William; Robert was then about seventeen years old (*Cal. Genealog.* p. 194); he was an idiot (*ibid.* p. 706; *Rot. Parl.* 196), and from him the lands descended to his brother John, who was also an idiot; after John's death there was a great lawsuit between rival claimants (*Placit. Abbrev.* pp. 309, 310). The date of the first idiot's death I have not ascertained, but it occurred in Edward I's reign.

[2] Fleta, p. 6.

must ascribe the new law to the last years of Henry III. Our "Praerogativa" then, was compiled after that change.

In its fourteenth chapter we have a story from Henry III's reign. John of Monmouth died; his heir was an alien, a Breton, and King Henry took his land. In the fifteenth we have another story from the same reign. On the death of William, Earl Marshall, his brother and heir, Anselm, entered on the lands that had descended to him without first doing homage to the king; he then died, and it was adjudged that his widow, Maud, daughter of the earl of Hereford, should have no dower, for her husband had entered as an intruder on the king. John of Monmouth I take to be the bearer of that name who died in or shortly before 1257[1]; he seems to have left as heiresses two aunts, who were of the family of Waleran. The tale about the Marshalls is not quite correctly told by this so-called statute. The inheritance did not pass immediately from William to Anselm; as is well known it came to five brothers in succession, of whom William was the eldest and Anselm the youngest; Anselm died in 1245, and his widow, Maud, died in or shortly before 1252[2]. These stories about what happened in the middle of the thirteenth century would hardly have been very interesting to lawyers in the fourteenth, when they would have been regarded as antiquated illustrations of well-established legal rules. That Edward II's parliament was at pains to tell them I should not easily believe.

We come to the chapter on which Dr Henderson

[1] *Cal. Gen.* p. 73; Courthope, *Historic Peerage*, p. 325.

[2] *Excerpt. e Rot. Fin.* I. 143.

relies. The king is to have year, day, and waste of the felon's land; the tenement is to be actually wasted. Britton mentions the wasting as a thing of the past; upon this Dr Henderson founds an argument that the "Praerogativa" comes from Henry III's day. But why, I must ask, may it not come from the early years of Edward I? Britton did not write until 1290 or thereabouts; at least his book as we have it was not written until then. This leaves some seventeen years during which the change in the law, if change there was, may have taken place, without our being driven to suppose that a document which mentions King Edward was written before his accession.

In Edward III's reign those who held that the "Praerogativa" was a statute believed it to be a statute of Edward I; but there were others who said that it was no statute at all, but a mere "rehearsal" of the common law[1]. Throughout the middle ages it never obtained an unconditional acceptance as part of the written law of England. In 1475 all the great lawyers seem agreed that it is no statute[2]. Littleton in particular is clear and emphatic. It is an "affirmance of the common law, for every statute mentions the date at which it was made, but this document is dateless; it is not a statute, no more than the 'Dies Communes in Banco,' the 'Dies Communes in Dote,' and the 'Expositiones Vocabulorum' are statutes. They are written in our books, but they are not statutes." Then Littleton tells how "my lord Markham" had disregarded the words of the "Praerogativa," and so, he

[1] Y. B. 43 Edw. III, f. 21 (Trin. pl. 12).

[2] Y. B. 15 Edw. IV, f. 11 (Mich. pl. 17).

repeats once more, "it cannot be called a statute." What exactly these judges meant when they said that the document was a "rehearsal" or an "affirmance" of the common law is not in all cases very plain. But Littleton puts it on the same level with two documents fixing the "delays" which are to be given in actions—documents which perhaps may be described as "rules of court"—and with another document which certainly had no authoritative origin—namely, the "Expositiones Vocabulorum," a belated and not too intelligent attempt to give some certain meaning to *sake, soke, toll, theam,* and other Anglo-Saxon law words. Littleton very probably thought that great respect was due to the "Praerogativa"; it was a venerable statement of common law, and perhaps he believed that it had been issued by some person or body of persons having power to make statements of law which should command the respect of the justices; but certainly he did not think that its very words were law as the very words of a statute would be law. Markham had disregarded them, and Littleton was ready to do the like.

Whether it be purely private work or no I will not take on me to decide; it may have been a document issued by the king to his serjeants, possibly to his judges, instructing them as to the king's views of his own rights (at every doubtful point it leans towards royal claims); but at least I think that we ought to agree with Littleton, *ceo ne poet estre dit come un statute.*

A CONVEYANCER IN THE THIRTEENTH CENTURY[1]

AMONG the monuments of the legal industry of the great age which saw English law becoming a science, the age of Edward I, there are, I am assured, many collections of precedents in conveyancing, which await an editor. Lately, while looking for other things, I happed on three in our Cambridge Library: they are contained in the MSS. Ee. i. 1 (f. 225), Dd. vii. 6 (f. 55), Mm. i. 27 (f. 78). The first and third of these seem to belong to the period before the Statute *Quia Emptores*; the second is a little later. Of the first I may be allowed to say a few words. The book in which it is found belonged to the monks of Luffield Priory, which stood on the border between the counties of Buckingham and Northampton. It purports to be a work composed by one John of Oxford, and we may gather from its contents that John of Oxford became a monk at Luffield. It begins with a short preface touching the desirability of having written evidence of legal transactions—"Cum humana condicio vergat ad decliue et generaliter loquendo proniores sunt homines ad malum natura carnea quam

[1] *Law Quarterly Review*, January, 1891.

ad bonum," and ends thus: "Explicit modus, et ars componendi cartas, cyrographa, convenciones, obligaciones, testamenta, litteras presentacionum ecclesie, et institucionum, suspencionum, certificacionum, edicionum et literarum dimissoriarum et litterarum pro pecunia patri a[1] scolari destinatarum[2] secundum Johannem de Oxonia et similiter quietarum clamacionum et manumissionum. Explicit expliciat, ludere scriptor eat." Let us see what forms this ancestor of our Jarmans and Davidsons thought profitable for mankind, and let us not omit to notice any dates that occur :—

1. Charter of feoffment in fee simple "tenendum de me et heredibus meis."

2. Alia carta que tangit condiciones utiles emptori. Charter of feoffment "tenendum dicto J. et heredibus suis vel cuicumque vendere legare vel assignare voluerit."

3. Charter of feoffment for life.

4. Charter of feoffment in frank almoign.

5. Carta de domo religiosa seculari concessa. Brother J. Master of the Hospital of S. John of Oxford and the brethren of the said place make a feoffment of land in the parish of All Saints, Oxford, to R. F. his heirs and assigns save Jews and any other religious house.

6. Carta de libero maritagio: to the husband and the heirs that he shall have by my daughter whom I have given him to wife, and in case she shall die without an heir *de se*, the land shall return from the husband to me, my heirs or assigns.

[1] pro pecunia pat'a (MS.). [2] destinatorum (MS.).

7. Carta de dote libera. I have given certain land to my wife by way of dower for her life.

8. Quitclaim to W. et heredibus suis et cuicumque vendere, dare, legare, vel assignare voluerit in perpetuum.

9. Another quitclaim supposed to be made by J. of Oxford.

10. Carta de maritagio. Feoffment of a burgage in municipio Oxonie to hold to husband and wife and their heirs proceeding from the wife. If the wife dies without an heir *de se* I will that the land revert to me my heirs and assigns without any contradiction on the part of the husband.

11. Carta de empcione redditus et servicii.

12. Carta specialis de vendicione terre...tenendum de me et heredibus meis sibi et heredibus suis et cuicumque et cuilibet dare vel legare vel assignare et quandocunque et ubicumque dimittere voluerit tam in prosperitate quam in egritudine excepto loco religionis et judeissmo.

13. Carta de confirmacione vicarie.

14. Sale of a villain for the purpose of manumission. I have granted and quitclaimed to H. my "native" R. with his progeny (*sequela*) and all his chattels for ever, for 10 marks of silver.

15. Consequent manumission. H. now manumits R. whom he purchased from A. B., and for further assurance hands over the deed of purchase.

16. Sale and manumission of a villain effected by a single deed. B. grants to W. one R. with his chattels and a virgate of land held by him in servitude in order that W. may manumit R. and make him free, "so that

he with his whole suit and all the things aforesaid may remain a free man, rendering to me and my heirs 10 shillings a year." For this grant B. has received 10 marks from W.

17. Lease dated 1272. A conventio by which A. demises to W. all his land at Preston with the manor thereto belonging, to hold to him his heirs and assigns for 10 years at a rent of a pair of gloves or 6*d.*, W. having given to A. £30 to deliver his land from the Jews. The lessee is to repair.

18. Alius modus cyrographi. Dated 1274. Lease for ten years of land with a manor and farming stock, which is valued; tenendum to the lessee his heirs and assigns for the said term; rent of ten shillings; £100 paid by lessee to lessor for this lease. The lessee finds pledges for the fulfilment of his obligation. Both parties pledge faith. Instrument executed in duplicate.

19. Cyrographum de acris terre. Dated 1274. Lease of an acre of arable land and half-acre of meadow for ten years. In the parcels the "aqua que vocatur Charewelle" is mentioned.

20. Cyrographum de burgagio dimisso ad firmam. Dated 1274. Demise of a burgage in the High Street (*magna strata*) and the parish of All Saints, Oxford; tenendum by the lessee his heirs and assigns for twenty years; rent twenty shillings. Lessor is to do the repairs; if the house falls down he will rebuild it; if lessee has to spend money on repairs he may hold the premises until he has been satisfied for his expenditure according to the view and award of good and lawful men.

21. Forma obligacionis de pecunia mutuata. In

respect of certain loans and purchases which took place in 1274, I am bound in certain sums to W., "vel suis certis procuratoribus vel heredibus suis vel executoribus hoc scriptum presens habentibus si de eo, quod absit, humanitus contigerit," to be paid by certain instalments, under penalty of twenty shillings to be paid to the fabric of the church of S. Mary at Oxford, and of twenty shillings to the said W. the principal creditor, and of the twenty pence "suo certo nuncio vel procuratori hanc literam defferenti," for their expenses. I have bound myself to this "fide media," and have found sureties A., B., C., who have constituted themselves principal debtors along with me for the said monies. We submit ourselves to the judgment of any court, whether spiritual or civil, chosen by the creditor. We submit to be excommunicated by the bishop or to be distrained in all our movables and immovables by the king's bailiffs; any goods taken in distress may be sold in our absence; the bailiff making the distress may have twenty shillings for his pains; the custodian of the crusaders in such a bishopric for the time being shall have twenty shillings of our goods for the aid of the Holy Land if we make default in payment of any instalment. We renounce the privilege of crusaders and every cavil, more especially the king's prohibition. We grant that the creditor or his proctor shall be believed without making oath.

22. Obligation by the Prior of Luffield and his Convent. We have sold to Alexander le Riche of Brakele all our wool, to be delivered to him or his attorney at the shearing in 1272. If we make default

we subject ourselves to the jurisdiction and coercion of the Archdeacon of Northampton or of Buckingham, whichever Alexander may prefer, that he may compel us from day to day by ecclesiastical censure, until we satisfy Alexander by delivering the wool and paying costs and damages. Dated Luffield, 1st Aug., 1271. Note that two witnesses with the tabellio or notary are enough for a bond; for a chirograph there should be four; for a charter seven or nine, but at any rate an uneven number.

23. Forma obligacionis de ecclesia dimissa ad firmam. Dated 1272. Lease by rector to chaplain of land and tithes in Preston for four years. Lessee submits to ecclesiastical jurisdiction and renounces divers privileges, including royal prohibition.

24. Obligacio denariorum. Short bond. I am bound to R. in sixty shillings to be paid to him or his certain attorney bringing these letters, within a fortnight after 1st Aug., 1274, and I am bound to pay any damages and expenses to which he shall be put.

25. Modus componendi testamentum. Anno gracie 1274 coram domino Willelmo presbitero ecclesie Omnium Sanctorum, A. de B. et B. de C. vicinis meis et coram aliis ibidem existentibus, et hoc audientibus et videntibus, ego J. de N....condo testamentum in hunc mundum [corr. *in hoc modo*]. Various pecuniary legacies to pious uses, to the poor, &c., to marry my daughter, to my servant, for the repair of bridges. All my household utensils to be divided between my heir and my wife. Appointment of A., B., C., D. executors. "Et ut hoc firmum sit et stabile tam ego

quam predicti executores mei scriptum istud sigillorum nostrorum munimine roboravimus." Schedule of debts owed to and by the testator. (Note that the executors are present when the will is made and seal it.)

26. Alius modus testamenti. I., J. of Oxford, clerk, on Tuesday next, after the feast of S. Edmund A.D. 1274, make my testament. Pecuniary legacies to pious uses, and six marks to my mother. No residuary gift. Reference to the last precedent for the concluding formula.

27. Litera presentacionis ecclesie per patronum episcopo.

28. Presentacio ab episcopo ad decanum. R. bishop of Lincoln in the fifteenth year of his pontificate[1] addresses the Dean of Oxford, directing him to see whether a certain church is vacant.

29. Litera patens institucionis by R. bishop of Lincoln in the fourteenth year of his pontificate.

De episcopo ad decanum pro eodem.

Litera patens de decano pro eodem.

30. Litera certificacionis super ordinibus.

31. Litera citacionis by the Official of the Archdeacon of London. Dated 1271 in the church of S. Mary at Oxford.

32. Litera certificacionis super eodem; testifying that a citation has been made.

33. Litera suspencionis ab ingressu ecclesie.

34. Litera absolucionis.

35. Adam Prior of Luffield and his convent appoint "our beloved in Christ John of Oxford com-

[1] Richard of Gravesend was consecrated Bishop of Lincoln in 1258.

monachum nostrum" to be our procurator; giving him large and general powers.

36. Adam Prior of Luffield and his convent appoint their fellow monk, brother John of Oxford, to be their proctor in proceedings before the bishop of Lincoln. Given at Luffield on Tuesday next after the feast of S. Lucy A.D. 1273.

37. Litera procuracionis.

38. Litera edicionis. Ecclesiastical plaint of C. against N.; C. has been transcribing a book for N.; he was to be paid according to the estimate of good men; N. has broken the agreement; C. seeks justice.

39. Precedent for a letter by an Oxford student to his father.

40. Litera warantizacionis. The Master of the Temple announces that R. de F. the bearer of these letters, "our merchant and tenant," is travelling for our business and is therefore to be quit of tolls and tallages.

41. Litera acquietacionis. Release for a bailiff who has rendered his accounts.

42. Adam Prior of Luffield and his convent pray Oliver bishop of Lincoln to admit to priest's orders the bearer, namely, Walter of Mursele, deacon.

43. Adam Prior of Luffield excuses himself to the Archdeacon of Buckingham for not attending a synod at Aylesbury.

In its present form the treatise cannot be older than the year 1280, for it mentions Oliver bishop of Lincoln. This must be Oliver Sutton, who was consecrated in that year. The document in which Prior Adam is supposed to appoint John of Oxford proctor

for the convent may cause us some little difficulty, for it is dated in 1273, while the only Prior Adam of whom we can hear presided over the monastery from 1279 to 1287[1]. But many of the instruments are supposed to bear a somewhat earlier date, and at any rate I think it clear that the book belongs to the earlier years of Edward I's reign:—the Jews are still in England, and *Quia Emptores* is still in the future.

Now there are a good many points in this book on which at a proper time and place a commentary might be hung. Thus there is the attempt to make freehold land devisable "per formam doni," that is to say, to give the donee a power of devising it by making the gift to him his heirs and devisees. I am persuaded by Bracton's vacillating language[2], by a precedent that I have found in another collection, and by several actual deeds that I have seen, that this attempt very nearly succeeded, that the power of devise given by the Statutes of Henry VIII and Charles II was very nearly won in the middle of the thirteenth century. Then again when a lease of land is made for a term of years, it is made to the lessee "his heirs and assigns"; this however will surprise nobody who has looked at the earlier Year Books. Then again the manumission by way of sale is very interesting; this also I have seen in another collection. But on the whole the most curious documents are the bonds, the most curious because as yet no one has thought worth while to investigate the mercantile law of this period. The ordinary mercantile bond of the thirteenth century, if the transaction is a big one, is often a very elaborate

[1] *Monasticon*, IV. 346. [2] Bract. f. 18 b; 49; 412 b.

affair, and in order to understand it we ought to know something of three different systems of law, the English Common law, the mediaeval Roman law, and the Canon law, for the obligor is made to submit himself to every conceivable jurisdiction English and foreign, temporal and spiritual. He has to renounce all manner of "exceptiones" given by Roman or given by Canon law, besides renouncing the writ of prohibition and submitting to extra-judicial distraint by the sheriff. Very curious too are the manifold devices by which the sin of usury is evaded, penal stipulations in favour of the relief of the Holy Land, or in favour of the building of Westminster Abbey, and agreements to accept the creditor's unsworn estimate of the "damages and costs" that he has been put to by being kept out of his money. The conveyancer of Henry III's day ought to have known a little of several kinds of law. When he drew a will he drew a document the validity and interpretation of which would be a matter for the ecclesiastical courts, and when he drew a bond he drew a document which he hoped would hold good by whatever law it might be tested. This leads me to venture a guess: Had Brother John been studying or teaching the art of draftsmanship in the learned city whence (perhaps not until he got to Luffield) he took his name? At Oxford of course Roman and Canon law were being read, and the latter at all events was not studied merely as a scholastic exercise but as a matter of practical importance, a "bread-and-butter science" if you will. Also it must have been almost necessary for every large monastery to have among its members some one who could readily draw all the documents of

common use in the management of large estates and the transaction of mercantile affairs. Some houses were deeply engaged in the wool trade, constantly making elaborate bargains with Lombard merchants; all must have been glad of a brother who at short notice would draw a charter of feoffment, a will, a lease, a mortgage, besides being familiar with those "briefs, citations, and excommunications" of which our Prayer Book still speaks. People must have been taught these things, and why not at the great seat of learning?

But I am keeping to the last by way of plum the most striking testimony to the connection of this book with University life. I have said that among the precedents there is one for a letter to be written by a student to his father—a letter asking for money, an old, old form of "common assurance," perhaps the oldest and the commonest. Once more I place it at the disposal of the studious but impecunious youth, premising that here and elsewhere the scribe of this Cambridge MS. has shown himself to be a careless workman.

Metuendo patri suo domino R. de B.—P. filius suus studens Oxonie pro salute famulatum in omnibus filialem. Precepit mihi vestra paternitas reverenda in discrecione mea ut statum meum et eventus mihi contingentes quam cicius possem vobis propallare. Quare vestre paternitati tremende post deum unico refugio, singulari me[e] miserie fulcimento parens, breviter ad presens significo me in optimo statu tam sanitatis anime quam corporis existere quod de vobis et karissima genitrice mea et domina, sororibus et aliis amicis

meis plus corporeis oculis intueri quam audire desidero. Cum autem honestum sit studentis propositum, et artes liberales ejus intencio intendat adipissi [*sic*], pro hoc a patre largius meretur subveniri, unde paternitatem vestram, de qua non modicam reporto fiduciam, dignum duxi deprecandam[1] et ea qua possum devocione attencius supplicandam quatinus mihi vestro indigenti, numismate carenti [*Angl.* in want of coin,] studium exercenti, nihil quid[2] temporale lucranti, consilio et auxilio destituto, nisi vestra mihi solita cicius suspiraverit benivolencia ad erudicionis mee sustentacionem, quod[3] sederit vestro beneplacito[4] conferre dignemini, in presenti facto taliter provisuri ne pro tali defectu scolas relinquere, tempus amittere, domumque redire compellar. Vivite, gaudete semper sine fine, valete.

[1] deprecandum (MS.).
[2] nⁱl q̄ (MS.).
[3] The usual abbreviation of *quod*.
[4] beneplacita (MS.).

A NEW POINT ON VILLEIN TENURE[1]

IN this paper, which was read before the Economic Section of the British Association at its meeting in 1890[2], Mr Ashley, who in his little book on Economic History has given the best popular sketch of "the Manor and Village Community" that has yet been published, discusses a few points in the history of villeinage. As regards remote times, he seems to be now more decisively inclined than he was three years ago to accept Mr Seebohm's theory, but seems to have no new evidence to offer. As regards the thirteenth century, he "purposely omits all reference to Bracton," on the ground that "so long as we are without a critical edition, and unable to distinguish Bracton's text from later accretions, it is possible to support by his authority almost any opinion as to villein tenure." This, as we think, goes much too far. No one has a worse opinion of the vulgate text of Bracton than that which we hold; but still, though a few details may be doubtful, Bracton's general theory of villein status and villein tenure becomes clearer,

[1] *Law Quarterly Review*, January, 1891.

[2] "The Character of Villein Tenure," by W. J. Ashley (*Annals of the American Academy of Political and Social Science*, Jan. 1891).

more definite, and more consistent every time that one reads it, and (at least so it seems to us) proves beyond doubt that early in Henry III's reign the king's judges were within an ace of granting to the free man who held in villeinage that protection of common law and royal justice which—the opportunity having once been lost—he did not gain for some centuries afterwards. For how many centuries afterwards? —in other words—When was it that the copyholder acquired an action against his lord? Now it is on this question of comparatively recent history that Mr Ashley has something to say that seems to us new and startling. We all know the famous section of *Littleton's Tenures* (sec. 77), which enshrines the dicta of Danby and Brian, and probably we have all been wont to think that those dicta solved a great question for good and all. But did Littleton write that section, or rather the latter half of it? "This passage does not appear either in an edition of Littleton printed about the year of his death, or in the issues of Pynson in 1516 and 1525. It occurs for the first time in the edition of Redmayne in 1530." This opens a very serious question, one upon which we shall not be in a hurry to make up our minds; and though we are not very favourably inclined towards Mr Ashley's explanation of the celebrated dicta as the attempts of Yorkist judges to gain favour with the poorer sort by whom their master was supported, still true it is that these dicta were, if the phrase be allowed us, as *obiter* as dicta could be, and if the Year Books fairly represent this matter, they long remained isolated dicta. We must confess that at the moment we have

no answer ready for Mr Ashley, and that in our opinion one more point in our legal history must now be considered doubtful. On the other hand, we think that Mr Ashley has made too light of the customary heritability of customary estates. It is quite true that some of the great religious houses were careful to prevent the dead tenant's heir from succeeding his ancestor. Thus, for example, in the lately published *Literae Cantuarienses* we find the monks of Christ Church in 1340 resisting an attempt of their villein tenants to establish a customary inheritance; and if in recent days the Dean and Chapter of Durham have had no copyholders, while the Bishop has had plenty, this seems due to the fact that the corporation aggregate was more far-sighted than the corporation sole, that the Prior and Convent enforced the rule that there should be no inheritance of their *bondagia*. Still in Court rolls of the thirteenth and fourteenth centuries, it is common enough to find a demandant claiming a villein tenement by inheritance "according to the custom of the manor," and alleging descent from heir to heir with all the same strict accuracy that would have been required of him had he been a freeholder pleading before the Common Bench. However, Mr Ashley's great point is, to our minds, the point about Danby, Brian and Littleton, and we are very glad that he has made it.

FRANKALMOIGN IN THE TWELFTH AND THIRTEENTH CENTURIES[1]

At the beginning of the thirteenth century a large and ever-increasing quantity of land was held by ecclesiastics, regular and secular, in right of their churches or religious houses by a tenure commonly known as frankalmoign, free alms, *libera elemosina*. The service implied by this tenure was in the first place spiritual, as opposed to secular service, and in the second place it was an indefinite service. Such at least was the doctrine of later days[2]. We may take this latter characteristic first. At all events, in later days[3] if when land was given there was a stipulation for some definite service albeit of a spiritual kind, for example a stipulation that the donee should sing a mass once a year or should distribute a certain sum of money among the poor, the tenure thus created was called, not frankalmoign, but tenure by divine service; the tenant might perhaps be compelled to swear fealty to his lord, and the performance of the service might

[1] *Law Quarterly Review*, October, 1891.

[2] But in 13 Edw. I (Fitz. Abr. *Counterple de voucher*, 118) it is said that frankalmoign is the highest and *most certain* of all services.

[3] Lit. sec. 133–8.

be exacted by distress or by action in the king's courts[1]. On the other hand, if the tenant held in frankalmoign, if the terms of the gift (as was often the case) said nothing of service or merely stipulated in a general way for the donee's prayers, then no fealty was due and only by ecclesiastical censures could the tenant be compelled to perform those good offices for the donor's soul which he had impliedly or expressly undertaken. Perhaps this distinction was admitted during the later years of the period with which we are now dealing; but we shall hereafter see that in this region of law there was a severe struggle between the temporal and the ecclesiastical courts, and very possibly an attempt on the part of the former to enforce any kind of service that could be called spiritual would have been resented. The question is of no very great importance, because stipulations for definite spiritual services were very rare when compared with gifts in frankalmoign[2].

Here, as in France, the word *elemosina* became a technical word, but of course it was not such originally. At first it would express rather the motive of the gift

[1] See the writ *Cessavit de cantaria*, *Reg. Brev. Orig.* 237 b, 238.

[2] A few instances of such definite spiritual services may be found already in Domesday, *e.g.* II. 133, 133 b, a tenant was to sing three masses every week. Gifts for the maintenance of lamps before particular altars and the like are not uncommon, and often they expressly say that the land is frankalmoign, *e.g.* *Reg. St Osmund*, I. 234 (1220–5), a gift of land to the church of Sarum in pure and perpetual alms to find a taper to burn before the relics on festivals. Sometimes it would have been difficult to draw the line between "certain" and "uncertain" services, as when land was given that its rents might be expended "tam in reparanda ecclesia quam in majoribus necessariis ecclesiae," *Reg. St Osmund*, I. 350.

than a mode of tenure that the gift creates. And so in Domesday Book it is used in various senses and contexts. In some cases a gift has been made by the king "in elemosina," but the donee is to all appearance a layman; in one case he is blind, in another maimed; he holds by way of charity and very possibly his tenure is precarious. To hold land "in charity" might well mean to hold during the giver's pleasure, and it may be for this reason that the charters of a later day are careful to state that the gift has been made not merely in alms but "in perpetual alms[1]." Then again in some parts of the country it is frequently noted that the parish priest has a few acres "in elemosina"; in one case we learn that the neighbours gave the church thirty acres in alms[2]. There are, however, other cases in which the term seems to bear a more technical sense;

[1] D. B. I. 293, "In W. tenet quidam cecus unam bovatam in elemosina de rege"; IV. 466, "Tenuit Edritius mancus in elemosina de rege Edwardo." In Dorsetshire, under the heading "Terra Tainorum Regis" (I. 84), we find "Hanc terram dedit Regina Dodoni in elemosina." In Devonshire, under the like heading (118), we find "Aluuard Mert tenet dim. virg....Regina dedit ei in elemosina." In Hertfordshire (137 b) we read how a manor was held by two thegns, one of whom was the man of King Edward, the other was the man of Asgar; they could not sell "quia semper jacuerunt in elemosina." This would seem to mean that they held precariously. See the curious entry, II. 5 b, which tells how Harold gave a hide to a certain priest of his, "set hundret nescit si dedit liberae [*sic*] vel in elemosina"; seemingly the hundred did not know whether the priest's tenure was free or precarious.

[2] D. B. II. 24 b; II. 189, the parish church holds sixty acres of free land "elemosina plurimorum." See the survey of Suffolk where the parish church generally holds some acres "of free land" in elemosina.

some religious house, English or French, holds a considerable quantity of land in alms; we can hardly doubt that it enjoys a certain immunity from the ordinary burdens incumbent on landholders in general, including among such landowners the less favoured churches[1]. And so again in the early charters the word seems to be gradually becoming a word of art; sometimes we miss it where we should expect to find it, and instead get some other phrase capable of expressing a complete freedom from secular burdens[2]. In the twelfth century, the century of new monastic orders, of liberal endowments, of ecclesiastical law, the gift in free, pure, and perpetual alms has a well-known meaning[3].

The notion that the tenant in frankalmoign holds

[1] D. B. I. 25 b, "Clepinges tenet Abbatia de Almanesches de Comite (Rogerio) in elemosina...se defendit pro xi. hidis. ... In eodem manerio tenet S. Martinus de Sais de Comite in elemosina xi. hidas"; I. 58, "Episcopus Dunelmensis tenet de Rege Waltham in elemosina"; I. 166 b, "Ecclesia de Cirecestre tenet de Rege duas hidas in elemosina et de Rege E. tenuit quietas ab omni consuetudine."

[2] Thus when Henry I makes gifts to the Abbey of Abingdon "to the use of the alms of the said church," we seem to get the term in a slightly different sense from that which becomes usual; he may well mean that the land is devoted to those pious works of the Abbey which belong to the almoner's department; *Hist. Abingd.* II. 65, 94.

[3] In comparatively late documents we may still find persons who are said to hold in frankalmoign who are not holding in right of any church. Thus in the *Whalley Coucher*, I. 43, William the clerk of Eccles gives land to his brother John his heirs and assigns, to hold in pure and perpetual alms of the donor and his heirs, rendering yearly a pound of incense to God and the church of Eccles. William's tenure may have been frankalmoign, but according to modern notions John's could not be.

his land by a service done to his lord seems to grow more definite in course of time as the general theory of tenure hardens and the church fails in its endeavour to assert a jurisdiction over disputes relating to land that has been given to God. The tenure thus becomes one among many tenures, and must conform to the general rule that tenure implies service. Still this notion, at least on the continent, was a very old one. A document of 817 contains a list of fourteen monasteries which owe the emperor aids and military service (*dona et militiam*), of sixteen which owe aids but no military service, and of eighteen which owe neither aids nor military service, but only prayers[1]. In English charters it is common to find the good of the donor's soul and the souls of his kinsfolk, or of his lord, or of the king, mentioned as the motive for the gift; the land is bestowed *pro anima mea, pro salute animae meae*. Sometimes the prayers of the donees are distinctly stipulated for, and occasionally they are definitely treated as services done in return for the land[2]; thus, for example, the donor obliges himself to warrant the gift "in consideration of the said service of prayers[3]." Not unfrequently, especially in the older

[1] Pertz, *Leges*, I. 223, 331; Viollet, *Histoire des Institutions*, I. 331. The translation of *dona* by *aids* may be a little too definite.

[2] *Cart. Glouc.* I. 197, "habendum in liberam elemosinam...sine aliquo retinemento ad opus meum vel aliquorum haeredum meorum nisi tantummodo orationes spirituales perpetuas"; *ibid.* I. 199, 289, 335, II. 10. Such phrases are common in the *Whalley Coucher Book*.

[3] *Cart. Glouc.* I. 307, "Nos vero...praedictam terram...per praedictum servicium orationum warantizabimus." The term "consideration" is of course a little too technical, but still the prayers seem regarded as having a certain juristic value.

charters, the donor along with the land gives his body for burial, by which is meant that the donees undertake the duty of burying him in their church[1]; sometimes he stipulates that should he ever retire from the world he shall be admitted to the favoured monastery, sometimes he binds himself to choose no other place of retirement; often it is said that the donees receive him into all the benefits of their prayers[2].

We have spoken as though gifts in frankalmoign were made to men, but according to the usual tenour of their terms they were made to God. As Bracton says, they were made *primo et principaliter* to God, and only *secundario* to the canons or monks or parsons[3]. A gift, for example, to Ramsey Abbey would take the form of a gift "to God and St Benet of Ramsey and the Abbot Walter and the monks of St Benet," or "to God and the church of St Benet of Ramsey and the Abbot and his monks," or simply "to God and the church of St Benet of Ramsey," or yet more briefly "to God and St Benet[4]." The fact that the land was given to God was made manifest by appropriate

[1] Litigations over the right to bury benefactors may be found, *e.g.* *Register of St Thomas*, Dublin (R. S.), 349, between the canons of St Thomas and the monks of Bective about the body of Hugh de Lacy; also struggles for the bodies of dying men, *e.g.* between the monks of Abingdon and the canons of St Frideswide's, *Hist. Abingd.* II. 175. See also a charter of John de Lacy in the *Whalley Coucher*, I. 33: "Know ye that I have given and granted to the abbot and monks of Stanlaw after my death myself, that is to say, my body to be buried."

[2] For an elaborate agreement about masses and other spiritual benefits, see *Newminster Cartulary*, p. 120.

[3] Bract. f. 12.

[4] *Cart. Ramsey*, I. 159, 160, 255, 256.

ceremonies; often the donor laid the charter of feoffment, or some knife or other symbol of possession upon the altar of the church[1], sometimes he "abjured" the land and thus confirmed his gift by his oath[2]. Clauses denouncing excommunication and damnation against all who should disturb the donee's possession did not go out of use at the Norman Conquest, but may be found in charters of the twelfth century[3], nor was it uncommon for a great religious house to obtain a papal bull confirming gifts already made and thereafter to be made, and whatever might be the legal effect of such instruments, the moral effect must have been great[4]. We are not entitled to treat these phrases which seem to make God a landowner as of no legal value. Bracton more than once founds arguments upon them[5], and of course they very naturally suggest that land given in frankalmoign is utterly outside the sphere of merely human justice.

In later days the feature of tenure in frankalmoign which attracts the notice of lawyers is a merely negative feature, namely, the absence of any service that can be enforced by the secular courts. But here some distinctions must be drawn. The king might give land to a religious house "in free, pure, and perpetual alms," and in that case not only would no secular service be

[1] See *e.g. Cart. Glouc.* I. 164, 205; II. 74, 86, 97.

[2] See *e.g. Reg. St Osmund*, I. 356; *Chron. Melsa.* I. 309.

[3] See *e.g. Hist. Abingd.* II. 55; *Whitby Cartulary*, I. 200; *Whalley Coucher*, I. 17, 113.

[4] See *e.g.* Bull of 1138, *Hist. Evesham*, 173; Bull of 1140, *Cart. Ramsey*, I. 155; Bull of 1146, *Hist. Abingd.* II. 173.

[5] Bract. f. 12, 286 b.

due from the donee to the donor, but the land in the donee's hand would owe no secular service at all. But tenure in frankalmoign is by no means necessarily a tenure in chief of the crown; indeed it would seem that the quantity of land held in chief of the crown by frankalmoign was never very large. It will, of course, be understood that an ecclesiastical person might well hold lands, and hold them in right of his church, by other tenures. The ancient endowments of the bishops' sees and of the greater and older abbeys were from the Conqueror's reign onwards held by knight's service; the bishop, the abbot, held a barony. Besides this we constantly find religious houses taking lands in socage or in fee farm at rents, and at substantial rents, and though a gift in frankalmoign might proceed from the king, it might well proceed, and probably more often did proceed, from a mesne lord. In this case the mere gift could not render the land free from all secular service; in the donor's hand it was burdened with such service, and so burdened it passed into the hands of the donee[1]. If the donee wished to get rid of the service altogether, he had to go to the donor's superior lords and ultimately to the king for charters of confirmation and release. But as between themselves the donor and donee might arrange the incidence of this "forinsec service" as pleased them best. The words "in free, pure, and perpetual alms" seem to have implied that the tenant was to owe no secular service to his lord; but they did not necessarily imply that as between lord and tenant the lord was to

[1] Bract. f. 27 b.

do the forinsec service. And so we find the matter settled in various ways by various charters of donation:—sometimes it is expressly stipulated that the tenant is to do the forinsec service[1], sometimes the lord expressly burdens himself with this[2], often nothing is said, and apparently in such case the service falls on the lord.

Another rule of interpretation appears, though somewhat dimly. In accordance with more recent books, we have spoken as though a gift in frankalmoign, in free alms, always implied that no secular service was due from the donee to the donor. But the words generally used in such gifts were "free, pure, and perpetual alms," and in Bracton's day much might apparently turn on the use of the word "pure[3]." Seemingly there was no contradiction between a gift in "free and perpetual alms" and the reservation of a temporal service, and many instances may be found of such gifts accompanied by such reservations. This will give us cause to believe that the exemption from secular service was not the one essential feature of tenure in frankalmoign; and if we find, as well we may, that a donor sometimes stipulates for secular

[1] Hunter, *Fines*, I. 200 (3 John), "Ala dedit et concessit in puram et perpetuam elemosinam Deo et ecclesie S. Marie de B... totam terram suam...ita quod predictus prior et successores sui facient inde forinsecum servicium." *Cart. Glouc.* I. 167, gift in frankalmoign, "salvo tamen regali servicio"; *ibid.* 187, gift in frankalmoign saving the landgafol due to the king; *ibid.* 389, gift in free, pure and perpetual alms subject to a rent of pepper due to a superior lord and to royal service.

[2] *Cart. Glouc.* II. 17, 30, 98.

[3] Bract. f. 27 b; Bracton's *Note Book*, pl. 21.

service, though he makes his gift not only in free but even in pure alms, our belief will be strengthened[1].

The key to the problem is given by the Constitutions of Clarendon (1164). "If a dispute shall arise between a clerk and a layman, or between a layman and a clerk concerning any tenement which the clerk asserts to be 'elemosina,' and the layman asserts to be lay fee, it shall be determined by a recognition of twelve lawful men and the judgment of the chief justiciar, whether (*utrum*) the tenement belongs to 'elemosina' or belongs to lay fee. And if it be found that it belongs to 'elemosina,' then the plea shall go forward in the ecclesiastical court: but if it be lay fee, then in the king's court, or in case both litigants claim to hold of the same lord, then in the lord's court. And in consequence of such a recognition, the person who is seised is not to lose his seisin until it has been deraigned by the plea[2]." Let us observe how large a concession to the church the great Henry is compelled to make, even before the struggle with Becket has put him in the wrong. This is all that

[1] *Rievaulx Cart.* p. 29, gift by Bishop Hugh of Durham in free and perpetual alms at a rent of 60 shillings, payable to him and his successors; *ibid.* pp. 80, 226, 249. *Newminster Cart.* p. 73, gift by Newminster Abbey to Hexham Priory in free, pure, and perpetual alms at a substantial rent. *Malm. Reg.* II. 124, gift in free, pure, and perpetual alms to hold of me and my heirs "jure eleemosinario," rendering to me and my heirs one penny yearly. Bracton, f. 48, holds that in these cases the reservation being repugnant to the gift is of no effect.

[2] Const. Clarend. c. IX. In the *Gesta Abbatum*, I. 114, the St Alban's chronicler gives an account of litigation in Stephen's reign in which something very like an Assisa Utrum takes place.

those "avitae leges," of which he talks so frequently, will give him, and he claims no more. The clergy have established this principle:—All litigation concerning land held in almoign belongs of right to the ecclesiastical courts. All that the king insists on is this; that if it be disputed whether the land be almoign or no, this preliminary question must be decided by an assize under the eye of his justiciar. Thus the assize *Utrum* is established. It is a preliminary, prejudicial procedure; it will not even serve to give the claimant a possession *ad interim*; the possessor is to remain possessed; it decides not the title to land, but the competence of courts. Here then we find the essence of "almoign" as understood in the middle of the twelfth century:—the land is subject to no jurisdiction save that of the tribunals of the church. Even to maintain his royal right to decide the preliminary question of competence, was no easy matter for Henry. Alexander III freely issued rescripts which ordered his delegates to decide as between clerk and layman the title to English land, or at least the possessory right in English lands: he went further, he bade his delegates award possession even in a dispute between layman and layman, though afterwards he apologized for so doing. The "avitae leges," therefore, were far from conceding all that the clergy, all that the pope demanded[1].

[1] See the very remarkable series of papal rescripts in the *Rievaulx Cartulary*, 189–197; see also *Decret. Gregorii IX*, lib. IV. tit. xvii. cap. 7, where the pope admits that he has gone too far in ordering his delegates to give possession in a dispute between laymen, which came into the ecclesiastical courts in consequence of a question having been raised about bastardy. See also in the *Malmesbury*

They conceded, however, much more than the church could permanently keep. If as regards criminous clerks the Constitutions of Clarendon are the high-water-mark of the claims of secular justice, as regards the title to lands they are the low-water-mark. In Normandy the procedure instituted by Henry, the *Breve de Feodo et Elemosina*, which was the counterpart, and perhaps the model, of our own *Assisa Utrum*, seems to have maintained its preliminary character long after Henry's son had forfeited the Duchy; its object is still to decide whether a dispute belongs to the ecclesiastical or to the temporal forum[1]. In England it gradually and silently changed its whole nature; the *Assisa Utrum* or action *Juris Utrum*[2] became an ordinary proprietary action in the king's court, an action enabling the rectors of parochial churches to claim and obtain the lands of their churches: it became "the parson's writ of right[3]." Between the time of Glanvill and the time of Bracton

Register, II. 7, proceedings under letters of Innocent III for the recovery from a layman of land improvidently alienated by an abbot. In the *Gesta Abbatum*, I. 159–162, there is a detailed account of litigation which took place early in Henry II's reign between the Abbot of St Alban's and a layman touching the title to a wood; the Abbot procured letters from the Pope appointing judges delegate.

[1] *Ancienne Coutume* (de Gruchy), c. 117; Brunner, *Entstehung der Schwurgerichte*, 324–6.

[2] The term *Juris utrum* seems due to a mistake in the expansion of the compendium *Jur'*; it should be *Jurata Utrum*, in French *Juré Utrum*; see *e.g. Y. B.* 14 & 15 Edw. III (ed. Pike), p. 47; and see Bracton, f. 287, where the technical distinction between an *Assisa Utrum* and a *Jurata Utrum* is explained.

[3] Britton, II. 207.

this great change was effected and the ecclesiastical tribunals suffered a severe defeat[1].

The formal side of this process seems to have consisted in a gradual denial of the assize *Utrum* to the majority of the tenants in frankalmoign, a denial which was justified by the statement that they had other remedies for the recovery of their lands. If a bishop or an abbot thought himself entitled to lands which were withholden from him, he might use the ordinary remedies competent to laymen, he might have recourse to a writ of right. But one class of tenants in frankalmoign was debarred from this remedy, namely the rectors of parish churches. Bracton explains the matter thus:—When land is given to a religious house, though it be in the first place given to God and the church, it is given in the second place to the abbot and monks and their successors, or to the dean and canons and their successors; so also land may be given to a bishop and his successors; if then a bishop or an abbot has occasion to sue for the land he can plead that one of his predecessors was seised of it, just as a lay claimant might rely on the seisin of his ancestor: but with the parish parson it is not so; we do not make gifts to a parson and his successors; we make them to the church, *e.g.*

[1] According to Glanvill (XII. 25, XIII. 23, 24) the Courts Christian are competent to decide an action for land between two clerks or between clerk and layman in case the person in possession is a clerk who holds in free alms. So late as 1206 an assize *Utrum* is brought by one monastic house against another, and on its appearing that the land is almoign the judgment is that the parties do go to Court Christian and implead each other there; *Placit. Abbrev.* p. 54 (Oxon.).

"to God and the church of St Mary of Dale[1];" true, that if the parson himself be ejected he may have an assize of novel disseisin, for he himself has been seised of a free tenement, but a proprietary (as opposed to a possessory) action he can not bring, he can have no writ of right, for the land has not been given to a parson and his successors, it has been given to the church; he cannot therefore plead that his predecessor was seised and that on his predecessor's death the right of ownership passed to him; thus the assize *Utrum* is his only remedy of a proprietary kind[2]. In another context it might be interesting to consider the meaning of this curious argument; it belongs to the nascent law about "corporations aggregate" and "corporations sole." The members of a religious house can already be regarded as constituting an artificial person; the bishop also is regarded as bearing the "persona" of his predecessors—the vast temporal possessions of the bishops must have necessitated the formation of some such idea at an early time; but to the parish parson that idea has not yet been applied: the theory rather is that the parish church itself is the landowner and that each successive parson (*persona ecclesiae*) is the guardian and fleeting representative

[1] This remark seems fairly well supported by the practice of conveyancers in Bracton's time; thus *e.g.* a donor gives land "to God and St Mary and St Chad and the church of Rochdale," and contracts to warrant the land "to God and the church of Rochdale," saying nothing of the parson; *Whalley Coucher*, I. 162.

[2] Bracton, f. 286 b, 287. This may have been the reasoning which caused a denial of the assize to the parson when that parson was a monastery, a denial which an ordinance of 1234 overruled; Bracton's *Note Book*, pl. 1117.

of this invisible and immortal being[1]. However our present point must be that legal argument takes this form—(1) No one can use the assize *Utrum* who has the ordinary proprietary remedies for the recovery of land; (2) All or almost all the tenants in frankalmoign, except the rectors of parish churches, have these ordinary remedies; (3) The assize *Utrum* is essentially the parson's remedy; it is "singulare beneficium," introduced in favour of parsons[2]. This argument would naturally involve a denial that the assize could be brought by the layman against the parson. According to the clear words of the Constitutions of Clarendon, it was a procedure that was to be employed as well when the claimant was a layman as when he was a clerk. But soon the doctrine of the courts began to fluctuate. Martin Pateshull at one time allowed the layman this action; then he changed his opinion on the ground that the layman had other remedies; Bracton was for retracing this step, on the ground that trial by battle and the troublesome grand assize might thus be avoided[3]. One curious relic of the original meaning of this writ remained until 1285, when the Second Statute of Westminster gave an action to decide whether a piece of land was the

[1] Bracton, f. 287 b. The parson has not only the assize of novel disseisin, but he may have a writ of entry founded on the seisin of his predecessor. This being so the refusal to allow him a writ of right is already somewhat anomalous. But the writs of entry are new, and the law of the twelfth century (completely ignored by Bracton) was that the ecclesiastical court was the tribunal competent to decide on the title to land held in frankalmoign.

[2] Bracton, f. 286 b.

[3] Bracton, f. 285 b; Fleta, p. 332; Britton, II. 207.

elemosina of one church or of another church[1]. The assize had originally been a means of deciding disputes between clerks and laymen, or rather of sending such disputes to the competent courts temporal or spiritual, and the Constitutions of Clarendon contain a plain enough admission that if both parties agree that the land is "elemosina" any dispute between them is no concern of the lay courts.

We have been speaking of the formal side of a legal change, but must not allow this to conceal the grave importance of the matters which were at stake. The argument that none but parochial rectors have need of the *Utrum*, the conversion of the *Utrum* from a preliminary procedure settling the competence of courts into a proprietary action deciding, and deciding finally, a question of title to land, involves the assertion that all tenants in frankalmoign (except such rectors) can sue and be sued and ought to sue and be sued for lands in the temporal courts by the ordinary actions. And this, we may add, involves the assertion that they ought not to sue or be sued elsewhere. The ecclesiastical courts are not to meddle in any way with the title to land albeit held in frankalmoign. To prevent their so doing writs are in common use prohibiting both litigants and ecclesiastical judges from meddling with "lay fee" (*laicum feodum*) in the Courts Christian, and in Bracton's day it is firmly established that for this purpose land may be lay fee though it is held in free, pure, and perpetual alms[2]. The interference of the

[1] Stat. 13 Ed. I, c. 24.

[2] Bracton, f. 407; Bracton's *Note Book*, pl. 547, 1143. Compare the somewhat similar distinction, "entre lieu saint et lieu religieus," in Beaumanoir, vol. I. p. 163.

ecclesiastical courts with land has been hemmed within the narrowest limits. The contrast to "lay fee" is no longer (as in the Constitutions of Clarendon) *elemosina*, but consecrated soil, the sites of churches and monasteries and their churchyards, to which, according to Bracton, may be added lands given to churches at the time of their dedication[1]. The royal court is zealous in maintaining its jurisdiction; the plea rolls are covered with prohibitions[2] directed against ecclesiastical judges; and it is held that this is a matter affecting the king's crown and dignity—no contract, no oath to submit to the Courts Christian will stay the issue of a prohibition[3]. But the very frequency of these prohibitions tells us that to a great part of the nation they were distasteful. As a matter of fact a glance at any monastic annals of the twelfth century is likely to show us that the ecclesiastical tribunals, even the Roman curia, were constantly busy with the title to English lands, especially when both parties to the litigation were ecclesiastics. Just when Bracton was writing, Richard

[1] Bracton, f. 407. Such lands constitute the church's *dos* or *dower*. See also f. 207 b.

[2] See Bracton's *Note Book* passim. The writ of prohibition is found in Glanvill, XII. 21, 22. It is found in the earliest Chancery Registers. Bracton discusses its scope at great length, f. 402 fol.

[3] In the twelfth century the donor sometimes expressly binds himself and his heirs to submit to the Church Courts in case he or they go against the gift; *e.g. Rievaulx Cartulary*, 33, 37, 39, 69, 159, 166. So in the *Newminster Cartulary*, 89, a man covenants to levy a fine and submits to the jurisdiction of the archdeacon of Northumberland in case he fails to perform his covenant. For a similar obligation undertaken by a married woman, see *Cart. Glouc.* I. 304. As to such attempts to renounce the right to a prohibition, see Bracton's *Note Book*, pl. 678.

Marsh at the instance of Robert Grostete was formulating the claims of the clergy—"He who does any injury to the frankalmoign of the church, which therefore is consecrated to God, commits sacrilege; for that it is *res sacra* being dedicated to God, exempt from secular power, subject to the ecclesiastical forum and therefore to be protected by the laws of the church[1]." It is with such words as these in our minds that we ought to contemplate the history of frankalmoign. A gift in free and pure alms to God and his saints was meant not merely, perhaps not principally, that the land is to owe no rent, no military service to the donor, but also and in the first place that it is to be subject only to the laws of the church and the courts of the church.

[1] *Ann. Burton*, p. 427. See also the protest of the bishops in 1257, Mat. Par. *Chron. Maj.* VI. 361.

REVIEW OF "THE GILD MERCHANT[1]"

THE *Gilda Mercatoria* of 1883 has become the *Gild Merchant* of 1890; the little German tract published at Göttingen has grown into two noble volumes equipped with appendixes, glossary, index, bibliography, "proofs and illustrations," "supplementary proofs and illustrations," and every device for the ease and contentment of readers that the Clarendon Press can command. As a secondary title for his book, Dr Gross has chosen *A Contribution to British Municipal History*; and if his English critics do not at once say that this is the largest contribution of new and authentic raw material that has been made by any one man to this unfortunate and neglected subject, he will not take this ill of them, when he knows what, in all probability, is the only exception present to their minds. "*Madox ist ein Forscher ersten Ranges.*" Dr Gross, when seven years ago he wrote this sentence, gave not the least among the many proofs that he was on the right track. No one is likely to make much of a "contribution to British municipal history" who does not know and admire his Madox; and yet, in a very popular history of England, a list of the authorities for the tale of our

[1] *Economic Journal*, June, 1891.

boroughs spoke of Merewether and Stephens, of Brady and Brentano, and said nothing of the *Firma Burgi*. Our boroughs have not been very happy in their historians; few have been able to approach the story of their early adventures without some lamentable bias towards edificatory doctrine, or some desire to prove a narrow and inadequate thesis. Madox was one of the few. "In truth, writing of history is in some sort a religious act." Coming from some people we should resent such words as cant: we do not resent them when they come from Madox. And now on our bookshelf we can place *The Gild Merchant* next to the *Firma Burgi*, and know that each of them is where it should be. Like his illustrious predecessor, Dr Gross has perceived that a very laborious induction is the one method that can deal with the complex subject-matter, and that if the theorist is to persuade such of his readers as are really worth persuading, he must give them not merely his theories, but the evidence which proves those theories; must give the very terms of the original documents candidly, accurately, and at length. The result is work that must perdure, a book that must become classical; for, put the case that all the author's speculations are unfounded, and will be disproved in due course, the evidence that he has been diligently collecting during the past seven years from the scattered and obscure archives of our towns will remain of priceless value to any one who would either contradict him or follow in his steps. When, if ever, his first volume has become obsolete, there will still be the second volume with its proofs and illustrations, and supplementary proofs and illustrations, its precious extracts

from rolls that have never been used before, rolls which are dispersed abroad throughout England, and for the continued existence of which we have no very perfect security.

Differing in this from some of his forerunners, Dr Gross does not believe that a history of the gild merchant can be a full history, or anything at all like a full history, of the English boroughs. He holds out to us the hope of another "contribution." He has, he tells us, collected much material bearing on the governmental constitution of the towns, in particular on the growth of "the select body." Also he has "almost ready for the press a comprehensive bibliography of British municipal history, comprising about 4000 titles, with a critical survey of the whole literature." But then comes a qualification or stipulation. "Whether it will ever be printed must probably depend upon the success of the present work." This puts us in a difficulty. We want these further contributions, but would like to purchase them without the expenditure of a falsehood. But what are we to say? To tell Dr Gross that his book will sell well? The falsehood, if such it would be, would not even deceive, for publishers keep accounts; and in truth to predict a great sale for such a book is impossible. Had Dr Gross wished to make a book that would attract the largest number of readers, he should have taken not Madox but Brentano as his model. He should have been brief; he should have been dogmatic; he should have cited few authorities, and been very positive about the meaning of those that he cited, and then, may be, there would have been for some years a general

agreement as to his infallibility. But if in such a context it be "success" enough to have made a book, which every one who knows anything about the matter of it will pronounce to be a great book, a book which every labourer in the same field must not merely read, but keep permanently at his elbow, then we claim an immediate fulfilment of the promise. We must have the "bibliography," we must have the "critical survey of literature," and the history of the select body, for the "success of the present work" is assured—it has already taken its place beside the *Firma Burgi*. Should any one ask for more success?

To give a summary of such a book is to do it an injustice; for happily it comprises those copious proofs and illustrations, in particular those Andover Gild Rolls, the like of which have not been printed, the like of which few readers of English history can have hoped to see. Nevertheless I will endeavour to set forth, in as few words as possible, the main points which Dr Gross has made.

There is no proof whatever of the existence of any gild merchant before the Norman Conquest. The importance of the Anglo-Saxon gilds has often been exaggerated. There is no proof that there were gilds in England before the ninth century. The meaning of "gegildan" in the laws of Ine and Alfred is extremely uncertain; but it does not necessarily point to gilds. Kemble and Schmid agree about this. It is in the highest degree doubtful whether the *Judicia Civitatis Londoniæ* can be fairly described as "the statutes of a London gild." The organisation of which they speak seems no voluntary brotherhood,

but a compulsory organisation for police purposes. At any rate they stand alone, and we may not draw general inferences from them. There is nothing to show that the "knight's gild" was, or became, a merchant gild, or that it had anything to do with the government of the town. Passing to Domesday Book, the survey does not, as is generally supposed, prove the existence at Canterbury of a burghers' gild and a priests' gild. The passage "*Burgenses habebant de rege xxxiii acres terre gildam suam*," may mean that they had thirty-three acres which were part of the property for which they paid "geld"—they held this land "in their geld." Dr Gross, on more than one occasion, appeals to the connection between "gild" and "geld." The history of the gild merchant begins with the Norman Conquest. The earliest distinct references to it occur in a charter granted by Robert Fitz Hamon to the burgesses of Burford (1087–1107), and in a document drawn up while Anselm was Archbishop of Canterbury (1093–1109). It is mentioned in various charters of Henry I, and it is one of the franchises commonly granted to the towns by Henry II, Richard and John. Dr Gross rightly, as it seems to me, insists, in many places, that the privilege of having a gild merchant is one among many franchises (*libertates*), that is to say, privileges which none but the king can grant. He never forgets, as some of his predecessors have forgotten, that in England the development of the boroughs is conditioned at every point by common law and royal power. Now the meaning of this franchise is best seen from an account preserved in the Domesday

Book of Ipswich, concerning what happened there in the year 1200. The men of Ipswich obtained a charter from King John which granted to them, among other rights, the right to have a gild merchant. They proceeded to organise themselves as a borough. They elected bailiffs, coroners, and capital portmen; and then, this done, they proceeded to establish a merchant gild, which was to be governed by an alderman and four associates. Here and elsewhere we see the merchant gild as something distinct from the governing body of the borough, or from the nascent municipal corporation. It is so everywhere, or almost everywhere. The gild is not the borough; the gild has officers, aldermen, skevins (*scabini*), stewards, marshals, cup-bearers, and so forth, who are distinct from the governing officers of the borough, the mayor, bailiffs, coroners, capital burgesses and the like; "the morning speech" of the gild brothers is distinct from the court and council of the borough, the portmote or burghmote; a gildsman is not necessarily a burgess, a burgess is not necessarily a gildsman. Some of the most important boroughs never have merchant gilds. There is no proof whatever that there ever was a gild merchant in London. The *communa* of London which John recognised was no gild merchant. The argument from a gild hall to a gild merchant is idle. The famous passage in Glanvill, which some have regarded as establishing the identity of the *communa* with the *gilda*, may be a gloss, and, at any rate, does not prove the proposition in support of which it is commonly adduced. There is no proof of a gild merchant having existed in such important towns as Norwich (Mr Hudson,

in his admirable paper on the history of Norwich, has recently confirmed this), Northampton, or Exeter. Indeed, it is in the small mesne boroughs that the importance of the gild merchant reaches its highest point. In such boroughs the court is still under seignorial influence—the lord's steward still presides over it; and so the burgesses attempt to make their gild a general organ of self-government. It is a mistake, therefore, to make the municipal corporation of later days the outcome of a gild merchant. It is a mistake to make the grant of a gild merchant an act of incorporation, though, under the influence of the narrow theory put forward by Merewether and Stephens, English writers are now in the habit of assigning too late a date even for the definite and technical incorporation of the boroughs. But though we may not identify the gild merchant with the corporation or with the governing body, still we cannot regard it as a mere voluntary association of merchants. It is an organ of the borough, whose primary function is to maintain and protect that immunity from toll which is conceded by the borough charters. None but a gildsman may enjoy this immunity; within the borough those who are not gildsmen are excluded from trade or subjected to differential duties. Starting from this point, the gild claims to regulate trade. It further makes itself a board of arbitration, and in some cases it even assumes to act as a court of law, though in general it remains quite distinct from the regular borough courts. Then as to its subsequent history: the popular doctrine which tells of a prolonged struggle between the merchant gilds and the craft gilds, and the victory of the latter, is just the outcome of Dr Brentano's

imagination—he has read foreign history into English history. Certainly there is often enough a struggle between rich and poor, between the *majores* and the *minores*; but hardly is there any trace of a struggle between various gilds, between merchants and craftsmen. Certainly it is no general truth that the government of the boroughs gradually becomes more democratic; on the contrary the general rule is that it steadily becomes more aristocratic.

In three very interesting appendixes the Scottish Gild Merchant, the Continental Gild Merchant, and the Affiliation of Medieval Boroughs are discussed. Upon the last of these three topics Dr Gross has spent a marvellous amount of industry to very good purpose.

His theories, if they be accepted—and for my own part I am inclined to accept many of them—will hardly make a revolution. This is in part due to the fact that Dr Stubbs, in his treatment of our boroughs, has been, if possible, more cautious and circumspect than he always is. In part it is due to the fact that Dr Gross has committed an offence, hideous in the eyes of the medieval gildsman, that of "forestalling"; he has forestalled himself. Already, for some time past, the doctrines of the *Gilda Mercatoria* have been slowly working their way into English literature; and it is pleasant to record in this place that "economic" historians have hitherto shown a juster appreciation of Dr Gross's German thesis than has been shown by the generality of "general" historians. In 1888 Mr Ashley spoke of the Göttingen tract as "the best work on its subject," and more recently Dr Cunningham has described it as marking an epoch. Still, if Dr Gross has forestalled himself, few others have forestalled him.

His work is sterling original work. Some, of course, of his conclusions should be vigorously discussed before they are accepted, but there is none of them that does not deserve discussion. Now and again he speaks too severely of his predecessors and fellow labourers. When he says that "Most English writers servilely follow Brentano," we could wish that the adverb had not been written. Still there has of late been a great deal too little controversy about these things, and more than enough unquestioning acceptance of unproved assertions, in particular the unproved assertions of a writer of whom it is no blame to say that he had seen but a very small part of the evidence, a very small part indeed when compared with the documents which Dr Gross has read and pondered and published. Those who dissent from his doctrines, and who feel themselves aggrieved by his strictures, will have to admit that in combating him they borrow their weapons from the great store of arms that he has collected.

Will the day ever come when the boroughs of England will print their records? Nottingham has set a splendid example. Not every borough will be able to find so good an editor as Mr Stevenson; but still it is shame to our mayors and corporations that the work is not done. They should be peremptorily asked *quo warranto* they pretend to be proud of their towns; and on their failing to give a satisfactory answer, their franchises should be seized into the Queen's hand. Meanwhile our oldest England has to be thankful for what it can get from New England, the *Essays on Anglo-Saxon Law*, the *Placita Anglo-Normannica*, and last, but not least, the *Gild Merchant*.

HENRY II AND THE CRIMINOUS CLERKS[1]

If I venture to write a few words about the great quarrel between Henry and Becket, a quarrel which has raged from their day until our own, it is with no intention of taking a side, still less with any hope of acting as a mediator. But, as it seems to me, there is a question of fact (which is also in a certain sense a question of law) involved in this quarrel, about which we are apt to think that there is, and can be, but one opinion, while in reality there are two opinions. Possibly I may do some good by pointing out that this is so. Perhaps if we were better agreed about the facts of the case we should differ somewhat less about the merits of the disputants. At any rate it is not well that we should think that we agree when really we disagree.

What did Henry II propose to do with a clerk who was accused of a crime? This is a very simple question, and every historian of England has to answer it. Generally, so far as I can see, he finds no difficulty in answering it and betrays no doubt. And yet, when I compare the answers given by illustrious and learned

[1] *English Historical Review*, April, 1892.

writers, it seems to me that there is between them a fundamental disagreement, of which they themselves are not conscious. The division list, if I were to draw it up, would be a curious one. Some of Henry's best friends would find themselves in the same lobby with warm admirers of Becket, and there would be great names on either side of the line. But I will not thus set historian against historian, for my purpose is not controversial, and I am very ready to admit that every writer has told so much of the truth as it was advisable that he should tell, regard being had to the scale of his work and the character of those for whom he wrote. Rather I would point out that, without doing much violence to the text, it is possible to put two different interpretations upon that famous clause in the Constitutions of Clarendon which deals with criminous clerks. I may be told that the difference between these two interpretations is a small one, one hardly visible to any but lawyers. Still it may be a momentous difference, for neither Becket nor Henry, unless both have been sorely belied, was above making the most of a small point, or insisting on the very letter of the law.

Let us have the clause before us :—

> Clerici rettati et accusati de quacunque re, summoniti a iustitia regis venient in curiam ipsius, responsuri ibidem de hoc unde videbitur curiae regis quod ibidem sit respondendum; et in curia ecclesiastica unde videbitur quod ibidem sit respondendum; ita quod iustitia regis mittet in curiam sanctae ecclesiae ad videndum qua ratione res ibi tractabitur. Et si clericus convictus vel confessus fuerit, non debet de cetero eum ecclesia tueri.

Now, according to what seems to be the commonest opinion, we might comment upon this clause in some

such words as these:—Offences of which a clerk may be accused are of two kinds. They are temporal or they are ecclesiastical. Under the former head fall murder, robbery, larceny, rape, and the like; under the latter incontinence, heresy, disobedience to superiors, breach of rules relating to the conduct of divine service, and so forth. If charged with an offence of the temporal kind, the clerk must stand his trial in the king's court; his trial, his sentence will be like that of a layman. For an ecclesiastical offence, on the other hand, he will be tried in the court Christian. The king reserves to his court the right to decide what offences are temporal, what ecclesiastical; also he asserts the right to send delegates to supervise the proceedings of the spiritual tribunals.

The words are just patient of this meaning. Nevertheless if we adopt it two things will strike us as strange. Why should Henry care about what goes on in the ecclesiastical courts if those courts are only to deal with breaches of purely ecclesiastical rules? If he did propose to send delegates to watch trials for incontinence, disobedience, and the like, he inflicted a gratuitous and useless insult upon the tribunals of the church. And then let us look at the structure of the clause. In its last words it says that after a clerk has been convicted or has confessed, the church is no longer to protect him. Has been convicted of what? Has confessed what? Some temporal crime it must be. But the phrase which tells us this is divorced from all that has been said of temporal crimes. We have a clumsy sentence: "A clerk, if accused of a temporal crime, is to be tried in the king's court; but if he be

accused of an ecclesiastical offence, then he is to be tried in a spiritual court; and when he has confessed or been convicted [of a temporal crime] the church is no longer to protect him." And what, if this interpretation be correct, is the meaning of the statement that when he has confessed or been convicted the church is to protect him *no longer*? If he is to be tried like a layman in a temporal court, the church will never protect him at all.

Let us attempt a rival commentary. The author of this clause is not thinking of two different classes of offences. The purely ecclesiastical offences are not in debate. No one doubts that for these a man will be tried in and punished by the spiritual court. He is thinking of the grave crimes, of murder and the like. Now every such crime is a breach of temporal law, and it is also a breach of canon law. The clerk who commits murder breaks the king's peace, but he also infringes the divine law, and—no canonist will doubt this—ought to be degraded. Very well. A clerk is accused of such a crime. He is summoned before the king's court, and he is to answer there—let us mark this word *respondere*—for what he ought to answer for there. What ought he to answer for there? The breach of the king's peace and the felony. When he has answered—when, that is, he has (to use the words of the enrolment that will be made) "come and defended the breach of the king's peace, and the felony, and the slaying, and all of it word by word," then, without any trial, he is to be sent to the ecclesiastical court. In that court he will have to answer as an ordained clerk accused of homicide, and in that court there will be a

trial (*res ibi tractabitur*). If the spiritual court convicts him it will degrade him, and thenceforth the church must no longer protect him. He will be brought back into the king's court—one of the objects of sending royal officers into the spiritual court is that he may not escape—and having been brought back, no longer a clerk but a mere layman, he will be sentenced (probably without any further trial) to the layman's punishment, death or mutilation. The scheme is this: accusation and plea in the temporal court; trial, conviction, degradation in the ecclesiastical court; sentence in the temporal court to the layman's punishment.

This I believe to be the meaning of the clause. The contrary opinion can only be upheld if we give to the word *respondere* a sense that it will hardly bear. No doubt if nowadays one says that a man will have to answer for his crime at the Old Bailey, one means that he can be tried there and sentenced there. But we ought not lightly to give to *respondere* so wide a meaning when it occurs in a legal document. It means to answer, "to put in an answer," to plead, "to put in a plea." The words of our clause are fully satisfied if the clerk, instead of being allowed to say, "I am a clerk and will not answer here," is driven to "defend" —that is, formally to deny—the breach of the king's peace and the felony, and is then suffered to add, "But I am a clerk, and can be tried only by the ecclesiastical forum." According to this opinion Henry did not propose that a clerk accused of crime should be *tried* in the temporal court, and he did not propose that *a clerk* should be punished by a temporal court. The clerk was to be tried in the bishop's court; the convict

who was to be sentenced by the king's court would be no clerk, for he would have been degraded from his orders.

Even if this clause stood by itself we should, so I venture to think, have good reason for accepting the second as the sounder of these two interpretations. If we look to the words it seems the easier; if we look to the surrounding circumstances it seems the more probable. But we do not want for contemporaneous expositions of it. In the first place I will allege the letter addressed to the pope in the name of the bishops and clergy of the province of Canterbury.

Qua in re partis utriusque zelus enituit; episcoporum in hoc stante iudicio, ut homicidium, et si quid huiusmodi est, exauctoratione sola puniretur in clerico; rege vero existimante poenam hanc non condigne respondere flagitio, nec stabiliendae paci bene prospici, si lector aut acolythus quemquam perimat, ut sola iam dicti ordinis amissione tutus existat[1].

According to this version of the story there is no dispute between king and clergy as to the competence of any tribunal; the sole question is as to whether degradation—a punishment which can be inflicted only by the ecclesiastical court—is a sufficient penalty for such a crime as murder. Still more to the point are the words of Ralph de Diceto.

Rex Anglorum volens in singulis, ut dicebat, maleficia debita cum severitate punire, et ordinis dignitatem ad iniquum trahi compendium incongruum esse considerans, clericos a suis iusticiariis in publico flagitio deprehensos episcopo loci reddendos decreverat, ut quos episcopus inveniret obnoxios praesente iusticiario regis exauctoraret, et post *curiae traderet puniendos*[2].

[1] *Materials for the Hist. of Thomas Becket*, v. 405.

[2] R. de Diceto, i. 313.

Now this, of course, is as plain a statement as could be wished that the second of our two interpretations is the right one, that the accused clerk is to be tried by his bishop; and those who contend for the contrary opinion seem bound to maintain that the dean of St Paul's did not know, or did not choose to tell, the truth. Still it may be said of one of these witnesses—the author of the letter to the pope—that he is Gilbert Foliot, Becket's bitter antagonist, and of the other that he may have had his version of the tale from Foliot, and that, though a fair-minded man, he was inclined to make the best case he could for the king; and I must admit, or rather insist, that in the last words of the passage that I have cited from him Ralph de Diceto is making a case for the king, for he is in effect telling us by the phrase that is here printed in italics that we ought to read our Gratian and see how strong the king's case is.

But we may turn to other accounts. In the tract known as *Summa Causae* the king is supposed to address the bishops thus:—

> Peto igitur et volo, ut tuo domine Cantuariensis et coepiscoporum tuorum consensu, clerici in maleficiis deprehensi vel confessi exauctorentur illico, et mox *curiae* meae lictoribus *tradantur*, ut omni defensione ecclesiae destituti corporaliter perimantur. Volo etiam et peto ut in illa exauctoratione de meis officialibus aliquem interesse consentiatis, ut exauctoratum clericum mox comprehendat, ne qua ei fiat copia corporalem vindictam effugiendi[1].

Thereupon "the bishops," who in this version take the king's side, urge that the demand is not unreasonable. *Episcopi dicebant secundum leges saeculi clericos*

[1] *Materials*, IV. 202.

exauctoratos curiae tradendos et post poenam spiritualem corporaliter puniendos. Thomas replies that this is contrary to the canons—*Nec enim Deus iudicat bis in idipsum.* He argues that the judgment of the ecclesiastical court must put an end to the whole case. It condemns a clerk to degradation. Either this judgment is faulty or it is a complete judgment. It ought not to be followed by any other sentence.

The story as told by "Anonymus II" is to the same effect. The king's demand is thus described:—

ut in clericos publicorum criminum reos de ipsorum [sc. episcoporum] consilio sibi liceret quod avitis diebus factum sua curia recolebat; tales enim deprehensos, et convictos aut confessos *mox degradari*, sicque poenis publicis sicut et laicos subdi, tunc usurpatum est[1].

To this the bishops reply, not that a lay tribunal is incompetent to try an accused clerk, but *Non iudicabit Deus bis in idipsum.*

Yet more instructive is "Anonymus I." The king's officers, instigated by the devil, took to arresting clerks, investigated the charges against them, and, if those charges were found true, committed them to gaol. (We must note by the way that even these royal officers, though instigated by the devil, do not condemn these clerks to death or mutilation; they are sent to prison.) The archbishop, however, held that though these men were notoriously guilty, the church ought not to desert them, and he threatened to excommunicate any who should pass judgment upon them elsewhere than in the ecclesiastical court. Thereupon the king, admitting the reasonableness of this assertion

[1] *Materials*, iv. 96.

(*necessitate rationis compulsus*), consented that they should be given up to the bishops, upon condition that if they should be degraded by their ecclesiastical superiors they should then be delivered back to the temporal power for condemnation (*ita tamen ut et ipse* [*archiepiscopus*] *eos meritis exigentibus exordinatos suis ministris condemnandos traderet*). Thereupon Thomas, as is usual, is ready with the *Nemo bis in idipsum*[1]. This is an instructive account of the matter, because, as I read it, it distinctly represents Henry as not venturing to make the claim which he is commonly supposed to have made. No doubt he would like to try clerks in his court, but he knows that the church will never consent to this.

Testimony that could be put into the other scale I cannot find. True, it is often said that the king wants "to draw clerks to secular judgments (*trahere clericos ad saecularia iudicia*)." This was Becket's own phrase[2]; and though I do not think that it was strictly and technically true, I think that in the mouth of a controversialist it was true enough. Henry did propose that clerks should be accused in his court, and he did propose that punishment should be inflicted by the temporal power upon criminals who were clerks when they committed their crimes. The archbishop might from his own point of view represent as a mere sophism the argument that during the preliminary proceedings in the lay court there was no judgment, and that during the final proceedings there was no clerk. But we can hardly set this somewhat vague phrase, "to

[1] *Materials*, IV. 39.

[2] Letter by Thomas to the pope, *ibid.* V. 388.

draw clerks to secular judgments," in the balance against the detailed accounts of Henry's proposals which we have had from other quarters, in particular against the plain words of Ralph de Diceto.

But we have yet to consider the story told by Herbert of Bosham. He says that the king was advised that his proposed treatment of criminous clerks was in accordance with the canons, and that the advice was given by men who professed themselves learned *in utroque iure*. Herbert sneers at these legists and canonists as being *scienter indocti*; still he admits that they appealed to the text of the canon law. He puts an argument about that text into their mouths, and then proceeds to refute it in the archbishop's name. Now of course if Henry really proposed to try criminous clerks in a temporal forum he had no case on the Decretum Gratiani, and no one would for one moment have doubted but that he was breaking canon after canon. However we have Herbert's word for it that the king's advisers thought, or at all events said, that the king's scheme was sanctioned by the law of the church, and with Herbert's help we may yet find in the Corpus Juris Canonici the words upon which they relied. It will, I suppose, hardly be questioned that Herbert may in the main be trusted about this matter, for he is here making an admission against the interest of his hero, St Thomas; he is admitting that the king's partisans professed themselves willing to stand or fall by the canon law. And the story is corroborated by phrases which are casually used by other writers, phrases to which I have drawn attention by italic type. When Ralph de Diceto

writes *curiae traderet puniendos*, when the author of *Summa Causae* writes *curiae meae lictoribus tradantur*, when Anonymus II writes *mox degradari*, they are one and all alluding—so it seems to me—to certain phrases in Gratian's book.

The debate, as I understand it, turned on two passages in the Decretum[1]. One of them is the following:—

Decr. C. 11, qu. 1, c. 18. *Clericus suo inobediens episcopo depositus curiae tradatur.*

Item Pius Papa epist. II.

Si quis sacerdotum vel reliquorum clericorum suo episcopo inobediens fuerit, aut ei insidias paraverit, aut contumeliam, aut calumniam, aut convicia intulerit, et convinci potuerit, mox [depositus[2]] curiae tradatur, et recipiat quod inique gesserit.

The other of the two is introduced by a *dictum Gratiani* which ends thus:—

In criminali vero causa non nisi ante episcopum clericus examinandus est. Et hoc est illud, quod legibus et canonibus supra diffinitum est, ut in criminali videlicet causa ante civilem iudicem nullus clericus producatur, nisi forte cum consensu episcopi sui; veluti quando incorrigibiles inveniuntur, tunc detracto eis officio curiae tradendi sunt. Unde Fabianus Papa ait ep. ii. Episcopis orientalibus....

On this follows Decr. C. 11, qu. 1, c. 31.

Qui episcopo insidiatur semotus a clero curiae tradatur.

Statuimus, ut, si quis clericorum suis episcopis infestus aut insidiator extiterit, mox ante examinatum iudicium submotus a clero curiae tradatur, cui diebus vitae suae deserviat, et infamis absque ulla spe restitutionis permaneat.

[1] *Materials*, III. 266–70.

[2] It will be seen hereafter that this word is not in the text of the pseudo-Isidore, nor is it in the *Decretum Ivonis*, p. 5, c. 243.

These passages, it will be seen, contain more than once the phrase *curiae tradere*. What is the true meaning of it?

This seems to me an almost unanswerable question, for it amounts to this: By what standard shall we, standing in the twelfth century, construe certain passages which we believe to come from two popes, the one of the second, the other of the third century, but which really come from a forger of the ninth century, who, it is probable, has been using at second or third hand a constitution of the fifth century, when we know also that these passages have very lately been adopted, though not without modification, by a highly authoritative writer of our own days?

Apparently the disputable phrase takes us back in the last resort to a constitution of Arcadius and Honorius which was received into the Theodosian code[1]. It begins thus:—

Quemcunque clericum indignum officio suo episcopus iudicaverit et ab ecclesiae ministerio segregaverit, aut si qui professum sacrae religionis obsequium sponte dereliquerit, continuo eum curia sibi vindicet, ut liber illi ultra ad ecclesiam recursus esse non possit, et pro hominum qualitate et quantitate patrimonii vel ordini suo vel collegio civitatis adiungatur; modo ut quibuscunque apti erunt publicis necessitatibus obligentur, ita ut colludio quoque locus non sit.

Then with this in his mind—or rather with the West Goth's *interpretatio* of it in his mind, or yet rather with some epitome of that *interpretatio* in his mind—the pseudo-Isidore inserted certain clauses into the decretals that he was concocting for Pope Pius I

[1] Lib. xvi. tit. ii. l. 39.

and Pope Fabian[1]. What he says in the name of Fabian we need not repeat, for it is fairly enough represented by the second of the two passages from Gratian that are quoted above[2]. What he says in the name of Pius is this:—

Et si quis sacerdotum vel reliquorum clericorum suo episcopo inobediens fuerit aut ei insidias paraverit aut calumniam et convinci poterit, mox curiae tradatur. Qui autem facit iniuriam, recipiat hoc quod inique gessit[3].

There is here enough difference between Gratian and Isidore to make us doubt whether the one fully understood the other. But yet a third time did the great forger return to this theme. To the pen of Pope Stephen he ascribed

Clericus ergo qui episcopum suum accusaverit aut ei insidiator extiterit, non est recipiendus, quia infamis effectus est et a gradu debet recedere aut curiae tradi serviendus[4].

Now of course the phrase in the Theodosian code, *continuo eum curia sibi vindicet*, has nothing whatever to do with the point at issue between Henry and Becket. The clerk who has been degraded from, or who has renounced, his holy orders is to become a *curialis*; he is to become obnoxious to all those duties and burdens, those *munera*, by which in the last days of the empire the *curiales* are being crushed.

[1] Hinschius would trace these passages to that epitome of the *Breviarium Alarici* which is represented by the Paris manuscript, *sup. lat.* 215. See Hænel, *Lex Romana Visigothorum*, pp. 246–8.

[2] Fabianus, XXI. (ed. Hinschius, p. 165).

[3] Pius, X. (Hinschius, p. 120).

[4] Stephanus, XII. (Hinschius, p. 186).

I suppose that no words of ours will serve as equivalents for the *curia* and the *curialis* of the fourth and fifth centuries; even German writers, with all their resources, leave these terms untranslated. I suppose that if Henry had wished to substitute for the words of Arcadius and Honorius a phrase which should express their real meaning, and be thoroughly intelligible to his English subjects, he would have said, *Clericus degradatus debet scottare et lottare cum laicis.* It would seem also that Becket and his canonists knew something of the history of the words *tradatur curiae,* and were prepared to go behind Gratian. But what I am concerned to point out is that on the text of the Decretum Henry had an arguable case. Here, he might say, are words that are plain enough. A clerk disobeys or insults his bishop; *mox depositus curiae tradatur, et recipiat quod inique gesserit.* What can this mean if it be not that the offender, having been deposed by his bishop, is to be handed over to the *curia,* the lay court, for further punishment? Very well, that is what I am contending for. Further punishment after degradation does not infringe your sacred maxim *Nemo bis in idipsum,* or if it does then you are prepared to infringe that maxim yourselves whenever to do so will serve your turn.

But more than this can be said. Not very long after Henry's death the greatest of all the popes put an interpretation on the phrase *curiae tradere.* Innocent III issued a constitution against the forgers of papal letters. The forgers, if they be clerks, are to be degraded and then

postquam per ecclesiasticum iudicem fuerint degradati, saeculari potestati tradantur secundum constitutiones legitimas puniendi, per

quam et laici, qui fuerint de falsitate convicti, legitime puniantur [c. 7, X. 5, 20][1].

This seems plain enough. Henry, had he been endowed with the gift of prophecy, might well have said, "Here, at any rate, is an exception to your principle, and for my own part I cannot see that the forgery of a decretal—though I will admit, if you wish it, that it is wicked to forge decretals—is a much worse crime than murder, or rape, or robbery."

But this is nothing to what follows. Innocent III speaks once more (c. 27, X. 5, 40)[2].

Novimus expedire ut verbum illud quod et in antiquis canonibus, et in nostro quoque decreto contra falsarios edito continetur, videlicet ut clericus, per ecclesiasticum iudicem degradatus, saeculari tradatur curiae puniendus, apertius exponamus. Quum enim quidam antecessorum nostrorum, super hoc consulti, diversa responderint, et quorundam sit opinio a pluribus approbata, ut clericus qui propter hoc vel aliud flagitium grave, non solum damnabile, sed damnosum, fuerit degradatus, tanquam exutus privilegio clericali saeculari foro per consequentiam applicetur, quum ab ecclesiastico foro fuerit proiectus; eius est degradatio celebranda saeculari potestate praesente, ac pronunciandum est eidem, quum fuerit celebrata, ut in suum forum recipiat, et sic intelligitur "tradi curiae saeculari"; pro quo tamen debet ecclesia efficaciter intercedere, ut citra mortis periculum circa eum sententia moderetur.

Now this, as I understand it, is an authoritative exposition of the true intent and meaning of the phrase *tradere curiae*, contained in those passages from the Decretum that have been printed above. It was a dubious phrase; some read it one way, some another; but on the whole the better opinion is not that of St Thomas, but that of King Henry II. And so

[1] *Reg. Inn. III*, ed. Baluze, I. 574. [2] *Ibid.* II. 268.

the king's advisers have this answer to the sneers of Master Herbert of Bosham :—We cannot hope to be better canonists than Pope Innocent III will be.

I am far from arguing that Henry's scheme ought to have satisfied those who took their stand on the Decretum. From their point of view the preliminary procedure in the king's court, whereby the civil magistrate acquired a control over the case, would be objectionable, and the mission of royal officers to watch the trial in the spiritual court would be offensive. But still about the main question that was in debate, the question of double punishment, Henry had something to say, and something which the highest of high churchmen could not refuse to hear.

This account of the matter seems to fit in with all that we know of the behaviour of Alexander III and of the English bishops. Had Henry been striving to subject criminous clerks to the judgment of the temporal forum, the case against him would have been an exceedingly plain one. A pope, however, much beset by troubles, could hardly have hesitated about it ; no bishop could have taken the king's side without openly repudiating the written law of the church. But the pope hesitated and the English bishops, to say the very least, did not stubbornly resist the king's proposal. Even Becket's own conduct seems best explained by the supposition that until he grew warm with controversy he was not very certain of the ground that he had to defend. *Mox depositus curiae tradatur et recipiat quod inique gesserit*, was ringing in one ear, *Nec enim Deus iudicat bis in idipsum* in the other ear.

It is a curious coincidence, if it be no more than

a coincidence, that Henry's plan for dealing with criminous clerks—a plan which, as he asserted, was not his plan, but the old law of his ancestors—agrees in all its most important points with what, according to an opinion now widely received, was the scheme ordained by a Merovingian king in the seventh century. The clergy of Gaul had been claiming a complete exemption from secular justice. By an edict of the year 614 Chlothar II in part conceded, in part rejected their claim. If a bishop, priest, or deacon (clerks in minor orders were for this purpose to be treated as laymen) was accused of a capital crime, the accusation was to be made and the preliminary proceedings were to take place in the lay court; the accused was then to be delivered over to the bishop for trial in a synod; if found guilty he was to be degraded, and when degraded delivered back to the lay court for punishment. Merovingian grammar, to say nothing of Merovingian law, is a matter about which no one who has not given much time to its study ought to have any opinion. Still this opinion, put forward by Nissl, has met with great favour[1]. If it be true, then after five centuries and a half we find Henry reverting to a very ancient compromise. On this point I dare say little more, but it does not seem very certain that at any time the lay power in the Frankish state, or in the new principalities which rose out of its ruins, had ever, at least by any definite act,

[1] Nissl, *Gerichtsstand des Clerus*; Schröder, *Rechtsgeschichte*, 178; Viollet, *Histoire des Institutions Politiques*, I. 394. The settlement thus effected is not very unlike that defined by Justinian's Novels, 83 and 123.

receded from the position which Chlothar II took up. I see no proof that the law laid down by Chlothar, the law laid down by Henry, was not the law as understood by William the Conqueror and by Lanfranc. The evidence that we have of what went on under our Norman kings is extremely slight. From cases such as those of Odo of Bayeux, of William of Durham, of Roger of Salisbury, we dare draw no inference about the general law. In none of these cases is there a sentence of death or mutilation. In the two latter the king can be represented as merely insisting on the forfeiture of a fief, and even great canonists would admit that purely feudal causes were within the cognisance of the temporal forum. Bishop William and Bishop Roger rely much less on the mere fact that they are in holy orders than on the great maxim of the pseudo-Isidore (his greatest addition to the jurisprudence of the world), *Spoliatus ante omnia debet restitui.* As to Bishop Odo, Lanfranc very probably would have had no difficulty in proving that the scandalously militant earl of Kent had put himself outside every benefit of clergy. It has not been proved that our Norman kings insisted on treating criminal clerks just as though they were criminal laymen, and on the other hand it has certainly not been proved that such clerks had enjoyed the full measure of exemption that Becket claimed for them. Henry's repeated assertions that he is a restorer, not an innovator, meet with but the feeblest of contradictions.

On the whole I cannot but think that the second of the two interpretations of the famous clause is the right one. If this be so all those modern arguments

which would contrast the enlightened procedure of the canon law with the barbarous English customs—I am not at all sure that in the England of the twelfth century the procedure of the ecclesiastical courts was one whit more rational than that of the temporal courts —are quite beside the mark. Henry did not propose that an accused clerk should be tried in the lay court; he was to be tried in a canonical court by the law of the church[1].

[1] In the middle of the twelfth century the English clergy were still using the ordeal, c. 3, X. 5, 37; and their only alternative for the ordeal in criminal cases was the almost equally irrational compurgation.

TENURES IN ROUSSILLON AND NAMUR[1]

SUCH books as these[2], appearing as they do along with Dr Vinogradoff's *Villainage in England*, should make us Englishmen ashamed of our old-fashioned "county histories" and persuade us that we have hardly come in sight of the true method of making our superabundant local records tell their most interesting tales.

France will be fortunate when all the lands which lie between the Channel and the Pyrenees are covered by books such as those which now illustrate her uttermost departments. Just outside her limits lies the country that M. Errera has studied. Châtelineau near the Sambre—canton de Châtelet, arrondissement de Charleroi—is the centre from which he starts for his researches among "*les masuirs*," the *mansionarii*, the messuagers, we may say, of Belgium.

Both M. Brutails and M. Errera have felt the influence of Léopold Delisle, and both of them, though they approach their subject-matter by different routes, endeavour to unravel some of those problems of medieval history which are in part economical in part

[1] *English Historical Review*, Oct. 1892.

[2] *Étude sur la Condition des Populations Rurales du Roussillon au Moyen Age.* Par Jean-Auguste Brutails. *Les Masuirs: Recherches historiques et juridiques sur quelques Vestiges des Formes anciennes de la Propriété en Belgique.* 2 vols., par Paul Errera.

legal problems. That neither the social economy, nor yet the law, of the middle ages can be profitably studied by itself is a truth the full meaning of which is always becoming more clearly apparent. A little while ago a German jurist writing a *Lehrbuch der deutschen Rechtsgeschichte* would hardly have thought that a map of a typical German village was one of the things that might be expected of him. Nowadays it is otherwise: he will give the map and discourse about methods of agriculture. Medieval land law is not to be understood apart from medieval agriculture. Both M. Brutails and M. Errera know this, and they also know the other half of the truth—namely, that we can only get at the economic facts of the middle ages through the medium of legal documents, documents which can only be interpreted by those who have studied the law. Indeed, in M. Errera's case the juridical interest of the problems is apt to get the upper hand; but this predominant jurisprudence, if it will perhaps deprive him of some English readers, who are like to be impatient of what they will call his "legal technicalities," will teach some others a very wholesome lesson—how little is gained by our easy talk of "village communities," how elaborate an analysis of the legal thought of the middle ages is necessary if we are really to understand the commonest economic facts. Both of our authors speak with reverence of Sir Henry Maine. It would seem as if Maine's teaching bore better fruit in France and Belgium than in England. But then both of our authors have before their eyes those terrible pulverising, macadamising methods of Fustel de Coulanges.

Even to one who knows next to nothing of

Roussillon and its history it is plain enough that M. Brutails' book is the work of a scholar who has collected evidence industriously, weighed it soberly, and arranged it lucidly. He gives us what we want where we expect to find it, and is careful to support his opinions by extracts from the numerous medieval cartularies that he has examined. His general theory of the law that prevailed in Roussillon during the later middle ages is that it was Frankish feudal law. It was not Visigothic, though a certain theoretical respect was paid to the *Forum Judicum*. The Saracens destroyed what was Visigothic, and for their own part contributed nothing towards the law of later times. When they were expelled they left behind them a *tabula rasa*, and thenceforth feudal law of the Frankish type reigned in Roussillon. Roman law, even after the Bolognese revival, exercised but little influence. Such a phrase as *les prétendus pays de droit écrit* will perhaps give some Englishmen a slight shock. M. Brutails, however, contends, and seems to represent a strong current of modern learning in contending, that *la division de la France en pays de droit écrit et en pays de droit coutumier, quelque ancienne qu'elle soit d'ailleurs, est une grave erreur historique*. To repeat a phrase already used, a certain theoretical respect is professed for Roman law, and some of its phrases, half understood, will adorn the style of the notary; but at bottom the law is not Roman. We would willingly have heard a little more than M. Brutails tells us about the famous "Usatici Barchinonensis patriae," for the relation between them and the medieval Roman law book known as the "Exceptiones Petri," or rather, perhaps,

between them and the yet earlier books whence "Petrus" took his matter, is an important point in the general history of European law and one which will not be settled until the "Usatici" has been carefully dissected. Our author is content to tell us that, according to common opinion, they were promulgated by Count Raymond Bérenger in 1068 (it interests us Englishmen to find a contemporary of William the Conqueror ready with *quia quod principi placuit legis habet vigorem*), but that some of the articles, notably some of the Roman articles, were inserted at a later date. However, his general conclusion is—*Le droit romain représentait dans nos pays le droit par excellence*, jura, *la plus haute expression de la justice; mais dans la pratique il ne fut jamais qu'un droit supplétoire.* He makes us think that if an English lawyer of the thirteenth century had wandered as far as the Spanish march, he would have found little to surprise him; and we are constantly reminded of the opinion which our kind neighbours, French and German, are for ever pressing upon us, namely, that English common law is a *Tochterrecht* of Frankish law, is, in short, just one more French provincial custom.

Thus one of the institutions with which he has to deal is the *alleu*. Whatever may be the original meaning of the term *alodium*, and whatever may have been the relation between it and the *beneficium* or *feudum*, it seems quite certain that there are ages into which we must not carry that sharp distinction between alodial ownership and dependent tenure which modern theorists have discovered or invented. M. Brutails remarks that if a tenant at a rent, instead

of sub-letting or sub-infeodating, transfers his whole interest to another person, substitutes that person for himself as tenant, he will say that he transfers the tenement *in alodium, ad alodem,* or the like. Even so we know that Norman clerks of the eleventh century, in their own country and in England, made no difficulty about saying *A tenet terram illam de B in alodio.* We are apt, as M. Brutails says, to give too sharp an edge to the legal terms of the middle ages, to treat them as fixed, whereas they were vague and fluid. The same term *dominium* has to serve for sovereignty and for ownership; the king's supremacy, the state's supremacy, has to appear as a *directité féodale* or not to appear at all. Thence spring the inept controversies of later lawyers. Louis XV has succeeded to the rights of Charlemagne in Roussillon, and, if we are to define the rights of Louis, we ought to know—which means in the present context that we ought to construct—the rights of Charles. M. Brutails is *juge au tribunal supérieur d'Andorre,* and as such must have ever in his mind a splendid example of that fusion of private property with political dominion which is characteristic of the middle ages. He is at his best when he is explaining how ancient law gets perverted when it is forced to solve modern problems. M. Errera has much to say about the same topic, much that is good; but by a practical example he shows us how unavoidable this process of perversion is. If *alodium* cannot always be translated by *dominium,* property, ownership, what shall we say of *tréfonds?* Is it not an intensified form of absolute property: does it not answer to our English "very

own"? Must not the *tréfoncier* of a piece of land be, among all the various people who have rights in or over that land, that one who is in a superlative sense its owner, *fundarius, seu, ut ita loquar, fundariissimus*? But then it was the use of this word in a document of 1479, which in these last years gave rise to a long dispute between the *masuirs* of Châtelineau and one of the departments of the Belgian government, of which dispute M. Errera's work is likely to be for the world at large the most important outcome. He contends that in the document in question the word *tréfonds* did not mean the ownership of the soil, but meant a seignory over the soil, and in this he may be right; still he more easily convinces us that in a given context the word does not stand for the ownership known to modern private law, than that it ever pointed to rights which we could correctly call purely political. And yet a modern court of justice has to make its choice, to force its dilemmas through all historical obstacles, and to decide that a disputed tract of land belongs to these masuirs, or to the commune of Châtelineau, or to the Belgian state as representative of a dissolved abbey.

As to the legal and economic condition of the individual peasant, we hear more from Roussillon than from Namur. When M. Brutails speaks of this he constantly reminds us of England. He hardly mentions a service or a due for which any reader of Seebohm or Vinogradoff could not supply a parallel. Such a passage as the following will seem very familiar —if we except two or three outlandish words—to those who have glanced at English custumals:—

"Hec sunt consuetudines castri de Taltavolio

[Tautavel] que sunt inter homines predicti castri et domini regis Majoricarum, scilicet quod homines qui non sunt domini Regis qui manent in predicto castro faciunt dicto domino Regi duas iovas quolibet anno, scilicet unam iovam in ciminterio et aliam in stivo, tamen si habent animalia cum quibus possint laborare. Item, homines qui sunt dicti domini Regis qui laborant cum animalibus faciunt dicto domino Regi in ciminterio et in estate et iuvant seminare bladum castri quousque sit seminatum; tamen in istis non intelligimus illos qui sunt avenidissi. Item, omnes homines dicti domini Regis debent triturare bladum castri de Taltavolio in area et debent eum mundare quousque sit pulcrum et debent eum deferre cum suis bestiis ad castrum predictum, cum pane et vino tantum dicti castri. Item debent amenar molas molendinorum dicti castri de Taltavolio, cum pane et vino dicti castri," and so forth.

But if M. Brutails has discovered the whole, or anything like the whole, truth—and he seems to have been indefatigable in his search for it—it certainly follows that the labour which the peasant of Roussillon had to do for his lord was trivial when compared with that which was due from the English *villanus*. The English virgater would have made light of it. He would have said, "Here are 'boon-days,' it is true, but there is none of that steady 'week work' which oppresses me at home." Some of these peasants of Roussillon were, like the Roman *coloni*, bound to the soil; they were *affocati*; they were *homines de remensa*; they were obliged to a *continua statica*. M. Brutails seeks the origin of this in contract. A man binds

himself *facere in dicta grangia residenciam personalem cum tota familia sua, et facere fochum et locum, prout in mansis est consuetum.* He may promise this for a term of six years, or he may promise it for all eternity. But true slavery, we are told, disappeared in the eleventh century, or rather after that the only slaves were the infidels—very curious is this list of things sold, *mansus et fumus et ortus cum pertinenciis eorum et sarracenus et asinus et census denariorum et aliarum rerum*—and nothing that could be called serfage, nothing that Beaumanoir would have called *servage*, took the place of slavery. This book comes just at the right moment to enforce what Vinogradoff has been telling us, that, "in a sense, the feudal law of England was the hardest of all in western Europe."

In a valuable chapter M. Brutails speaks of the communes of Roussillon, denying by the way that they can be connected with the Roman *municipia*; still, according to the picture that he draws, communes and communal property have not played so large a part in the agricultural economy of this part of the world as some of us might have expected. The commune, in his eyes, has long been capable of owning, and has owned, land, but he does not allow himself any speculations about a time when lands normally belonged rather to communities than to individuals. He holds, as already said, that the profitable history of Roussillon goes back only to what, having regard to some other countries, we may call a pretty recent date. The evicted Saracens leave behind them a void, and this void is filled by conquerors who are already far gone in feudalism. Therefore it is not to Roussillon that we

must look for any primitive communalism. Communal property and communal *droits d'usage*, rights of pasture and the like, he would trace chiefly to grants made, or encroachments suffered, by feudal lords, lords who were already by law the lords of the land. On the other hand, M. Errera, who tells us comparatively little about the individual peasant, has a great deal to say about the village community. He has been brought to the study of medieval affairs by certain modern facts and modern difficulties. These he discusses at very great length, giving in full all the documents that bear upon them. Still, he cannot be charged with describing them too minutely. We best see the real complexity of the problems of medieval communalism when they are brought into contact with modern law, when a court of justice or a governmental bureau unravels all the known facts, and then confesses that it knows not how to deal with them. Very briefly, let us try to state the nature of the cases which have arisen of late years in Belgium, and which have made M. Errera an historian.

Within the territory of a certain village there is a large wood. This, to use an English phrase, has been dealt with as "a timber estate"; the timber periodically cut down upon it has been sold. This wood has not been treated as forming part of the ordinary *biens communaux* of the village. The profits of it have not been enjoyed by the commune, nor have they been divided among all the members of the commune; they have been enjoyed by a group of persons having some such name as *masuirs*. This group is defined in various ways in various villages. At Châtelineau, for

example, in order to be a *masuir* one must be domiciled and resident (*manant et habitant*) within the limits of the commune: one must have a house. To be a *mansionarius* one must have a *mansus*; also one must own within the ancient jurisdiction of the Court of St Bartholomew (the court which once belonged to the collegiate church of St Bartholomew at Liège) a *mesure* of meadow or a *jurnal* of arable land. The *mesure* being equal to some 23, the *jurnal* to some 31 *ares*, the number of these privileged persons may bear but a small ratio to the number of the inhabitants of the commune. At Châtelineau there were recently but 108 *masuirs*, while the sum of the population exceeded 8000. But though only a few of the inhabitants will get any profit out of the wood, still it is usual to find that, in some way or another, the communal assembly has taken some part in its management.

Well now, to whom does this wood belong; in whom is the ownership of it? The question is not one of a merely theoretical interest—far from it: the *masuirs* want to sell the land and divide the price amongst them, or they want to divide the land itself, so that each *masuir* may become the owner of a separate strip. In such a case several solutions may be possible. We may attribute the ownership (*a*) to the *masuirs* as a corporation, (*b*) to the *masuirs* as a group of co-proprietors, (*c*) to the commune. It is with problems such as this in his mind that M. Errera has been exploring the past history of many different villages.

Each case, of course, has its own peculiarities, and,

as we understand, its inherent difficulty is sometimes complicated by laws of the revolutionary age which suppressed all "lay corporations," and handed over their property to the state. A theory therefore which would make the *masuirs* of old times a corporation has to be rejected unless we do not shrink from the conclusion that ever since the beginning of this century these woods have been enjoyed by those who had no title to them. For the rest, we seem brought face to face in a practical fashion with, among other problems, the question that has been much debated in Germany ever since Beseler drew his famous contrast between *Volksrecht* and *Juristenrecht*. What is the true nature of the land-holding community of the middle ages? Is it a *universitas*, a juristic person; is it, on the other hand, just a group of co-owners; or is it a *tertium quid*? M. Errera will make us think of Gierke's answer and Heusler's answer and Sohm's trenchant dogma, "*Vermögensgemeinschaft mit körperschaftlicher Verwaltungsorganisation.*" M. Errera is much against any *solution individualiste*. In this, if foreigners may dare to take a side, we shall probably be at one with him so long as he is arguing as to what is expedient, or what ought to be. We may well think that a *solution communaliste* which treated these lands as *biens communaux* would make for the general good; still better would be legislation which provided a fair compensation for the "vested interests" of the *masuirs*. But when M. Errera argues that this *solution communaliste* is required by history, we are by no means certain that we can agree with him, though he has stated his case with skill and learning.

When we speak of one of two solutions of a prac-

tical legal difficulty as being the more historical, we are using a somewhat ambiguous term. We may mean that this solution will best reproduce, so far as modern means will allow, some state of affairs which we regard as having been original and rightful, and as having never been rightfully altered. On the other hand, we may mean that, so far from recurring to the old, we are completing the as yet unfinished work of history. A political revolution is in progress, one of those slow revolutions, let us suppose, which are always going on in England; shall we say that history requires a restoration or shall we say that history will only be satisfied when the revolutionary principles which have hitherto been but partially triumphant have attained to a full realisation? But let the term be taken in either sense, we have many doubts as to the superior "historicalness" of the *solution communaliste*. The conclusion to which, if we mistake not, M. Errera would like to bring us is that at some period these lands belonged to the village commune, that all the inhabitants of a given district had some right to enjoy them, and that the restrictions which have excluded many of the inhabitants to the profit of the few are of later date. We do not think that the documents industriously collected by him prove this, and yet a student of the parallel English documents would say that it requires much proof. At all events, in England, so soon as the curtain rises and we have clear history, the rights of the villagers in woods, wastes, and waters are normally bound up with the tenure by them as individuals of arable lands and houses; the commoners are, we may say, *masuirs*.

We cannot help suspecting that if M. Errera had

been able to obtain a more copious supply of documents from the early middle ages he would have found that so far back as he could trace these *droits d'usage*, they were intimately connected with the individualistic ownership of manses, and that he would have relegated any more definitely communal arrangement to the realm of prehistoric guess-work. As to the acquisition of the ownership of the soil, the evidence that he tenders seems to show that the *masuirs* and the communes alike rely for their title on pretty modern events. The *masuirs* of Châtelineau, for example, are the successors in the title of the chapter of St Bartholomew of Liège, and of the abbey of Soleilmont; it is only since 1749 that they have owned the debatable wood. Then if, on the other hand, the requisite historical solution is to be one in which historical tendencies are to achieve their accomplishment, we shall find much in M. Errera's book, and very much elsewhere, which will make us think that in these village affairs the tendency towards individualism has been until very lately the main historical tendency. So, at least, an Englishman is likely to think. Our own insular experience seems to be that out of a vague undifferentiated somewhat, which was neither merely a *universitas*, nor yet merely a group of co-owners, nor yet again any definite *tertium quid*, co-proprietorship, or, in other words, individualism, emerged as the most powerful, and, in course of time, as the all-absorbing, element. We could wish that foreign writers when they discuss the village community would face the fact that the term *biens communaux* has no English equivalent. The English village owns no land, and,

according to our common law, it is incapable of owning land. It never definitely attained to a "juristic personality." Far be it from us to say that this is other than a misfortune; but we are speaking of medieval history, and the English common law has some right to be regarded as an extremely conservative exponent of medieval principles; it has been stupid and clumsy, if you please, but, at any rate, it has kept a tenacious grip of ancient ideas. No doubt, too, it has been one-sided: it has utterly ignored all that it could not bring within narrow ancient formulas. All that we are concerned to urge is that already in the thirteenth century the corporative element was so feeble that law could ignore it and draw a hard line between the borough which can hold land and the village which cannot. Already the villagers, if they held land in undivided shares, treated themselves, and were treated by law, as a group of co-owners, each with his own proprietary right. We may have lost much by our individualism, but we evaded many most intricate difficulties. In one place M. Errera suggests as a solution of the problem of Châtelineau—*la propriété appartenait aux masuirs* ut universi *et la jouissance* ut singuli. This is a curious variation on Dr Sohm's formula—*Vermögensgemeinschaft mit körperschaftlicher Verwaltungsorganisation.* Sometimes it may seem to us that such phrases attribute legal theories to men who had none, and who were quite willing to accept any one of the many possible solutions of those practical questions which arose from time to time. At any rate, in England the *solution individualiste* long ago presented itself as the obvious solution.

If in speaking of these books we have said too little of Roussillon and Namur, too much of England, we may seek to excuse ourselves in the eyes of M. Brutails and M. Errera by saying, as we can with truth, that their work will be of great value to all Englishmen who are studying the history of property in land, and even to those who have England more especially in their minds.

GLANVILL REVISED[1]

WHEN I was editing for the Selden Society some precedents for proceedings in manorial courts I had occasion to remark that one of the manuscripts that I had been using—it lies in the library of our English Cambridge, and is there known as Mm. I. 27—contained "a revised, expanded, and modernized edition" of Glanvill's treatise on the laws of England[2]. This remark brought to me from the American Cambridge a very kind note suggesting that more should be said of this revised Glanvill, and the editors of the *Harvard Law Review* have been good enough to permit me to say a few words about it in these pages. I hope that the circulation of their excellent magazine will not suffer thereby.

Almost the whole of the manuscript book in question seems to me to have been written by one man, though at many different times. It opens with a table of contents. Upon this follows a Registrum Brevium which I should ascribe to Edward I's reign (1272–1307), and not to the latest years of that reign. Then at the beginning of a new quire begins the revised

[1] *Harvard Law Review*, April, 1892.

[2] *The Court Baron*, Selden Soc., p. 6.

Glanvill. This, as I shall remark below, gradually degenerates into a mere series of writs. Then we reach "Explicit summa que vocatur Glaunvile." A few more writs follow, with some notes and the articles of the eyre. Then the correspondence which took place between Henry III and de Montfort on the eve of the battle of Lewes; then a short account of that battle (14 May, 1264). Then the king's writ to the mayor and bailiffs of York announcing that peace had been made. Then the following: "And in order that you may know of the events of the battle fought at Evesham between Worcester and Oxford on Tuesday the nones of August in the 49th year of King Henry, son of King John, between the lord Edward son of the King of England and the lord Gilbert of Clare Earl of Gloucester, and Simon of Montfort and his followers, who was slain on the same day, as was his son Henry and Hugh Despenser. [Here we come to the end of a line and a full stop. Then we have the following at the beginning of the next line:] In the 49th year of King Henry, son of King John, and the year of Our Lord 1265, at Whitsuntide, the following page (*subsequens pagina*) was written in the chapel of S. Edward at Westminster and extracted from the chronicles by the hand of Robert Carpenter of Hareslade, and he wrote this." The date is then given by reference to various events, ranging from the creation of the world downwards. It is the year of grace 1265; it is the 33rd year since King Henry's first voyage to Gascony; since his second voyage it is twelve years plus the interval between the 1st of August and Whitsuntide; it is twenty years from the beginning of the king's new

work at Westminster, and one year since the battle of Lewes. Thus we are brought to the foot of a page. At the top of the next page (and the structure of the book seems to show that nothing has here been lost) we find a precedent for a will, which is followed by a few legal notes written in French, and these bring us to the well-marked end of one section of the book.

The statement about Robert Carpenter, minutely accurate though it is meant to be, is none the less a very puzzling one. In the first place, "he wrote this," (*hic hoc scripsit*) is not free from ambiguity. Did he trace the very characters that we now see, or was he merely the author, the composer or compiler of the text that we now read? And then, whatever "wrote" may mean, what was it that he wrote? At Whitsuntide in the year 1265, at Whitsuntide in the 49th year of Henry III, he cannot have written anything about the battle of Evesham, for that battle was still in the future. We are told that he wrote "the following page," but the following page contains a precedent for a will, and contains nothing that could have been "extracted" from any "chronicles." I have not solved the difficulty.

Was the man who wrote this manuscript the man who revised and tampered with Glanvill's text? This also is a question that I cannot answer. On the one hand, what he gives us is not always free from mistakes of that stupid kind which we should naturally attribute rather to a paid copyist than to a man who was putting thought into his work. On the other hand, both in the Glanvill and in the other matters contained in this volume there are frequent allusions to one particular part of England, namely, the Isle of Wight and

the neighbourhood of Southampton and Portsmouth. Thus in Glanvill's famous passage about the privileged towns, which describes how by becoming a citizen of one of them a villain will become free,—a passage to which Dr Gross has lately invited our careful attention[1],—the name of Southampton has been introduced; and when the writer wants an example of a writ addressed to a feudal court, he supposes the court to be that held by the guardian of the heir of Baldwin de Redvers, Earl of Devon and lord of the Isle of Wight. Allusions to Baldwin and his family (the family de L'Isle, de Insula, that is, of the Isle of Wight) are not uncommon. But this question, whether Carpenter was the man who revised Glanvill's text, or whether he merely copied a text which had already been revised by some one else, is a question which we cannot answer until all the MSS. which profess to give Glanvill's treatise have been examined. In the meantime I will indulge in no speculations, but will simply describe what is found in the Cambridge manuscript.

A few words about the date of this revised version may however be premised. As it stands it cannot have been written before 1215, for it alludes to Magna Charta; before 1236, for it alludes to the Statute of Merton; before 1237, for it alludes to the Statute of ordinance of that year which fixed a period of limitation for divers writs[2]. Further, it alludes to the minority of Baldwin de L'Isle. This allusion may be ambiguous, for unless I have erred, there were two periods in

[1] Gross, *Gild Merchant*, I. 102.

[2] *Harvard Law Review*, III. 102.

Henry III's reign during which a Baldwin heir to the Earldom of Devon was an infant in ward to the king. The first of these occurred at the beginning of the reign[1]. The second opened in 1245, and must have endured until 1256 or thereabouts[2]. But our "Glanvill" also alludes to Isabella, Countess of Devon; and this seems to bring down its date to 1262, for in that year the last of these Baldwins died, and the inheritance passed to Isabella, who had married William de Forz, Count of Aumâle[3]. Then at the very end of the work we find a writ in which King Henry calls himself Duke of Aquitaine, but does not call himself Duke of Normandy or Count of Anjou. This writ must have been issued between Henry's resignation of the Norman duchy in 1259 and his death in 1272. Also it is a writ founded either upon one of the Provisions of Westminster (1259) or upon a clause in the Statute of Marlborough (1267) which re-enacted that provision; I think that it is founded upon the former. On the other hand, unless this be a trace of the Statute of Marlborough, I see no other trace of that comprehensive Statute. I see no mention of Edward I, and no allusion to any of the many Statutes of his reign. Almost immediately after the end of the Glanvill there come—and there is no transition from one quire to another—articles for an eyre of the 40th year of Henry III (1265–6), and then we have the passage which tells of Lewes and Evesham, and of what Robert

[1] *Annales Monastici*, I. 113; Courthope, *Historic Peerage*, 158.

[2] *Annales Monastici*, I. 99, II. 99; *Excerpts from the Fine Rolls*, I. 431.

[3] *Annales Monastici*, I. 499; *Calendarium Genealogicum*, I. 106.

Carpenter did in 1265. On the whole, I am inclined to suppose that the Glanvill was written within a short space on one side or the other of 1265, though it contains more writs of trespass than I should have expected to find at that date[1]. The man who wrote it —I mean the scribe from whose pen we get this manuscript of Glanvill—must have lived on into Edward I's reign. As already said, he copied a Register of that reign, and he copied various Statutes. I think that he copied the Circumspecte Agatis, which is ascribed to 1285. The Second Statute of Westminster (1285) is in the book, but was written by another hand.

If the revised Glanvill belongs, and I think that in its present shape it does belong, to the last years of Henry III, then it is somewhat younger than Bracton's work, and we may be not a little surprised that at so late a time some one attempted to refurbish the old text-book and bring it "up to date"; for in the interval there had been great changes in the law, and many new actions had been invented. We cannot say that success crowned the endeavour. The reviser seems to have started upon his task with the intention of explaining difficulties, correcting statements which had become antiquated, and inserting new writs and new rules at appropriate places. But ultimately he discovered that the work was beyond his powers, or perhaps he grew weary of it. He divides his text into "treatises" (*tractatus*). The following scheme will show how his "treatises" correspond to the "books" and "chapters," which we see in the printed volumes:

1. Tractatus de baroniis et placito terre = lib. I., II., III.

[1] *Harvard Law Review*, III. 177.

2. Tractatus de aduocationibus ecclesiarum = lib. IV.

3. Tractatus de questione status = lib. V.

4. Tractatus de dotibus mulierum, unde ipse mulieres nichil perceperunt et cum partem aliquam perceperunt = lib. VI., VII.

5. Tractatus de querela et fine facto in curia domini Regis et non observato = lib. VIII.

6. Tractatus de homagiis faciendis et releuiis recipiendis = lib. IX. cap. 1–10.

7. Tractatus de purpresturis = lib. IX. cap. 11–14.

8. Tractatus de debitis laycorum que solummodo super proprietate rei prodita erunt = lib. X. cap. 1–13.

9. Tractatus de placitis que super possessionibus loquuntur = lib. X. cap. 14–18.

At the end of what is the tenth book of our printed Glanvill, he begins a new, a tenth "treatise," "De placitis que per recognitiones terminantur," and he follows Glanvill down to a point which is in the middle of the third chapter of the eleventh book of our *textus receptus*. He has still to deal with part of the eleventh book, and then with the three remaining books. For a moment we think that he is going to follow Glanvill in his treatment of the possessory assizes. These possessory assizes are the subject-matter of Glanvill's thirteenth book. But from this point onwards the work degenerates into a mere Register of Writs, though among the writs a few explanatory notes will now and again be found.. The compiler deals first with the possessory assizes, but then gives us writs of all sorts and kinds, many of which have been already dealt with in the previous "treatises." I hear him saying to himself, "After all, it is a hopeless job, this attempt to edit the old text-book. Glanvill, or whoever its author may have been, was a great man in his day, but his day is over, and we cannot bring it back.

Let us at all events have a really useful list of those writs which are current in our own time." This, however, does not prevent him from writing at the end of his register, "Here endeth the Summa which is called Glanvill."

I shall best be able to convey an idea of his work by giving the most remarkable passages which he adds to our *textus receptus* of Glanvill, and some of those passages in which he qualifies or corrects that text. But he is always qualifying or correcting it about little matters. For example, he glosses some very simple words; thus, "proceres, id est, barones," "equidem, id est, certe," "natiuitate, id est, nauitate." This last gloss shows that he is more familiar with French than with Latin. We see the growth of a technical language when Glanvill's essoin "de infirmitate reseantise," becomes "de malo lecti," and even "mall de lith," which is to be contrasted with "mall de venue." And so he corrects his author by writing "defendens, id est, tenens." Then by a marginal note he sometimes stigmatizes a passage as "Lex Antiqua," or "Jus Antiquum," and is fond of speaking of what is done "moderno tempore." Sometimes he marks the interpolations by the word "Addicio," or the word "Extra"; but he is not very careful in this matter. He (I am speaking as though the scribe of our MS. was also the man who made the changes in Glanvill's text) was not much of a Latinist, and I doubt whether he was a great lawyer. At any rate, he succeeds in obscuring some matters which are clear enough in our printed book.

I hope that the passages printed below will speak for themselves to any reader who has the *textus receptus*

at hand. A collection of variants cannot be lively reading, but it still may be a useful thing. I have only noticed the considerable changes, for, as already said, the reviser is constantly making minor alterations, some of which are called for by the evolution of the various courts, while others seem almost gratuitous substitutions of a modern word for one which is going out of fashion. For three passages I will ask attention. The reviser says twice over that the recognitors of the grand assize are not to use in their oath a certain word which is used by other jurors. That word he seems to write as *amuncient.* This I take to be *a mun cient* or *a mun scient,* and to mean *to the best of my knowledge.* Before now in these pages I have drawn attention to a similar remark in a Registrum Brevium—the phrase there I took to be *a son scient*[1]. In the grand assize you must swear positively that A or that B has the greater right. You must not talk about the best of your knowledge or anything of the kind.

In a curious passage about divorce, our writer speaks of divorce for blasphemy, and refers to the opinion of one whom he calls *aug' mag'*. The reference is, I believe, to a passage from Augustine (Augustinus Magnus) which is contained in the Decretum Gratiani. The canonists held "quod contumelia Creatoris soluit ius matrimonii[2]." Lastly, we have a remarkable statement to the effect that of old the goods of bastards who died intestate belonged to their lords, but that nowadays they belong to our lord the king by the

[1] *Harvard Law Review,* III. 111.

[2] c. 7, X. 4. 19; see the passage from Augustine in c. 28, qu. 1.

grant of our lord the pope. But without further preface I must produce my collection of variants.

INCIPIT TRACTATUS DE CONSTITUCIONIBUS LEGUM AC IURIUM REGNI ANGLIE TEMPORE SECUNDI HENRICI REGIS.

i. 5. Cum quis conqueritur domino Regi vel eius iustic[iariis] vel cancellariis[1] super iniusta detencione de aliquo libero tenemento si fuerit loquela talis...

i. 7. quindecim dierum ad minus, ut liber homo habebit respectum quindecim dierum et baro tres ebdomadas et comes unum mensem[2].

i. 8. At the end comes the following passage which is noted in the margin as an "Addicio"—Item moderno tempore[3] si quis summonitus fuerit ad respondendum de terra et implacitatus fuerit per breve de recto vel de ingressu vel per breve quod dicitur "precipe," et placitum illud fuerit coram iusticiariis, et primo die summonitus non venerit, capietur terra in manu domini Regis, et ad comitatum si placitum fuerit et primo die non venerit, ponetur per vadium et plegios ad respondendum de defalta et capitali placito ad secundum comitatum si placitetur de recto, et si ad secundum comitatum non venerit ipse qui implacitatur, capietur terra in manu domini Regis, et si per quindecim dies non replegiata ipsa terra in manu domini Regis fuerit, perdet tenens seisinam. Et replegiari debet tenementum illud de illo per quem in manu domini Regis capta fuerit ut de iusticiariis vel comitatu per breue domini Regis illis directo. Et sciendum quod postquam tenementum aliquod captum fuerit in manu domini Regis non potest tenens se essoniare nec defaltam facere nisi perdat tenementum illud per defaltam.

[1] Here and elsewhere a notice of the Chancery as the place where writs are obtained is interpolated.

[2] I do not remember to have seen this rule elsewhere.

[3] The procedure seems to have been made a little less dilatory than it was.

i. 12. ...vel plegios inueniet, scilicet, secundum antiquum statutum aut fidem dabit[1].

i. 13. ...iusticiariis nostris de banco[2]....

i. 18. This is preceded by a classification of essoins in a tabular form and the following remark—Nulla mulier debet in aliquo placito essoniari de seruicio domini Regis, quia non possunt nec debent nec solent esse in seruicio domini Regis in exercitu nec in aliis seruiciis regalibus.

i. 30. Omit—Huiusmodi enim publicus actus.....primus dies similiter adiudicabitur utilis.

i. 31. ...et in nouis disseisinis, de ultima presentacione et in aliis consimilibus[3]....

corpus enim capietur vel attachietur de consilio iusticiariorum ut festinancius puniatur ille absens rettatus de pace domini Regis infrincta propter curie contemptum.

i. 32. In the margin over against the last sentences describing the imprisonment of a defaulting appellor stands—Jus antiquum.

ii. 3. The count is more elaborate: the demandant traces his pedigree step by step. The word "defendens" is glossed by "tenens." The fine for recreancy is 40, not 60 shillings—this, I think, is a mistake. The punishment imminebit super campionem victum vel super dominum suum si eum sursum caperet. This I understand to mean that the punishment for recreancy falls on the champion himself unless his hirer raises him from the field. By coming to the aid of the craven whom one has hired one exposes oneself to the recreancy fine.

ii. 7. In the famous description of the institution of the grand assize read regalis ista constitucio instead of legalis ista institucio: —an interesting variant.

Add at the end of this chapter—Et statim accedat tenens in propria persona sua quia non habebit respectum nisi xv. dies, et data fide quod sit tenens et quod in magnam assisam se posuerit, et habebit hoc breue sequens.

[1] It is enough nowadays that the essoiner should pledge his faith without finding a more material pledge.

[2] Here and elsewhere notices of "the Bench" are interpolated.

[3] Actions are being classified for the purpose of rules about essoins.

ii. 9. Prohibe custodibus terre et heredis Baldewini de Riueris Comitis Deuonie...

The writs of peace are treated at greater length. The chapter ends thus—Debent autem huiusmodi breuia irrotulari. Nullus vero tenens debet habere hec duo breuia "de pace de libero tenemento" et "de seruicio" per interpositam personam, hoc est per aliam personam quam per propriam, nisi sit de gracia, vel quia languidus, vel remotissimus et pauper[1].

ii. 11. Add at end—Notandum est quod in magna assisa non ponantur nisi milites et precipue [*corr.* precise?] iurare debent quod verum dicent, non addito verbo illo quod in aliis recognicionibus dicitur amuncient [*i.e.* a mun scient].

ii. 17. ...veritatem tacebunt, non addito hoc verbo quod in aliis recognicionibus adicitur, scilicet, amuncient. Ad scientiam autem...

ii. 19. ordinata *not* ordinaria[2].

iv. 4. After the writ of right of advowson comes—Aliud breue fere simile quod dicitur Quare impedit[3]. Then follows a writ De ultima presentacione. Then cap. 5.

iv. 9. The bishop is to distrain the clerk—et si episcopus hoc facere noluerit per iudicium curie debet dissaisiari de baronia sua et baronia ipsa tenebitur in manu domini Regis[4]. Tandem...

...eo ipso ecclesiam amittet? Solucio:—Equidem non amittet ut inferius monstrabitur. Sin autem...

iv. 11. ...remanebit assisa? Et non videtur quod ideo remanere debeat quia cum ille seisinam ipsius presentacionis aliquando habuerit eo quod ultimam presentacionem pater eius habuit, ergo quod recte petere possit seisinam patris eius non obstante aliquo quod factum sit de iure ipso presentandi. Si vero iterum...

iv. 13. Rex Priori de C. iudici a domino Papa delegato...

v. 1. Marginal note—Ad breue de natiuis sic potest obuiari, quod si ille qui ad vilenagium trahitur fugerit de terra domini sui

[1] If you put yourself on the grand assize, you must go in person for your writ of peace.

[2] This is a better reading of the original text.

[3] The *Quare impedit* is not one of the oldest actions.

[4] The bishops bitterly complained of this procedure, which made their baronies a security for the appearance of the clergy.

ante ultimum reditum domini Johannis Regis de Hibernia in Angliam a clamore domini petentis petitus liberatur quia breue non valet[1].

...breue de natiuis vicecomiti directum. On this follows a writ de natiuo habendo[2].

v. 2. Est autem breue tale quod dicitur breue de pace. [*Interlined*—uno modo antiquum breue formatum.] After this writ another—Aliud breue fere simile precedenti de eodem formatum: —the second writ ends with—et dic prefato H. militi quod tunc sit ibi loquelam suam prosecuturus versus predictum R. si voluerit. There is a small difference in form between the new writ and the old.

v. 5. Item si quis natiuus quiete sine aliqua reclamacione domini sui per unum annum et diem in aliqua villa priuilegiata ut in Suthamptona ut in dominico domini Regis manserit, ita quod in eorum comunam, scilicet, gildam tanquam ciuis receptus fuerit, eo ipso a vilenagio liberabitur.

v. 6. Idem est si ex patre libero et matre natiua nisi fuerit patri libero desponsata.

Over the last sentence relating to the partition of the children—Jus antiquum[3].

Marginal note—Natiuus potest tenere terram liberam habendo respectum erga diuersos dominos et non e contrario quod terra libera de natiuo teneatur[4].

vi. 4. The paragraphs about the actions of dower are recast. The action for dower unde nihil habet is more rapid than that by writ of right. Therefore the widow should not accept any part of her dower unless she can get the whole, so that she may be able to say "nihil habet."

vi. 10. At the end—Si quis heres infra etatem mulierem desponsat et eam dotat de omnibus terris et tenementis de quibus

[1] This limitation was introduced in 1237; Bracton's *Note Book*, pl. 1237.

[2] Glanvill had apparently omitted to give the words of the writ.

[3] It is no longer usual to divide the children between the two lords.

[4] Free land may be held *by* a villain, but cannot be held *of* a villain.

heres est, et de omnibus que acquirere potest, mortuo herede ipso infra etatem et antequam seisinam terre sue habuerit, poterit ipsa mulier dotem perquirere per legem terre per hoc breue "unde nichil habet," eo quod dominus heredis cepit homagium heredis infra etatem existentis, et eo quod si implacitaretur de terra heredis infra etatem existentis vocetur ad warantum ipsum heredem [*sic*].

vi. 17. The following passage is marked "Extra" in the margin —Unde si aliquis liber homo qui tenebat de marito dicte mulieris sine aliquo herede obierit, et ipse liber homo ipsi mulieri in dotem assignatus fuerit, ipsa mulier de terra que fuit dicti liberi hominis sine aliquo iuris impedimento liberam habebit disposicionem ad ipsam cuicunque voluerit dandam inperpetuum, saluo seruicio heredis quod ipse liber homo facere consueuit pro dicta terra marito dicte mulieris et eius antecessoribus.

vi. 17. ...non remanebit assignacio dotis ipsius mulieris. Respondet autem qui infra etatem est de dote, de ultima presentacione, et de nova disseisina et de fide, si tamen infra etatem feofatus fuerit, respondet infra etatem si implacitetur.

vi. 17. ...Sciendum autem quod si in vita alicuius mulieris fuerit ab eo uxor eius separata per parentelam vel ob aliquam corporis sui (id est, uxoris) turpitudinem, scilicet, propter fornicacionem et propter blasfemiam ut dicit aug' mag' [Augustinus Magnus ?] nullam vocem clamandi dotem habere poterit ipsa mulier, et tamen liberi possunt esse eius heredes et de iure regni patri suo vel matri si hereditatem habuerit succedunt iure hereditario. Set si uxor ipsa fuerit separata ab ipso viro eo quod contraxit matrimonium ante cum aliqua alia muliere per verba de presenti dicendo "Accipio te in uxorem," "Et ego te in virum," tunc eius pueri non possunt esse legitimi nec de iure regni patri suo vel matri succedunt iure hereditario. Notandum itaque quod cum quis filius et heres...

vi. 18. Omit from Si vero mulier aliqua plus...to the end of the book.

vii. 1. The passage Si autem plures habuerit filios mulieratos... is marked as Jus antiquum.

vii. 1. The passage Similis vero dubitatio contingit cum quis fratri suo postnato...is marked as Lex antiqua.

vii. 1. .....consequuturus esset de eadem hereditate. [Extra] Si quis habeat duos filios et primogenitus filius fecerit feloniam et captus et imprisonatus et pater suus obierit, postnatus frater eius nunquam terram ipsius patris optinebit nisi primogenitus frater obierit ante patrem. Veruntamen...

vii. 3. Item maritus primogenite filie, scilicet, cum habuerit heredem et non ante, homagium faciet capitali domino de toto feodo pro omnibus aliis sororibus suis. Tenentur autem postnate filie...

...secundum ius regni, homagium tamen secundum quosdam tenentur mariti postnatarum filiarum facere heredi primogenite filie set non marito suo ut dictum est et etiam racionabile seruicium. Preterea sciendum est...

...nisi in vita sua. [Extra] Set si maritus ipse in uxore sua hereditatem habens [*sic*] puerum genuerit, ita quod viuus natus fuerit, post decessum ipsius mulieris hereditatem illam omnibus diebus vite sue tenebit, siue infans ille mortuus fuerit, siue non, et hoc secundum consuetudinem Anglie. Item si quis filiam habuerit heredem.....

vii. 5. ...racionabilem divisum facere secundum quosdam sub hac forma, precipue secundum cuiusdam persone consuetudinem, ut hii qui socagium tenent et villani, primo dominum suum de meliore et principaliore re quam habuerit, recognoscat, deinde ecclesiam suam, postea vero alias personas.....secundum has leges Anglicanas et secundum alias leges, scilicet, Romanas. Mulier etiam sui viri voluntate testamentum facere potest.

vii. 7. [*Rubric*] Antiquum breue. De faciendo stare racionabilem devisum seu legatum alicuius defuncti.

vii. 8. Si quis autem auctoritate huiusmodi breuis predicti et modo moderno tempore vetiti[1] in curia Regis aliquid contra testamentum proposuit, scilicet quod testamentum ipsum non fuerit recte factum, vel quod res petita non fuerit petita ita ut legata...

vii. 10. ...veruntamen racione burgagii tantum vel feodi firme non profertur dominus Rex aliis dominis in custodiis, nisi ipsum burgagium vel ipsa feodi firma debeant servicium militare domino Regi.

vii. 12. ...infra etatem, id est, infra xv. annos...maiores, id est, de etate xv. annorum...

[1] The ecclesiastical courts have won a victory since Glanvill's day.

Quia generaliter dici solet quod putagium hereditatem non dimittit. Et istud intelligendum est similiter de putagio matris quia filius heres legitimus est licet non fuerit filius viri sui quem nupcie demonstrent.

vii. 13. Heres autem omnis legitimus est, nullus vero bastardus legitimus est, vel aliquis qui ex legitimo matrimonio natus non est, legitimus esse non potest.

vii. 14. ...et quoniam cognicio illius cause ad forum ecclesiasticum spectat [*instead of* et quoniam ad curiam meam non spectat agnoscere de bastardis].

vii. 15. A plea of special bastardy may be decided either in the ecclesiastical court or before the justices by an assize of twelve men.

vii. 16. ...succedere debet quia dominus non succedet racionibus predictis in capitulo de maritagiis. Dicendum est, ut dicunt quidam, quod illa terra remanebit in custodia dominorum capitalium quousque aliquis heres venerit ad ipsam clamandam. Si ipse qui eam dedit similiter bastardus sit et heredem de corpore suo non habeat, dicunt quidam quod dominus ipse si heredem non habuerit succedet et per hoc breue de eschaeta. [A writ of escheat follows.] Si quis autem intestatus decesserit omnia catalla sua domini sui [olim, *interlined*] intelliguntur esse, et tempore moderno domini Regis concessione domini Pape. Si vero plures habuerit dominos...

vii. 17. Certain of the clauses as to the lord's right to hold the tenement when there is doubt between two heirs seem to be stigmatized as Lex Antiqua. Thus...ad libitum suum. Lex Antiqua. Preterea si mulier aliqua...

Sciendum quod si quis conuictus fuerit de felonia et uxorem habuerit, ipsa uxor nunquam dotem habebit de terra que fuit viri sui de felonia conuicti[1].

viii. 1. The indenture of fine is more fully described. There are three parts and the king keeps one of them.

viii. 2. The precedent is that of a fine levied at Westminster on the Vigil of S. Andrew in the 13th year of King Henry.

viii. 3. Et sciendum quod nulla terra potest incyrographari nisi data fuerit in perpetuum vel ad terminum vite alicuius.

viii. 9. Sciendum tamen quod nulla curia recordum habet gene-

[1] A very doubtful point in the thirteenth century.

raliter preter curiam domini Regis. [Extra] Sciendum quod tres sunt homines in Anglia qui recordum habent, videlicet, justiciarii, coronatores, viredarii, non alii. In aliis autem curiis...

ix. 1. Et sciendum quod quando fit homagium domino, dominus capiet manus hominis sui similiter clausas sub capa sua vel sub alio panno, et homagio facto inuicem se osculabuntur.

Item quero utrum dominus possit distringere hominem suum veniendi in curiam suam sine precepto domini Regis ad respondendum de seruicio unde dominus suus conqueritur quod ei deforciat vel quod aliquid de seruicio suo ei retro sit. Equidem secundum quosdam antiquos bene poterit id facere. Secundum alios modernos non poterit quod ad aliquem effectum veniat, quia homo ille non respondebit de alio [*corr.* libero] tenemento suo nec de hoc quod tangitur [*corr.* tangit] liberum tenementum suum sine precepto domini Regis, quia forte incontinenti tale ostendat breue. [A writ Precipimus tibi quod non implacites A. de libero tenemento suo] Et ita poterit inter dominum et hominem...

ix. 2. ...pro solo vero dominio [*not* domino][1]...

ix. 11. ...Ille autem purpresture que super dominum Regem in regia via probate fuerint per xij. patrie, licet in alio casu aliter fuerit iudicatum, nichilominus in misericordia domini Regis remanebunt hii qui purpresturas illas fecerint...

...de suo honorabili tenemento [*not* contenemento]...

...et non infra assisam fuerit, hoc est si assisam dominus inde perquirere non poterit, tunc distringetur ut veniat ex beneficio et granto domini Regis in curiam domini sui ad id recitaturum [*corr.* adreciaturum], scilicet, de adresser[2]. Ita dico...

ix. 13. ...tempore H. Reg. tercii aui nostri Reg. H. filii Johannis Regis et per hoc sequens breue. Et sciendum quod istud breue in curia domini Regis non potest haberi nisi ipse diuise fuerint inter duas villas precipue, vel inter duo feoda et quod feoda illa diuersificarentur nomine, verbi gracia, La Scherde, Billingeham. Et preterea dicunt quod ad istud sequens breue adaptari poterunt duellum et magna assisa.

ix. 14. At the end follows a writ directing a perambulation of boundaries.

[1] A better reading.

[2] The writer takes to his French.

x. 1. ...cum quis itaque de debito quod sibi debetur curie domini Regis conquiritur, si placitum ipsum ad curiam domini Regis, scilicet, ad comitatum, trahere possit et voluerit, quia illud placitare poterit in curiis dominorum suorum, tunc tale breue de prima summonicione habebit...

The writ is not a Precipe but a Justicies to the sheriff. Instead of a sum of money a charter may be demanded: Eodem modo de catall[is], set catallum non oportet poni in breui nec debet, set eius precium quia diuersa catalla petuntur aliquando et non particule debiti separate, set coniunctim poni non possunt, set narrande sunt omnes particule debiti sicut debentur in placito quando breue inde placitatur, sic, Monstrat D. quod B. iniuste ei detinet unum quarterium frumenti de precio trium solidorum, et unam loricam de precio dimidie marce etc. Et sciendum quod si precium catallorum xxx. marcas in breui excesserit, debet petens dare terciam partem domino Regi per [*corr.* pro] hoc supradictum breue habendo quia breue illud tunc non est de cursu[1].

The case may then be removed from the county court by Pone.

Si autem quis per consilium et auxilium curie domini Regis tale sequens breue de debitis habendis perquirere poterit ut opus suum cicius et melius expediatur, tunc habeat tale breue. Then follows a Precipe for 40 shillings, quos ei debet et unde queritur quod ipse ei iniuste detinet.

x. 5. ...ex sequentibus liquebit. Si vero principalis vel capitalis debitor habeat unde reddere debitum illud et nolit cum possit, plegii eius respondeant pro debito, et si voluerint habeant terras et redditus debitoris quousque eis satisfactum fuerit de debito quod ante pro eo soluerunt, nisi capitalis debitor monstrauerit se inde esse quietum versus eosdem plegios. Et si ipse debitor paratus sit de debito illo satisfacere, plegii ipsius debitoris non distringantur quamdiu ipse capitalis debitor sufficiat ad solucionem debiti, nec terra vero nec redditus alicuius seisietur pro debito aliquo quamdiu catalla debitoris presencia sufficiunt ad debitum reddendum. Then follows a writ of Justicies to compel the principal debtor to acquit his sureties. This writ may be removed from the county court to the Bench. Some say that it will not be granted for a sum of more

[1] See *Harvard Law Review*, III. 112.

than 40 shillings except as a favor. Soluto eo quod debetur ab ipsis plegiis...

Dicunt autem quidam quod creditor ipse suo et legitimorum testium iuramento poterit hoc debitum de iure probare versus ipsum plegium, nisi plegium ipsum curia ipsa velit ad sacramentum leuare[1], quod pocius accidit, olim autem ante legem vadiatam in tali casu ad duellium perueniebatur. [c. 6] Inuadiatur autem res...

x. 6. ...Si autem in custodia sua deterius fuerit factum infra terminum per talliam [*instead of* per culpam[2]] ipsius creditoris computabitur ei in debitum ad valenciam deterioracionis...

x. 11. ...precium mihi restituendum. Omit the rest of c. 11.

x. 15. ...si certum vocauerit warantum in curia quem dicat se velle habere ad warantum, tunc dies ei ponendus est in curia, illo tamen emptore retento in prisona, quia hii homines qui rettati sunt solum de latrocinio per inditamenta et si imprisonati fuerint per legem Anglie, nulla eis facta [*corr.* facienda] est replegiacio, nec etiam de eis qui rettati sunt de morte hominis si imprisonati fuerint, sine speciali precepto domini Regis. Si vero ad diem illum...

...nisi warantus ille alium warantum vocauerit et cum venerit ad quartum warantum erit standum[3].

x. 17. Passage marked Extra—Item si quis captus fuerit cum aliqua re furata ipse qui furtum illud fecit non potest defendere se per duellium, ita quod dicat quod illam non furatus fuit, set si dicat quod res sua propria est bene potest ut dicunt quidam. Item si quis captus fuerit pro morte hominis, non potest iudicari de iure nisi voluerit se super veredictum visnetorum ponere, et si hoc voluerit [*sic*] seruabit prisonem. Si vero incertum vocauerit quis ad warantum...

x. 18. ...sed quid si conductor censum suum statuto termino non soluerit, nunquid in hoc casu licet locatori ipsum conductorem sua auctoritate expellere a re locata? Responsio, licet, si talis inter eos fuerit facta conuencio. [Here ends this book.]

xi. 3. ...extraneus extraneum uxor quoque marito. Here begins a new "treatise," De placitis que per recogniciones terminantur. It

[1] I doubt our author understood what Glanvill meant by "a sacramento leuare."

[2] This variant from the received text looks like a mere blunder.

[3] There is reason to believe that this is the true reading.

almost at once becomes a mere series of writs. The following notes may give a fair idea of its contents.

1. Novel disseisin; Limitation post primam transfretacionem nostram in Britanniam. Variations and notes.

Et sciendum est quod qui in seisina bona et placabili fuerit per unum diem, scilicet, ab aurora diei usque ad crepusculum, vel qui in seisina fuerit ut dictum est per unum diem et unam noctem, et inde eiectus fuerit, poterit recuperare per breue noue disseisine sine dubio. ...Differentia est inter feodum et tenementum; feodum est quod hereditabiliter tenetur; tenementum quod ad terminum vite tenetur. ...Dicitur autem tenementum, terra, mesuagium, redditus, molendinum, morra, marleria et alia consimilia.

2. Mort d'Ancestor; Limitation, last return of John from Ireland. Variations and notes.

3. Utrum. Note. Preterea sciendum est quod predicta communia placita ut recognicio de noua disseisina et de morte antecessoris non sequuntur coram iusticiariis domini Regis nec coram domino Rege, nec ad bancum, set in aliquo certo loco teneantur et capiantur ut in suis comitatibus[1]. Assise autem de ultima presentacione semper capiantur coram iusticiariis de banco et ibi terminentur.

4. Last presentation.

5. Attaint. Et sciendum quod istud predictum breue nunquam a domino Rege vel eius iusticiariis alicui conceditur sine dono, nisi de gracia, si sit pauper; et si petens conuictus fuerit, ibit ad prisonam, si vero lucratus fuerit, primi xij. iuratores imprisonantur donec ibi finem fecerint.

6. Redisseisin.

7. Disseisin; a special case.

8. Writs of right—addressed to the guardian of the heir of Baldwin, Earl of Devon, also to the bailiff of Abbot of Lyra.

Et si mesuagium petatur in aliquo burgagio tunc addatur hec clausula nisi redditus et edificium valeant per annum plus quam xl. solidos, quos clamat tenere de te in liberum burgagium.

Et notandum quod seruicium quod est in denariis non debet extendere [*corr.* excedere] xl. solidos et seruicium militare non debet esse minus quam medietas feodi unius militis, quia si fuerit

[1] Apparently a false interpretation of a famous clause in the Great Charter.

seruicium minus quam medietas feodi unius militis vel supra pro vero tunc non est breue de cursu[1].

9. Recordari facias. De falso iudicio.

10. Customs and services.

11. Mesne.

12. Account against bailiff or steward.

13. Quod permittat for easements and profits.

14. Entry. Many forms, including the *cui in vita*. The wife can be barred by her fine; si vero mulier ipsa coram iusticiariis de banco vel itinerantibus penitus virum suum contradixerit, cirographum de maritagio vel hereditate illa nunquam leuetur.

15. Warantia carte.

16. Protecting infants against litigation.

17. Covenant.

18. Escheat.

19. Ward.

20. Breue de occasione. This is Quare eiecit infra terminum.

21. Appointment of attorney.

22. Writs to bishops and prohibitions to Court Christian. Writs for arrest of excommunicates.

23. Replevin. De homine replegiando.

24. De rationabili parte.

25. Cosinage.

26. Dower ex assensu patris, etc.

27. Admeasurement of dower.

28. Admeasurement of pasture. Et sciendum quod homo non debet impetrare breue de admensuracione pasture super dominum suum.

29. Appeals of felony.

30. Trespass. Assault. Assault on plaintiff's wife.

31. Trespass by breach of pigeon house, by fishing in plaintiff's fishery, by breach of park and taking wild animals. Notandum quod qui conuictus fuerit per istam proximo dictam inquisicionem, non perdet vitam nec membra, eo quod columbe non sunt penitus domestice, nec pisces, nec etiam bestie, sicut boues, equi, vacce et huiusmodi talia.

[1] Compare *Harvard Law Review*, III. 110. The writer seems to have turned the rule inside out.

32. Writ directing that *A* shall have the king's peace, and that *B* do find pledges to keep the peace.

33. Trespass.

34. Replevin.

35. Writ of right. How the lord's court is to be falsified—Taliter autem probetur ipsa defalta, et sic abiuret curiam domini capitalis. Veniet ipse petens cum balliuo ipsius hundredi ad curiam dicti domini capitalis, et feret breue suum in manu sua et unum librum si voluerit, et stet super limitem illius curie et iuret super librum quod amplius per illud breue quod tenet in manu sua in curia illa non placitabit et quia illa curia ei defecit de recto, et tunc habebit breue balliuorum ad vicecomitem quod curiam illam abiur[auit] et defaltam probauit.

36. Odium et atia.

37. Quo iure.

38. Escheat.

39. Pone in replevin: Baldwin de L'Isle and William de L'Isle concerned.

40. Geoffrey parson of Serewelle [Shorwell, Isle of Wight], is in trouble for having procured the excommunication of Jordan of Kingeston who had brought a writ of prohibition against him. The writ is tested by R. de Turkebi[1].

41. Writ after judgment in a novel disseisin.

42. Revocation of writ ordering capture of an excommunicate.

43. Quod permittat habere pasturam for Walter Tho' the rector of the church of Arreton [Isle of Wight] against the Abbot of Quarr[2].

44. Trespass.

45. Novel disseisin.

46. Entry.

47. Aiel.

48. Casus Regis. P. habet duos filios, D. primogenitus est et A. postnatus. D. habet filium B. heredem et D. decedit, et P.

[1] Roger Thurkelby, justice of the Bench in the middle part of Henry III.'s reign. He died in 1260.

[2] In 1266 Walter Tholomei, rector of Arreton, executed a deed of exchange with the Abbot of Quarr, Hasley's *Isle of Wight*, App. p. cxxxvi.

decedit et capitalis dominus ponit in seisinam A. postnatum, et B. filius D. perquiret predictum breue de auo[1].

49. Waste.

50. Habere facias seisinam.

51. Trespass and imprisonment.

52. Contra forma feoffamenti. Henry of Clakeston and Alice his wife against William de Lacy. Recital—cum consilio fidelium nostrorum provideri fecerimus et statui necnon per totum regnum nostrum publicari ne qui occasione tenementorum suorum distringantur ad sectam faciendam ad curiam dominorum suorum nisi per formam feofamenti sui ad sectam illam teneantur, vel ipsi aut eorum antecessores tenementa illa tenentes eam facere consueuerunt ante primam transfretacionem nostram in Britanniam etc.[2] The king is H. dei gracia Rex Anglie, Dominus Hibernie et Dux Aquitanie.

Explicit summa que vocatur Glaunvile. This apparently by the same hand but in different ink. Then immediately a writ issued by H. King of England, Duke of Normandy etc. to B. de Insula. Then a count in an imaginary writ of right from the time of Henry III. Then the form of prohibition known as Indicavit issued by Henry when no longer Duke of Normandy concerning John vicar of Sorewelle, Jordan of Kingeston and William de L'Isle. Nota quod nullum tenementum potest incirographari in curia domini Regis alicui infra etatem existenti.

Item sciendum quod si quis perdiderit loquelam per paralisim et impotens sui fuerit, dominus Rex ponet custodem ad ipsum custodiendum et bona sua et dominus Rex nichil inde capiet. Et tribus de causis erit in custodia domini Regis, quia non debet esse in tuicione domini capitalis, quia dominus capitalis posset forte aliquid alienare de tenemento suo ad exheredacionem heredis. Item non debet esse in custodia heredis quia forte heres mallet ipsum esse pocius mortuum quam viuum. Item non debet esse in tuicione uxoris sue licet uxorem habeat, set in tuicione domini Regis, quia si esset, tunc optineret uxor dominium tocius ipsius

[1] This is the case of King John and Arthur; P = Henry II.; D = Geoffrey; B = Arthur; A = John. See Bracton, f. 267 b, 282, 327 b, where the casus Regis is discussed.

[2] See Provisions of Westminster (1259), c. 1.

tenementi, set per custodem domini Regis ut domina habebit racionabile estouerium suum. Et ita se habet lex Anglie siue tenuerit de domino Rege, siue non. Et si ipse implacitatus fuerit, ipse respondet pro eo qui positus fuerit ex parte domini Regis[1].

Si quis uxorem suam occiderit et conuictus inde fuerit, omnia bona ipsius conuicti erunt domini Regis, tamen per legem Anglie ipsa mulier que occisa fuerit partem suam catallorum mobilium habebit[2].

A page and a half of blank parchment. Then Capitula Itineris of 40 Henry III. Then other capitula as pleaded by Roger de Turkebi. The Assize of Bread and Beer. The correspondence between the King and the Barons before the battle of Lewes. Account of the battle of Lewes. Statement that the following page was written by the hand of Robert Carpenter of Hareslade at Whitsuntide 1265. Precedent for a will. A few legal notes in French. End of a quire.

In another part of the MS. (f. 87) there is a curious form of prayer apparently intended for the use of litigants..."sic me presens iudicium fac peragere, ut in tempore probacionis victor valeam apparere per Te, Saluator Mundi, qui viuis et regnas Deus per omnia secula seculorum. Amen. Pater noster, usque ad finem ter in honore Patris et Filii et Spiritus Sancti, et similiter eodem modo ter Pater noster in honore Raphaelis Archangeli, et similiter eodem modo ter Pater noster in honore Sancti Ezechielis Prophete, ut in placito tuo victor valeas existere, cum Aue Maria similiter dicta."

[1] This is an important note. The king's right to act as guardian of idiots and lunatics can, I believe, be traced to the last years of Henry III and no further. See *English Historical Review*, VI. 369.

[2] This curious note tends to show that at this time our law of husband and wife still entertained some notion of a community of goods. A man murders his wife and is hanged; the wife's share of movables is not forfeited, but goes to her kinsfolk.

THE PEACE OF GOD AND THE LAND-PEACE[1]

THE theme that Dr Huberti has chosen for elaborate treatment is fascinating; indeed, to an historian who would write about a great movement the whole middle ages will hardly offer a more fascinating theme. It has so many and such deep roots, so many and such luxuriant branches; it is of primary importance in the history of civilisation; it becomes implicated with other great themes, and yet it preserves its unity. He who would paint the *pax et treuga Dei* has a splendid if an arduous task before him.

In this book Dr Huberti aspires to show himself rather as an accurate draughtsman than as a colourist. He asks us not to overlook the three letters "zur" which stand upon his title-page[2]. His method may be briefly described; it is the commentator's method. What can be known of the earliest stages of the movement that is under review is to be found almost exclusively in documents which profess to give the canons that were made, the resolutions that were passed, and the oaths that were sworn at various councils and assemblies held in France—for France is the movement's "domicile of origin," and with France only is

[1] *English Historical Review*, April, 1893.

[2] *Studien zur Rechtsgeschichte des Gottesfrieden und Landfrieden*, von L. Huberti, vol. I. 1892.

this first volume concerned—during the tenth and eleventh centuries. These documents our author prints at full length in his text. He attempts—this is not always an easy feat—to assign to each its proper date; he then carefully analyses its contents and discusses the relation which it bears to its predecessors and successors. This is the commentator's method, and regard being had to the nature of the subject matter, it may well appear to us as not only the most scientific, but also the most artistic method. It is very doubtful whether the most skilful word-painter could improve upon the language of these documents or substitute for it any that would be half so picturesque. Take, for example, these extracts from an oath exacted by Bishop Warin of Beauvais in the year 1023:—

"Villanum et villanam vel servientes aut mercatores non prendam nec denarios eorum tollam, nec redimere eos faciam, nec suum habere eis tollam, ut perdant propter werram senioris sui, nec flagellabo eos propter substantiam suam....Bestias villanorum non occidam nisi ad meum et meorum conductum....Villanum non praedabo nec substantiam eius tollam perfide iussione senioris sui [pro fideiussione senioris sui?]. Nobiles feminas non assaliam, neque illas quae cum eis ambulaverint sine maritis suis, nisi per propriam culpam, et nisi in meo malefacto illas invenero; similiter de viduis ac de sanctimonialibus attendam."

The cautious particularity of the canons, resolutions, oaths, their provisoes and exceptions and saving clauses can only be brought home to us by the original documents, and yet they are the very essence of the story. Those who strive for peace are in the end successful,

because they are content with small successes, and will proceed from particular to particular, placing now the *villanus* and now the *femina nobilis*, now the sheep and now the olive tree, now the Saturday and now the Thursday outside the sphere of blood-feud and private war. When they are in a hurry they fail, for they are contending with mighty forces.

It is among Dr Huberti's merits that he does not underrate the might of these forces, that he perceives them to be moral forces. We miss the point and thread of the tale if we think that the movement is directed only against the brigand and the marauder, the robber baron who fears not God, neither regards man. It has also to contend against what has been, and is only by slow degrees ceasing to be, a righteous self-help. It has to aim not merely at the enforcement of law, but at the transfiguration of law. It cannot suppress, and we may say that it ought not to suppress, the blood feud, until it has something better, a true criminal law, wherewith to fill the void. Over and over again legislators under the influence of Roman law and Christian teaching have been too hasty; their laws have from the first been idle, or have become idle so soon as some strong king made way for a feebler son. Dr Huberti has spent pains over what we may call the background of his picture, and has therefore refrained from an indiscriminate use of those lurid colours in which some of his predecessors have delighted. There is a great deal that is good in self-help and vengeance, and, as a bishop of Cambrai thought, there is questionable wisdom in forcing men to swear impossible oaths.

A new phenomenon appears late in the tenth century. Dr Huberti fixes as the occasion of its first appearance an ecclesiastical council held at Charroux in the year 989. That council pronounces a general prospective anathema against three classes of persons, (1) *infractores ecclesiarum*, (2) *res pauperum diripientes*, (3) *clericorum percussores*—a cautious anathema set about with provisoes. A council at Narbonne in 990, a council at Anse in 994 do the like. In Dr Huberti's eyes these are not merely *die ersten kirchlichen Friedensatzungen*, but also *die ersten Friedensatzungen überhaupt*. One has to quote his German words, for one could hardly translate them without some small misrepresentation of their meaning, for they are used in the performance of a delicate operation. There is something that is new about these canons of Charroux, and yet when we analyse them it is difficult for us to detect the novel element. Legislative attempts to limit the range of the blood feud are not new; excommunication as a punishment for sacrilege is not new; the privilege of sanctuary is not new; even a special care for the defenceless is not new. What is new, if I have caught Dr Huberti's meaning, is the fusion of old elements in a conscious endeavour to mark off by general definitions a sphere of peace from the surrounding sphere of feud, so that peace itself and for its own sake now becomes the object that is aimed at. Having defined the new phenomenon, he has to account for its appearance in a particular form, to wit, that of purely ecclesiastical canons, at a particular place and time, to wit, Aquitaine and the last years of the tenth century. This is a problem that he discusses at length,

and if his solution of it is not complete he certainly has fulfilled one of the conditions of success. Some of his forerunners seem to have fancied that they had given explanation enough when they had daubed the tenth century with plenty of black and red and left their readers to supply some such suppressed premiss as that when night is darkest dawn is nighest. But night is not really the cause of day, nor order of disorder. One does not account for "the temperance movement" by saying that drunkenness has been on the increase. Dr Huberti, therefore, tries to show that the Aquitaine of the age that saw the coronation of Hugh Capet was the predestined scene of the first "peace movements"; and in this context his newest and most valuable suggestion is that which would connect these movements with the survival of Roman law in Aquitaine and the emergence of the principle of territorial law.

The first movement spreads outwards from Aquitaine. We can see it in progress between the years 989 and 1039; it aims at placing certain things and certain persons outside the province of fair fighting and legitimate self-help. Meanwhile, however, a second movement has begun in Aquitaine about the year 1027, or even somewhat earlier. The chronological order of our documents is not, therefore, the logical order. We have to think of successive waves starting in Aquitaine, and while the first is yet breaking over northern Gaul the second is flowing in the south. The characteristic of this second movement is the attempt to put not merely certain persons and certain things, but also certain seasons beyond the limits of the feud—to establish, we may say, "a close time" even for the

militant classes. This, the true *treuga Dei*, makes its first recorded appearance, so our author argues, in a synod held at Elne, in Roussillon, during the year 1027. "The close time" is at first but a brief space: it extends only from noon on Saturday to daybreak on Monday; but already before 1041 its beginning has been thrown back to vesper-tide on Wednesday, so that but a very short half of every week is left open. Then other holy seasons get exempted, until at length almost the whole period that lies between Advent and the octave of Pentecost is close. Here again Dr Huberti is at pains to show how much and how little is new, and the task is not a very easy one, for the attempt to make Sundays and others festival days of rest and peace and immunity from legal process is old enough. What seems new is the conscious effort to use the sanctification of these days as a means for obtaining as much peace as possible and the application to them of the idea of "truce," of an armistice ordained by God and sanctioned by sworn contract.

The true "truce of God," which consecrates seasons, becomes part of that "peace" for which men are striving; they now desire *pacem et treugam Dei*. Many persons, many things, as well as many seasons are *taboo* to the decently conscientious man-at-arms, even to the reasonably prudent man-at-arms, for—and here there is a very interesting episode—both church and state will be against him if he exceeds the narrow boundaries of lawful warfare, and indeed the two powers can now afford to be a little jealous of each other and inclined to quarrel over the right to punish him. A great deal more remains to be said. In one

chapter Dr Huberti deals with the adoption of this originally French institution by the popes and the catholic church; in a last chapter he traces the legislation by which the French kings gradually destroyed that right of warfare, which in the thirteenth century had already become the distinctive privilege of *gentix hons*. Here he has paused. As yet, except when speaking of the canon law, he has confined himself to France or Gaul, and, unless I am mistaken, he is reserving even Normandy, about which there is much to be said, for separate treatment. We are allowed to hope that in connexion with Normandy he will tell us something of England, for the last word about "the peace of God and of our lord the king" has not yet been uttered. At any rate his next volume will concern itself with the German *Landfrieden*, an institution as essentially German as the *treuga Dei* is essentially French.

I dare say but little more of this first volume than that I have read it with great interest, and that some of its merits are more apparent at a second than they are at a first reading. This is due to the method that I have called the commentator's method. One gradually learns where to look for the main arguments which are at times hidden from view by subsidiary discussions. Signs of solid industry are everywhere apparent. There is a little more bickering with forerunners and fellow-labourers than is to our English taste. One sometimes wishes that Dr Huberti would leave Sémichon and Kluckhohn alone and just tell us his own version of the story regardless of other versions. Still his theme is one that has suffered from a too lax use of terms

such as "peace of God" and "truce of God," and his efforts to establish a stricter usage, and one better warranted by the ancient documents, are praiseworthy and—so it seems to me—in the main successful.

At the same time I cannot but think that he has allowed his book to grow to an unnecessary size, and that the average quality of his matter would have been better if its quantity had been less. For example, he makes, as already said, the interesting remark that the country in which each successive "peace movement" begins is the country of the written, the Roman law. On this there follow some ten or twelve pages which deal with the survival of Roman law in Aquitaine and contain some paragraphs which are almost wholly made up of references. Such is one which begins thus: *Wir bemerken eine Beeinflussung durch Gaius in formulae Bituricenses* 9; "*dum lex Romana declarat etc.*"; *durch Paulus in formulae Turonenses* 17, *Turonenses* 16, *Marculfi* II. 19, *Bituricenses* 2; *durch Ulpianus in formulae Andegavenses* 41—and so forth. There is a place for all this erudition (which can be now somewhat easily collected), but it is not the place that Dr Huberti has found for it. It should be put where it will be looked for, and it will not be looked for here. Two or three well-chosen sentences, stating in general terms the results attained by those who have made the mediaeval history of Roman law the object of their researches, would have been far more to the purpose than this heap of notes.

HISTORY FROM THE CHARTER ROLL[1]

In England so soon as the royal charter becomes distinguishable from the royal letter patent, the main formal difference between the two instruments is this, that whereas the letter patent usually bears a simple *Teste Meipso*, the charter professes to have been delivered by the king or by his chancellor in the presence of many witnesses whose names are given. We have a fairly perfect series of charter rolls beginning in the year 1199. Now it seems to me that an eminent service in the cause of history would be done by any one who would be at pains to copy and publish the lists of witnesses that are to be found on the charter rolls of the thirteenth and fourteenth centuries; and in the hope of suggesting this task to some one who can spend a few months in the Record Office, I have asked leave to print here the result obtained by the examination of the roll of one particular year, the thirty-seventh of Henry III (28 Oct. 1252—27 Oct. 1253). The task would not be very laborious, and the outcome of it would not be a very bulky book, but it would, so I venture to think, be a book which every one who was

[1] *English Historical Review*, April, 1893.

studying the history of the period that I have named would be bound to have always at hand and often in hand.

These lists of witnesses give us week by week and almost day by day the names of those men who are in the king's presence, and I need not say that if we are to know minutely how England is being governed, it is necessary that we should know who are the persons whom the king habitually sees. In the absence of any official lists of the king's councillors, it is only thus that we can learn—unless the chroniclers give us some fitful help—who the king's councillors are. There are times also in our history in which it is more important to know who are the men who day by day have speech with the king than to know the names of those who are his titular councillors.

A doubt may well occur to us as to whether there may not be fictions lurking in the charter rolls, whether when we read that on a given day the king delivered a charter with certain men as witnesses, we are entitled to infer that on that day those men were really and truly, and not by way of fiction, in the king's presence. But having looked at a good many rolls of the thirteenth century (I must not speak of much later times) this doubt seems to me to be unwarranted. We see the witnesses changing day by day and can in some measure account for the changes. At one time the king is enjoying himself at one of his rural manors or hunting lodges; the witnesses will be for the more part officers of the household, though it may happen that some bishop or earl will be paying him a casual visit, and if so will be named in the charter. Then the king

comes to Westminster for the despatch of business; the number of charters that he has to execute increases, and the quality of the witnesses changes; the great officers of state are mentioned, and, it may be, some of the judges. The king holds a parliament; the quality of the witnesses changes once more; four or five bishops, four or five earls or great barons will attest his deeds. Further, it often happens that several charters are dated on the same day and that the lists of the witnesses coincide but partially. Now if we were dealing with a chancery fiction, with some rule which declared that certain officers ought to attest, and therefore must be supposed to have attested, a royal charter, all this would hardly be true. If the scribe of the charter had before him some rota of "gentlemen in waiting," and thence took his list of supposed witnesses, we should surely expect that one list would do duty for a whole day. If then we find, as well we may, that two charters were dated on the same day, and that the archbishop of Canterbury attested one out of the two, we are, so at present it seems to me, justified in believing that on the day in question the archbishop was in the king's presence, that while he was there a charter was delivered, and that the other charter was delivered before his arrival or after his departure. In no other way can I account for the rapid variations in the lists of witnesses.

The roll that I chose was chosen at haphazard. It is not an unusually good specimen, for it is imperfect, but it comes from an important time, and many of the names upon it are the names of those councillors of Henry III, of whom Matthew Paris has told us so

much that we would willingly learn more. We see William of Kilkenny, the learned legist who keeps the great seal, Philip Lovel, who is acting as treasurer, Peter Chaceporc, the keeper of the wardrobe, and the great John Mansel, who seems to be "prime minister without portfolio." Sometimes a few justices, Roger Thurkelby, Gilbert Preston, Simon Walton, appear, though only for a moment. The most constant witnesses seem to be household officers, headed by Ralph fitz Nicholas, the steward of the household. Rarely are the official titles of these witnesses mentioned, though the Prior of Newburgh is called "our chaplain." Mansel is merely provost of Beverley, Kilkenny and Chaceporc are merely archdeacons. I put the more faith in these lists because there is no well-settled order in which the names occur. Those witnesses who are of highest rank come first, but there is no carefully observed sequence such as we should expect were we dealing with a legal fiction. Then the kinsmen of the king and queen are prominent; among them are Archbishop Boniface and the elect of Winchester. Now and again some bishop or baron who is not connected with the court appears and vanishes. And two of the parliaments or grand councils of the year leave an obvious mark upon the roll. On 26 January, 1253, there are four bishops, besides the archbishop, in the king's presence. Had we no other evidence than that which is afforded by this roll, we should be able to say that there was an important meeting early in May. I cannot but think that a brief calendar of the charter rolls would fix the date of many a parliament or council, of which

we as yet know little or nothing. But now I will leave this specimen in the hands of those who can judge whether such a calendar would not be a very useful thing, premising that what is here printed is but a rough specimen, and not a finished model.

Charter Roll of 37 *Henry III.*

1252

29 *Oct.*, *Windsor.*—Geoffrey de Lusignan, William de Valence, John de Grey, William de Kilkenny, Robert de Muscegros, Robert Walerand, Bartholomew Pecche, Eble de Mountz (de Montibus), Robert le Norreis, Imbert de Pugeis.

Same, with Ralph de Bakepuz.

30 *Oct.*, *Windsor.*—Lusignan, Valence, J. de Grey, Kilkenny, Ralph f. Nicholas, Muscegros, Walerand, Pecche, Walter de Thurkelby, Norreis, Bakepuz, John de Geres, Pugeis.

31 *Oct.*, *Windsor.*—A[imer] bp elect Winchester, Richard E. of Cornwall, Lusignan, Valence, Peter de Savoy, John Maunsel, Kilkenny, John de Lexington, Walerand, Pecche, Norreis, Walt. de Thurkelby, Bakepuz.

2 *Nov.*, *Windsor.*—A. bp elect Winchester, Lusignan, Valence, Savoy, Maunsel, Kilkenny, Lexington, Muscegros, Walerand, Pecche, Geoffrey de Langley, Stephen Bauzan, Norreis.

Also Philip Lovel, Pugeis.

Also E. Cornwall, Gilbert de Segrave.

3 *Nov.*, *Windsor.*—P. de Savoy, J. de Grey, Kilkenny, Lovel, Segrave, Walerand, Bauzan, Norreis, Bakepuz, Pugeis.

3 *Nov.*, *Windsor.*—Lusignan, Savoy, J. de Grey, Lexington, Peter Chaceporc, Kilkenny, Artald de S. Romano, Muscegros, Walerand, Bauzan, Norreis, Bakepuz, Pugeis.

4 *Nov.*, *Windsor.*—Savoy, Lexington, Bertram de Crioll, Muscegros, Kilkenny, Walerand, Bauzan, Norreis, Walt. de Thurkelby, Bakepuz, Pugeis.

6 *Nov.*, *Reading.*—W[illiam] bp Salisbury, Segrave, Kilkenny,

Lexington, Walerand, Pecche, William de Chaenny, Walt. de Thurkelby, Bakepuz.

Also Simon de Wauton, Gilbert de Preston, Pugeis.

9 *Nov.*, *Marlborough.*—Lexington, Kilkenny, John Prior of Newborough, Segrave, Nicholas de Turri, Pecche, Chaenny, Walt. de Thurkelby, Pugeis.

10 *Nov.*, *Marlborough.*—Humfrey E. of Hereford, Lexington, Kilkenny, Elyas Rabain, Segrave, Langley, Pecche, Chaenny, Walt. de Thurkelby, Pugeis.

12 *Nov.*, *Marlborough.*—R[ichard] bp of Chichester, Lusignan, Earl of Hereford, Segrave, Kilkenny, Lexington, Pecche, Chaenny, W. Thurkelby, Pugeis.

12 *Nov.*, *Marlborough.*—R. bp of Chichest., Earl of Gloucester, E. of Hereford, Lusignan, Valence, Kilkenny, Lexington, Segrave, Guy de Rochefort, Pecche, Pugeis, W. Thurkelby.

16 *Nov.*, *Clarendon.*—Lusignan, Valence, Segrave, Lexington, Kilkenny, Rabain, Richard de Mundeville, Roger de Saunford, William de Chabbeneys, Chaenny, Pugeis, Geres.

Also Ralph fitz Nicholas, J. Maunsel, Walerand, de Turri.

17 *Nov.*, *Clarendon.*—Lusignan, Valence, f. Nicholas, Lexington, Kilkenny, Segrave, Walerand, Chaenny, Walt. Thurkelby, Pugeis.

19 *Nov.*, *Clarendon.*—A. bp elect Winchest., Earl of Cornwall, Lusignan, Valence, Maunsel, Kilkenny, f. Nicholas, Lexington, Muscegros, Walerand, Pecche, Chaenny, W. Thurkelby, Pugeis.

22 *Nov.*, *Clarendon.*—A. elect Winton, Lusignan, Valence, f. Nicholas, Maunsel, Kilkenny, Segrave, Lexington, Walerand, Pecche, Rabayn, Pugeis, Geres, Thurkelby.

23 *Nov.*, *Clarendon.*—Lusignan, Valence, Savoy, Maunsel, Kilkenny, Lexington, Walerand, Rabayn, Pugeis, Thurkelby.

24 *Nov.*, *Clarendon.*—Lusignan, Maunsel, Kilkenny, f. Nicholas, Lexington, Rabayn, Walerand, Pecche, Pugeis, Thurkelby, Geres.

Same, with Langley instead of Pecche.

29 *Nov.*, *Clarendon.*—Maunsel, Kilkenny, Chaceporc, Muscegros, Walerand, Langley, Pecche, Bauzan, Norreis, Pugeis.

Same, with Geres instead of Langley.

. . . . . .[1]

[1] The charters for December and the greater part of January seem to be missing.

1253

1 *Jan.*, *Westm.*—R[obert] bp Linc., W. bp Worcest., f. Nicholas, Segrave, Reginald de Moun, J. de Grey, Walerand, Kilkenny, Roger de Thurkelby, Peter de Rivaux, Pugeis, Will. de Gernun.

26 *Jan.*, *Westm.*—Valence, Maunsel, Kilkenny, f. Nicholas, Crioll, J. de Grey, Segrave, Lexington, Walerand, W. de Grey, Norreis.

26 *Jan.*, *Westm.*—B[oniface] abp Cant., F[ulk], bp Lond., R[obert] bp Linc., W[illiam] bp Salisb., R[ichard] bp Chichest., E. of Hereford, Maunsel, Kilkenny, f. Nicholas, J. de Grey, Crioll, Walerand, Gernun.

28 *Jan.*, *Westm.*—Eler. abb. Pershore, Maunsel, Kilkenny, f. Nicholas, Crioll, J. de Grey, Walerand, W. de Grey, Norreis, Gernun, Lokington, Bakepuz.

Same, with Pecche and Bauzan, and without the abbot, W. de Grey, Norreis, Lokington, and Bakepuz.

28 *Jan.*, *Westm.*—F. bp Lond., R. bp Linc., W. bp Worcest., W. bp Salisb., R. bp Chichest., L. bp Rochest., Maunsel, f. Nicholas, Crioll, J. de Grey, Walerand, Lokington.

29 *Jan.*, *Westm.*—Maunsel, Kilkenny, f. Nicholas, Crioll, J. de Grey, Walerand, Guy de Rochefort, Will. de Chaenny, Bauzan, W. de Grey, Gernun, Bakepuz, Pugeis, Lokington.

1 *Feb.*, *Westm.*—f. Nicholas, Segrave, Kilkenny, J. de Grey, Walerand, W. de Grey, Gernun, Norreis, Walt. Thurkelby, Bakepuz, Lokington.

5 *Feb.*, *Merton.*—Earl of Warwick, J. de Grey, Stephen Lungespe, Kilkenny, Pecche, W. de Grey, Gernun, Norreis, St Maur.

7 *Feb.*, *Merton.*—P[eter] bp Heref., E. abb. Pershore, J. de Grey, Kilkenny, Wengham, W. de Grey, Norreis, Gernun, St Ermin.

8 *Feb.*, *Merton.*—P[eter] bp Heref., Kilkenny, J. de Grey, Chabbeneys, Pecche, W. de Grey, Gernun, Norreis.

9 *Feb.*, *Merton.*—A. elect bp. Winch., Kilkenny, J. de Grey, Hugh le Bigod, Roger de Thurkelby, Walerand, W. de Grey, Pecche, Gernun, Norreis.

10 *Feb.*, *Merton.*—Earl of Warwick, J. de Grey, Maunsel, Kilkenny, Walerand, Pecche, Eble de Mountz, W. de Grey, Gernun, Stephen de Salmis, Norreis.

13 *Feb.*, *Windsor.*—Earl of Warwick, J. de Grey, Kilkenny,

Walerand, de la Haye, N. de Turri, Roger de Sumery, W. de Grey, Norreis, Gernun.

17 *Feb., Windsor.*—Maunsel, Chaceporc, Kilkenny, J. de Grey, Walerand, Wengham, Segrave, de Turri, W. de Grey, St Maur, Gernun, Peitevin.

18 *Feb., Windsor.*—Earl of Cornwall, Segrave, J. de Grey, Maunsel, Kilkenny, Walerand, de la Haye, Wengham, Gernun, W. de Grey, Matthew Bezill, St Maur.

23 *Feb., Windsor.*—Maunsel, Chaceporc, Kilkenny, J. de Grey, Walerand, Wengham, Segrave, de Turri, W. de Grey, St Maur, Gernun, Peitevin.

Earl of Cornwall, Savoy, Maunsel, Chaceporc, Kilkenny, J. de Grey, de Mountz, W. de Grey, St Maur, Pugeis.

24 *Feb., Windsor.*—Earl of Cornwall, J. de Grey, Maunsel, Kilkenny, de Mountz, St Maur, Pugeis.

2 *March, Westm.*—John Maunsel, Chaceporc, Kilkenny, J. de Grey, P. Lovel, de Turri, de Mountz, St Maur, Pugeis, Peitevin.

2 *March, Westm.*—Maunsel, Kilkenny, Chaceporc, J. de Grey, Drogo de Barentin, Pecche, St Maur, Pugeis.

4 *March, Westm.*—Maunsel, Chaceporc, Kilkenny, J. de Grey, Simon de Wauton, Lovel, St Maur, Pugeis, Peitevin.

10 *March, Westm.*—Savoy, E. of Warwick, Maunsel, Chaceporc, Kilkenny, J. de Grey, Ralph de la Haye, Nich. de Molis, Rabayn, St Maur, Pugeis, Rog. de Lokington, Peitevin.

11 *March, Westm.*—E. of Warwick, J. de Grey, Maunsel, de Molis, Kilkenny, de la Haye, Rabayn, Chabbeneys, Pugeis, Lokington, Peitevin.

Also Savoy and Wengham.

12 *March, Westm.*—Earl of Warwick, J. de Grey, Kilkenny, Nicholas de Molis, Chaceporc, Wengham, Ralph de la Haye, Rabayn, St Maur, Pugeis, Peitevin.

13 *March, Westm.*—Earl of Warwick, Savoy, Maunsel, Kilkenny, J. de Grey, Wengham, St Maur, Pugeis, Lokington.

14 *March, Westm.*—Earl of Warwick, J. de Grey, Maunsel, Kilkenny, de Molis, Walerand, Pugeis, St Maur, Bakepuz, Haye, Peitevin.

14 *March, Westm.*—Maunsel, Chaceporc, Kilkenny, J. de Grey, Walerand, Wengham, W. de Grey, St. Maur, Pugeis.

16 *March, Westm.*—Maunsel, Chaceporc, Kilkenny, f. Nicholas, J. de Grey, Walerand, Wengham, W. de Grey, St Maur, Lokington, Pugeis.

17 *March, Westm.*—Maunsel, Chaceporc, Kilkenny, f. Nicholas, J. de Grey, Walerand, Wengham, de Molis, W. de Grey, Lokington.

18 *March, Westm.*—Maunsel, Chaceporc, Kilkenny, f. Nicholas, J. de Grey, Walerand, Wengham, W. de Grey, St Maur, Lokington.

Same, with Pugeis.

20 *March, Westm.*—Maunsel, Chaceporc, Kilkenny, f. Nicholas, J. de Grey, Wengham, W. de Grey, St Maur, Lokington, Pugeis, William de Gardinis.

Maunsel, Kilkenny, f. Nicholas, J. de Grey, Segrave, de la Haye, Walerand, de Molis, Drogo de Barentin, Peter Braunche, W. de Grey, St Maur.

f. Nicholas, Maunsel, Segrave, Kilkenny, Chaceporc, J. de Grey, Walerand, W. de Grey, St Maur, Bakepuz, Pugeis.

22 *March, Westm.*—Maunsel, f. Nicholas, Kilkenny, de Grey, Segrave, de la Haye, Walerand, W. de Grey, St Maur, Lokington, Bakepuz, Pugeis.

23 *March, Westm.*—Earl of Gloucester, Savoy, Maunsel, Chaceporc, Kilkenny, f. Nicholas, J. de Grey, Walerand, Segrave, Wengham, St Maur, W. de Grey, Lokington.

29 *March, Waltham.*—J. de Grey, Kilkenny, Walerand, Chabbeneys, W. de Grey, Pugeis, Bakepuz, Peitevin.

Same, with Warin f. Gerald and St Ermin instead of Chabbeneys and Pugeis.

29 *March, Waltham.*—Kilkenny, J. de Grey, Wengham, Walerand, Chabbeneys, W. de Grey, Pugeis, Bakepuz, Peitevin.

30 *March, Waltham.*—J. de Grey, Kilkenny, John Prior of Newborough, Wengham, Chabbeneys, W. de Grey, Pugeis, Peitevin.

J. de Grey, Kilkenny, Walerand, Wengham, Chabbeneys, Robert de Shotindon, W. de Grey, Bakepuz, Pugeis, Peitevin, St Ermin.

4 *April, Westm.*—J. de Grey, Kilkenny, Wengham, W. de Grey, Chabbeneys, Robert de Mares, Pugeis, Peitevin, St Ermin.

4 *April, Havering.*—Kilkenny, J. de Grey, Wengham, Chabbeneys, W. de Grey, Pugeis, Peitevin.

Also Maunsel, St Ermin.

Also Prior of Newborough.

6 *April, Havering.*—J. de Grey, Kilkenny, Wengham, W. de Grey, J. de Geres, Pugeis.

Also de Mountz, Bauzan, St Ermin.

8 *April, Havering.*—Kilkenny, J. de Grey, Ric. de Munfichet, Wengham, Rochefort, W. de Grey, Bauzan, Pugeis, Geres.

15 *April, Westm.*—Maunsel, Kilkenny, Prior of Newborough, J. de Grey, Wengham, de Mountz, W. de Grey, Bauzan, St Maur, Lokington, Pugeis.

16 *April, Westm.*—Maunsel, Kilkenny, Prior of Newborough, J. de Grey, Wengham, Rochefort, W. de Grey, St Maur, Pugeis, Lokington.

17 *April, Westm.*—Maunsel, Kilkenny, J. de Grey, Lovel, Wengham, Rochefort, W. de Grey, Bauzan, St Maur, Pugeis, Lokington, Bakepuz.

22 *April, Merton.*—S[ilvester] bp Carlisle, Maunsel, Kilkenny, J. de Grey, f. Nicholas, Wengham, W. de Grey, St Maur, Pugeis.

24 *April, Merton.*—f. Nicholas, Kilkenny, R. de Grey, Chaceporc, W. de Grey, Lokington...St Ermin, Geres [*imperfect*].

29 *April, Merton.*—f. Nicholas, Crioll, Kilkenny, R. de Grey, J. de Grey, Wengham, Rabain, W. de Grey, Lokington, St Ermin, Geres.

4 *May, Westm.*—A. bp elect Winchest., Earl of Warwick, Kilkenny, f. Nicholas, Crioll, R. de Grey, J. de Grey, Wengham, W. de Grey, Peitevin, Lokington, St Ermin.

5 *May, Westm.*—Earl of Warwick, f. Nicholas, Crioll, J. de Grey, Kilkenny, Wengham, W. de Grey, St Maur, Lokington, Walt. Thurkelby.

10 [?] *May, Westm.*—Savoy, Maunsel, Kilkenny, f. Nicholas, Crioll, R. de Grey, J. de Grey, Wengham, W. de Grey, Bauzan, St Maur, Lokington.

10 *May, Westm.*—Savoy, Maunsel, Kilkenny, f. Nicholas, Crioll, J. de Grey, Walerand, Wengham, Bauzan, W. de Grey, St Maur, Lokington.

F. bp London, W. bp Salisb., W. bp Durham, Earl of Norfolk, Earl of Warwick, Philip Basset, f. Nicholas, Maunsel, J. de Grey, Kilkenny, W. de Grey, St Maur, Bakepuz, Lokington, Pugeis, Peitevin.

B. abp Cant., Savoy, Maunsel, Kilkenny, f. Nicholas, Crioll,

J. de Grey, Walerand, Wengham...Bauzan, St Maur, Bakepuz, Lokington.

B. abp Cant., R. bp Linc., W. bp Durham, F. bp London, W. bp Salisb., W. bp Norwich, W. bp Bath and Wells, E. of Cornwall, E. of Norfolk, f. Nicholas, Maunsel, J. de Grey, Kilkenny, Crioll, Lexington, Walerand, W. de Grey, St Maur, Lokington, Bakepuz, Pugeis, Peitevin.

12 *May, Westm.*—Maunsel, f. Nicholas, Lexington, Crioll, J. de Grey, Kilkenny, Walerand, Wengham, W. de Grey, St Maur, Pugeis.

Savoy, Maunsel, f. Nicholas, St Maur, Pugeis, Lokington.

Savoy, Maunsel, f. Nicholas, Lexington, Crioll, Kilkenny, Walerand, Wengham, J. de Grey, St Maur, Pugeis, Lokington.

13 *May, Westm.*—Savoy, Maunsel, f. Nicholas, Lexington, Crioll, J. de Grey, Kilkenny, Walerand, Wengham, W. de Grey, Pugeis.

14 *May, Westm.*—Savoy, Maunsel, Chaceporc, Kilkenny, f. Nicholas, Crioll, J. de Grey, Lexington, Walerand, Bauzan, St Maur, Lokington.

15 *May, Westm.*—F. bp London, W. bp Salisb., Earl of Norfolk, f. Nicholas, J. de Grey, Kilkenny, Crioll, W. de Grey, St Maur.

15 *May, Westm.*—B. abp of Cant., A. elect bp Winch.,... f. Nicholas, Kilkenny, J. de Grey, Crioll, Walerand, W. de Grey....

16 *May, Westm.*—Savoy, Maunsel, Chaceporc, f. Nicholas, Lexington, Crioll, J. de Grey, Walerand, W. de Grey, Bauzan, Pugeis, Lokington.

22 *May, Westm.*—F. bp London, S. bp Carlisle, f. Nicholas, Lexington, J. de Grey, Pecche, Bauzan, W. de Grey, Lokington, Pugeis.

24 *May, Windsor.*—W. bp Durham, Kilkenny, J. de Grey, Walerand, Chabbeneys, Pecche, Bauzan, St Maur, Bakepuz, St Ermin.

25 *May, Windsor.*—J. de Grey, Kilkenny,...Rob. de Muscegros, Walerand, Pecche, Langley, Bauzan, St Maur.

29 *May, Westm.*—Chaceporc, Kilkenny, de Grey, Wengham, Pecche, Bauzan, Pugeis, St Ermin, Peitevin.

1 *June, Faversham.*—L. bp Rochester, Kilkenny, Crioll, W. de Grey, Pecche, Pugeis, Bauzan, Peitevin, Chaenny [*vacated*].

15 *June, Winchester.*—W. bp Bath, Chaceporc, Kilkenny, J. de Grey, Crioll, Lexington, Wengham, Walerand, St Maur.

18 *June, Winchester.*—Maunsel, Kilkenny, Crioll, J. de Grey, Lexington, Walerand, Wengham, Pecche, Bauzan, St Maur, Bakepuz, Pugeis.

19 *June, Winchester.*—B. abp Cant., A. bp elect Winchest., W. bp Worcest., P. bp Hereford, W. bp Bath, E. of Cornwall, E. of Gloucester, Guy de Lusignan, f. Nicholas, Maunsel, Kilkenny, J. de Grey, Lexington, W. de Grey, Gernun.

20 *June, Winchester.*—B. abp Cant., E. of Cornwall, E. of Gloucester, Maunsel, Kilkenny, f. Nicholas, Crioll, Lexington, W. de Vesy,...Gernun [*imperfect*].

f. Nicholas, Kilkenny, J. de Grey, Walerand, de Mountz, Pecche, Bauzan, Bakepuz...[*imperfect*].

21 *June, Winchester.*—B. abp Cant., E. of Cornwall, Maunsel, Kilkenny, f. Nicholas, Crioll, J. de Grey, Lexington, Walerand, Wengham, Pecche.

22 *June, Winchester.*—f. Nicholas, Kilkenny, Crioll, J. de Grey, Lexington, Walerand, Wengham, Pecche, Bauzan, W. de Grey, St Maur, Pugeis, Bakepuz.

23 *June, Southwick* [*Suwyk*].—Kilkenny, John f. Geoffrey justiciar of Ireland, f. Nicholas, Crioll, J. de Grey, Lexington, Walerand, Pecche, W. de Grey, Pugeis.

25 *June, Southwick* [*Suwyc*].—Joh. f. Geoffrey, Will. de Cantilupe, Chaceporc, Kilkenny, f. Nicholas, Crioll, J. de Grey, Lexington, Walerand, Wengham, Pecche.

27 *June, Southwick.*—Savoy...Crioll, Lexington, J. de Grey, Kilkenny, Wengham....

29 *June, Southwick.*—F. bp London, W. bp Worcest., Savoy, Kilkenny, f. Nicholas, J. de Grey, Crioll, Lexington, Walerand, Pugeis.

. . . . . .[1]

[1] Part of the roll containing the charters of June is mutilated, and it seems probable that some membranes containing the charters of July are lost. In August the king left England for Gascony.

TALTARUM'S CASE[1]

THE name of the hero of what has long been, and in spite of anything that I can say will long be, known as Taltarum's case, was not Taltarum. I have lately seen the record of that case. It stands on the De Banco Roll for Mich. 12 Edward IV, m. 631. I wished to see whether the pleadings were correctly stated in the Year Book. In the main they are correctly stated, but I am able to supplement the report with a few details and to add a little local colour. It was a Cornish case, and concerned a messuage and 100 acres of land in Porhea (Portreath?). The plaintiff was Henry Hunt; the defendant was John Smyth. The action was on the Statute of 5 Richard II against forcible entry, and the plaintiff sued "tam pro domino Rege quam pro seipso." The original feoffor mentioned in the defendant's plea was Thomas Trevistarum. In the plaintiff's replication the famous recovery is alleged to have taken place in the Easter term of 5 Edward IV, before Robert Danby and his fellow justices of the bench. The writ stated that John Arundel, the lord of the fee, had remised his court. The demandant in it was Thomas Talkarum or

[1] *Law Quarterly Review*, Jan. 1893.

Talcarum. His name is written many times, now with a *k*, now with a *c*, never with a *t*. The vouchee was Robert Kyng. The well-known rejoinder about the settlement made by John Tregoz was pleaded only as to twenty-four acres, parcel of the land in question. As to the residue the plaintiff pleaded in a more general fashion that at the time of the recovery Humphrey Smyth was not seised of the freehold, and that therefore the recovery was void in law. The defendant demurred upon both replications and the plaintiff joined in demurrer. *Curia advisari vult,* and gives a day in next Hilary term for judgment. No judgment has been posted up on the Michaelmas roll, nor could I find any notice of the case on the Hilary roll.

On looking at the report in the Year Book I do not think that any judgment had been given when that report was written. The four judges—so it seems to me—were agreed about the two points in relation to which the case has so often been cited. (1) They were prepared to hold that a proceeding such as was afterwards known as a "recovery with single voucher" would serve to bar an estate tail if the tenant in the action was "in as of" that estate tail. (2) They thought that such a recovery would not bar an estate tail if the tenant was not "in as of" that estate tail at the time of the recovery. But so far as I can see they were hopelessly divided, two against two, about the question of remitter which was the thorniest question in the case. I have often attempted and often failed to understand what was the hypothetical state of facts which formed the basis of the argument about the remitter. It was therefore that I searched the roll. I

have only to report that what Mr Challis has justly called "the rambling obscurity" of the report correctly states the pleadings on the record. On the whole the hypothesis seems to be this. Talkarum, the recoveror, having obtained judgment, did nothing more during the life-time of Humphrey Smyth, the tenant in the action. Humphrey died seised; on his death Robert Smyth entered, and on Robert's death John Smyth entered. Then Taltarum entered on John and enfeoffed Henry Hunt, then John entered and cast out Hunt, and this was the forcible entry complained of. But I must confess that I am puzzled by those mysterious *absque hocs* with which the pleadings abound.

Leaving to Cornishmen the question whether Talkarum and Trevistarum are possible names, I cannot refrain from the remark that the name of Henry Hunt is beautifully simple.

THE SURVIVAL OF ARCHAIC COMMUNITIES[1]

I. The Malmesbury Case.

That land was owned by communities before it was owned by individuals, is nowadays a fashionable doctrine. I am not going to dispute it, nor even to discuss it, for in my judgment no discussion of it that does not deal very thoroughly with the history of legal ideas is likely to do much good. I must confess, however, to thinking that if the terms "community" and "ownership" be precisely used,—if ownership, the creature of private law, be distinguished from a governmental dominion conferred by public law, and if ownership by a public community (*universitas*, *persona ficta*) be distinguished from co-ownership (*condominium*, joint tenancy or tenancy in common),—then this doctrine is as little proved and as little probable as would be an assertion that the first four rules of arithmetic are modern when compared with the differential calculus. But this by the way, for my present purpose is merely that of raising a gentle protest against what I think the abuse of a certain kind of argument concerning "village communities"—the

[1] *Law Quarterly Review*, Jan. 1893.

argument from survivals. Some quaint group of facts having been discovered in times that are yet recent, some group of facts which seems to be out of harmony with its modern surroundings, we are—so I venture to think—too often asked to infer without sufficient investigation that these phenomena are and must be enormously ancient, primitive, archaic, pre-historic, "pre-Aryan."

Of course I am not saying that there is no place in the history of law for inferences drawn from the present to the past. A historian who, when dealing with a particular age, let us say the eleventh century, refused to look at any documents that were not so old as that age, would not merely place himself under a self-denying ordinance of unnecessary rigour, he would often be casting away his most trustworthy materials. The student of Anglo-Saxon law, for example, who refused to look at Domesday Book, because it did not belong to "his period," would be guilty of pedantry and worse. The surest fact that we know of Anglo-Saxon land law is that it issued in the state of things, more or less intelligently, more or less fairly, chronicled by Norman clerks as having existed on the day when King Edward was alive and dead. But obviously the method which would argue from what is in one century to what was in an earlier century, requires of him who employs it the most circumspect management. I need not expand this warning into a lengthy sermon; it has been given once for all in words that shall never be forgotten—"Praetorian here! Praetorian there! I mind the bigging o't."

If these words should be always in the ears of every

one who is hunting for "survivals," they should, so it seems to me, be more especially remembered by those who, not content with the phenomena which they can find in the open country, are looking for exceedingly ancient and even pre-historic remains within the walls of our English boroughs. Here if anywhere the danger of mistaking the new for the old is an ever-besetting danger.

To come to particulars:—When we see burgesses occupying land in severalty by a communal title—that is to say, occupying because they are burgesses and so long as they are burgesses—and when we see further that their occupation is subject to communal regulations, subject to the bye-laws made by the governing body of the corporation in the name of the corporation—we must not at once infer that this is a very ancient arrangement. In a very large number of instances the title by which a borough corporation holds its land—even land within or adjacent to the borough—is known to be a modern title; indeed it will I think be found that the borough "communitas" of the thirteenth century was but rarely a landowner; it generally owned valuable "franchises," but not land. In some cases the boroughs of the later middle ages profited by the liberality of individual burgesses; in other cases they profited by the Protestant Reformation, they acquired lands which had belonged to monasteries and to religious or semi-religious gilds; in yet other cases they obtained from the king or some other lord the ownership of soil over which they had for a long time past been exercising rights of pasture.

Now when land was thus acquired, what was to be

done with it? Let it at a rack rent, we moderns may say, carry the proceeds to the account of the borough fund, and then expend them on some object useful to the town at large, upon paving, lighting, water-supply, elementary education, or the like. But this is to impose upon our ancestors our own notions of right and wrong, and very modern notions they are. If we go back but a little way we find that the property of the corporation is regarded as being, not indeed the property of the corporators, but still property which the corporators may enjoy very much as they think best. Of course the corporators are neither joint tenants nor tenants in common of this property; they are to enjoy it because they are corporators, and "shares" in the corporation (if we may use that term) do not obey the common rules of private law applicable to cases of co-ownership, though often enough "birth" and "marriage" are titles to "freedom":—still they are to enjoy it. There is no other purpose for which it exists. No doubt the great reform of 1835 was a sadly needed reform; but the historian of our towns will have to point out that the harm that was to be remedied had been done much rather by the oligarchic constitution of the corporations,—in many cases a constitution deliberately fashioned for the purpose of making them the instruments or the playthings of politicians,—than by the prevalence of the notion that the property of the corporation should be enjoyed by the corporators. That notion was a very natural one, and we cannot blame our forefathers for having entertained it. The property of the corporation was not (except in quite exceptional cases) "impressed with a trust." No one

had ever laid down the rule that the only possible "ideal will" of this *persona ficta* must be that of keeping a well-lit, well-paved, well-watched, healthy and cleanly town. And so if the borough had land the burgesses meant to enjoy it. If they let it they would divide the proceeds among them, perhaps in equal shares, perhaps bestowing preferential shares on their aldermen or chief burgesses. But they might well like to enjoy it *in specie*, to cut it up into allotments, to allow every burgess to hold an allotment so long as he was a burgess, paying no rent or a rent much lower than that which a stranger would have given:—a score of intricate variations on this theme might be devised. Especially if the corporation of a small borough acquired land hard by the houses of the corporators, some plan of allotting the land among the burgesses would very probably be adopted at some time or another. A burgess of such a borough would much rather have some little plot which during his lifetime he could call his own, than a dividend of a few shillings or a right to turn out beasts upon a waste.

If I am not mistaken, we can see this in our own day. At Bishop's Castle in Shropshire—so the commissioners of 1835 reported—the burgesses had a right of common on a pasture containing from ninety to one hundred acres, called the Moat Hill or Burgesses' Hill. "It is a right of common without stint, but being merely adapted for a sheep walk, it is represented to be of inconsiderable value[1]." Before 1880 this pasture had been turned into arable land, cut up into small portions held in severalty by several burgesses, each of

[1] *Municipal Corporations Report*, 1835, vol. IV. p. 2598.

them holding under a lease from the corporation at a rent of 5*s.* per acre for a term of sixty years, renewable for ever on a fine of £5[1]. How had this come about? There had been some dispute between the corporation and some of the burgesses. Some of the burgesses had enclosed pieces of the land, and then the matter was settled on the terms just mentioned.

At West Looe the members of the corporation had turned out their cattle over a certain down. The corporation, having passed through every stage of degradation, finally became extinct. In 1828 the commoners, without any Act of Parliament, enclosed two-thirds of the common, cutting that part up into seventy-three little plots which they let at small rents to certain members of their body, mostly poor fishermen of the village. "Did all the inhabitants have these inclosures?" "Many of the inhabitants had these inclosures; they were let at a yearly rent." "But how were they chosen?".... "They settled it among themselves; they never disputed it." "But some got back an equivalent [for their pasture right] by taking a piece which they rented, and others apparently got nothing?" "Quite so." "How was that settled?" "I think that it was settled in this way, that after paying a certain amount of money for the expenses and other matters, the general income was handed over to the overseers for the poor-rate." "The whole population had a certain benefit out of it?" "They all had a benefit from it." Then in stepped the Duke of Cornwall with seignorial claims to this soil, but seemingly very willing to do what was fair by the men of Looe; and

[1] *Report of* 1880, p. 15, Evidence, p. 503.

by means of a conveyance to trustees all was, we may hope, settled for the good of all[1].

Now the question that I would ask is whether it is not very possible and even probable that what we see the men of Bishop's Castle and West Looe doing in the full glare of the nineteenth century, has been done by the burgesses of other boroughs in times that we cannot call archaic or primitive or prehistoric, times which lie well within the limit of legal memory.

Let us observe some few of the divers modes in which our burgesses have used the lands belonging to the boroughs, placing ourselves at the date of the great municipal reform.

Very often of course "burgesses" or "freemen" as such claim rights of pasture over soil of which the corporation is the owner, or (to speak more nicely) the tenant in fee simple. Sometimes the right of pasture is regarded as an appurtenance to a tenement in the borough. Thus in Clitheroe[2] the right to be a burgess was given by the tenure of certain burgage tenements. There were seventy-eight "free-borough houses," ten "borough houses," and fourteen "borough crofts." "The free borough houses formerly conferred a right of common of pasture for one horse and one cow, on the moors or commons within the borough. These are now inclosed. Borough houses and borough crofts were not entitled to such horse-gate and cow-gate."

Very often again all the "resident freemen" as such have pasture rights. Sometimes they have to pay

[1] *Municipal Corporations Report*, 1880, Minutes of Evidence, pp. 362–8.

[2] *Report of* 1835, vol. III. p. 1483.

small sums for it, sometimes not. Thus at Beverley[1] "the burgesses residing within the town have the privilege of depasturing cattle, being their own property, on lands belonging to the corporation, containing about 4217 acres. They are allowed to depasture three cows in Westwood pasture; one horse in Hurn Pasture; three beasts in Figham Pasture, and six beasts in Swinemoor Pasture from the 14th of May to the 14th of February. This privilege, if enjoyed to its utmost extent, would be worth £25 a year. Few enjoy it to that extent. Indeed the land would not support the cattle if all who were entitled so used it. Persons depasturing are subject to the payment of a small sum on every head of cattle depastured. This sum varies from 5*s.* 6*d.* to 16*s.* 6*d.* a head." At Doncaster[2] "every resident freeman is entitled to turn two head of cattle upon a tract of land belonging to the corporation, containing 142 acres, called the Low Pastures, during the summer season. This privilege is worth, to each freeman, about £1 per annum. A resident freeman may let this privilege to another resident freeman. The freemen are also entitled to the aftermath in a meadow called Crimpsall Meadow, containing about sixty-five acres. This privilege is worth very little; the eatage is soon consumed, it being without stint; it does not last more than a week or ten days."... "The Neatherd looks after the cattle depasturing on the low pasture, being the freeman's pasture. He is allowed 13*s.* 4*d.* a year, a pair of boots every year, a house and two acres of land rent free, of the value of about £10, and two

[1] *Report of* 1835, vol. III. p. 1459.
[2] *Ibid.* p. 1493.

cattle gates on the low pasture worth about 10*s.* a year each."

Then at York[1] we find that the rights of the freemen vary from ward to ward. They "exercise a right of pasturage over several pieces of waste land in the neighbourhood of the city. Their rights in this respect vary according to the several wards in which they inhabit. The freemen inhabitants of ancient messuages in Bootham Ward are entitled to a right of pasturage for three head of cattle, either cows or horses, on a tract of land in the parishes of Clifton and Huntingdon, containing about 180 acres, subject to the payment of 10*s.* a year for every cow, and 12*s.* for every horse depastured; the number of freemen who exercise this right is about seventy. The freemen occupiers of houses in Monk Ward are entitled to depasture two heads of cattle, either horses, cows, or other beasts, on a tract of about 131 acres, subject to annual payment of 10*s.* for each beast; about 100 freemen generally exercise this right, and the number of cattle depastured is generally about 150. Freemen occupiers of houses in Walmgate Ward are entitled to pasturage for one head of cattle only, i.e. one cow with a calf, one mare with a foal, or one gelding, on about seventy-five acres of land, subject to the payment of 20*s.* for each beast; about 100 freemen exercise this right. The freemen inhabitants in Micklegate Ward, and certain parts of Bootham Ward, Monk Ward, and Walmgate Ward are entitled to pasturage for one gelding, or one mare with a foal, and two cows, upon several tracts of land, containing together 437 acres,

[1] *Report of* 1835, vol. III. p. 1745.

subject to an annual payment of 8*s*. for each horse, and 6*s*. for each cow; about 400 head of cattle are usually depastured on these lands. These annual payments for depasturing cattle are received by the pasture masters, and by them applied about the necessary expenses of guarding the cattle and keeping the lands in order."

Elsewhere we may find that not all, but only some of the burgesses, are entitled to pasture. At Lancaster[1] "the free burgesses are entitled to a right of common on Lancaster Moor; but in practice this common is used by almost every one who has property adjoining it. The eighty senior burgesses are entitled to an equal share in the net income, arising from some ground, called Lancaster Marsh, the property of the corporation. Lancaster Marsh was formerly a stinted pasture; and by an old custom, of the commencement of which there is no record in the corporation books, the senior eighty resident freemen were alone entitled to the herbage. The Marsh was inclosed in 1796, and the rents, still called Marsh-grasses, are now apportioned among the freemen, according to the old custom. This property is exclusively under the management of the Bailiff of the Commons: the leases are for seven years, at rack rent. The rents now produce about £4 to each of the eighty persons, and greatly exceed the value which the land possessed before the inclosure."

With these cases in our minds, we turn to others in which burgesses as such occupy land in severalty. The

[1] *Report of* 1835, vol. III. p. 1597.

constitution of the corporation of Berwick[1] was democratic. There was no "select body"; but the whole corporation, consisting of the mayor, the four bailiffs and the other burgesses, assembled in guild managed the affairs of the corporation, made bye-laws and disposed of property in the same way as was generally done in other places by the common council. The number of burgesses was indefinite; men became entitled to be burgesses (1) by birth, (2) by servitude, and (3) by grant from the corporation. "There is a large tract of land lying near the town, which was granted to the corporation by charter 2 James I. The First Portion of this land consists of several farms, which are demised to tenants by the mayor, bailiffs and burgesses, the rent being reserved to the said mayor, bailiffs and burgesses, or their treasurer for the time being, and collected by him. The rent together with the proceeds of other property now forms a separate fund, out of which the salaries of the officers and other corporate expenses, are defrayed. These farms are called Treasurer's Farms. The Second Portion is subdivided into several parcels varying in quantities from an acre and a quarter to two acres and a half, and in value from £1. 13*s.* 9*d.* to £9 per annum. These are called meadows, and at an annual meeting of the burgesses, called a meadow-guild, are distributed as they become vacant by the death or non-residence of the last occupiers (or in case of widows, by subsequent marriage of the last occupiers), among the senior resident burgesses, and widows of burgesses, who succeed to the rights of their husbands as to

[1] *Report of* 1835, vol. III. p. 1435.

meadows and stints, though the charter has no provision in behalf of the widows; the most ancient resident burgess is entitled to choose the most valuable vacant meadow, and so on in succession down to the youngest, till the number of vacant meadows is exhausted. The number of these meadows is twenty-four. The burgesses may either occupy these meadows themselves, or let them to tenants, reserving rents to themselves. In practice they are generally let. The lands forming the Third Portion were, up to the year 1761, open fields, upon which each burgess was entitled to a certain right of pasture, but at that period they were inclosed, and have ever since been let, in guild, as farms to tenants for various terms of years, and are now demised by leases under the corporation seal, generally in farms of forty acres, or thereabouts. The rent of each farm is divided into a certain number of equal portions, generally eleven, but in a few instances twenty-two. At another annual meeting, called a Stint-guild, a portion is allotted upon a specific farm to each resident burgess or burgess's widow, or to as many of these as there are vacant portions. These portions are called stints, and like the meadows vary in value from £8 to £9 per annum. The number of these stints was increased about thirty years ago, by appropriating another portion of land to that purpose. The number of stints thus added is forty-four, making the total amount 561. The more ancient burgesses are in like manner entitled to a preference, as the more valuable stints become vacant, and the younger burgesses succeed to them, as vacancies occur by the death, removal, or promotion of their seniors. The portions of the rents called stints

are paid annually by the treasurer of the corporation to the burgesses who are entitled to them. The burgesses in guild have, by their charter, a power of making bye-laws for the good rule and government of the corporation, and for preserving, governing, disposing, letting and demising of their lands, &c. In the exercise of this right the burgesses assembled in guilds make bye-laws to regulate the enjoyment of the meadows and stints, and have prescribed the conditions of husbandry under which meadows and stint lands may be broken up, and converted into tillage, and (in the case of meadows) the terms for which they may be let by the individual burgesses to whom they are allotted. They also decide upon the title of those who claim to enjoy meadows and stints, according to their bye-laws; and instances occur upon their records, of forfeitures both of meadows and stints, either absolute or for limited periods, inflicted by the burgesses in guild, for infraction of bye-laws, or other gross misconduct. But unless there be such forfeiture, or the party either become non-resident or relinquish his stint or meadow by choosing one of more value, he may remain in the enjoyment of the stint or meadow which has at the first been allotted to him, for the term of his life. Some burgesses are permitted to enjoy one stint only, others two stints, and others again one meadow and one stint."

At Nottingham[1] "the burgesses are entitled to a considerable right of pasture....They are also entitled, if resident, to take in order of seniority what is called a burgess-part, that is, an allotment of land in the

[1] *Report of* 1835, vol. III. pp. 1993–7.

fields or meadows at a small ground rent payable to the corporation, or a yearly sum in lieu of the allotment, at the discretion of the corporation. These burgess-parts are 254 in number. They are unequal in value and form, in fact, a sort of 'lottery.'...The rental of the proper estates of the corporation, free from any specific trust, and commonly called the Chamber Estate, for the year 1831–2 [amounted to more than £5000 and included a sum of £144. 18*s.* 6*d.*, being the rents of burgess-parts]... The number of burgess-parts on the Chamber Estate amounts at present to 112....They are either allotments of land in the fields or meadows, for which a small ground-rent, charged without reference to the actual value of the burgess-part, is paid to the corporation; or a yearly sum in lieu of the allotment, at the discretion of the corporation. These allotments are not considered as freeholds; but the common hall exercise the right of resuming them if they think proper during the life of the burgess. Resumptions of the burgess-parts have been frequent in late years. Instances have formerly occurred in which the parts were resumed without any money payment in lieu being made to the burgess. At present, a compensation in money is always given in the shape of an annual payment, which is fixed at rather more than the burgess could have made out of the land. These resumptions have taken place when the corporation were enabled to make more of the land than the burgesses could do, and have proved beneficial to the corporation estate."

Now that arrangements of this kind may really be pretty modern, we get various hints. I will speak

more especially of the case of Stafford[1]. The corporation are possessed of a piece of land called the Coton Field, containing about 192 acres. It appears that in ancient times the burgesses of Stafford claimed a right of common over three open fields, composing the manor of Coton, called Coton Field, Broad Field and Kingston-hill Field; but the claim was disputed by the owners of the Coton manor. In 1705 the differences between them and the corporation were arranged in the following manner. The corporation gave up all claim to the right of common over Broad Field and Kingston-hill Field, and William Fowler, the owner of the manor, in consideration thereof demised to trustees the Coton Field, for ninety-nine years, in trust, to pay him a yearly rent of £12, and then in trust for the mayor and burgesses, subject to the payment by the latter of £28 a year, for the support of the poor in the almshouse.... The Coton Field is divided into portions containing each an acre, each of which is allotted to a burgess. Small rents, varying from four to six shillings are received from the occupiers, each of whom also pays, on his first entrance, 5*s.* on a tillage acre, and 10*s.* on any other acre. The gift of these acres is vested in the mayor for the time being. They are by no means confined to the poorer order of burgesses. Each of the members of the common council [mayor, ten aldermen and ten capital burgesses] invariably receive an acre; formerly they each held two, but of late years they have given up the one."

I can not but think that had the manner in which Coton Field was occupied in 1835 been brought to the

[1] *Report of* 1835, vol. III. p. 2028.

notice of some of our "survivalists," they would have pronounced it to be an interesting relic of archaic times. But the archaic times of which it tells are in truth the archaic times of Queen Anne or some king of that primeval dynasty, the illustrious house of Hanover. My reason for thinking that it would have been attributed to a much earlier age is to be found in what has been written concerning the borough of Malmesbury, more especially in what has been written about it by one to whom we all owe many thanks for his courageous and ingenious speculations, I mean Mr Gomme[1].

The facts are in brief these[2]:—In Malmesbury, as in many other boroughs, the titles to freedom are birth and marriage; that is to say, a son or a son-in-law of a free burgess is entitled "to take out his freedom." On so doing he becomes one of a class known as "the commoners." Before 1832 this would have given him a right to turn out beasts on certain unenclosed land. But in that year by Act of Parliament this land was enclosed, and dealt with in a somewhat elaborate fashion. Fifty acres of it were given to trustees, who were to apply the income in maintaining roads, fences, and the like. The rest was cut up into 280 allotments, the average size of which is an acre and a quarter; but though they vary in size their value is approximately equal, since it was arranged that the size of the allotments should vary inversely with their proximity to the town, the smaller pieces being those nearest to the

[1] Gomme, *Village Community*, p. 187.

[2] *Municipal Corporations Commission*, 1880, *Report*, p. 73, Evidence, pp. 127, 292, 831.

town. When one becomes a freeman of Malmesbury one becomes entitled to succeed in order of seniority to one of these 280 plots; until one gets a plot one receives 8*s.* a year out of the income of the fifty acres held by the trustees. Now all this arrangement, primitive though it may seem to us, is quite new, the result of an Act of Parliament coeval with the Reform Act; before that Act such of the freemen of Malmesbury as were but "commoners" had, as their name implies, rights of common and no more.

But there is an older arrangement and there are other lands to be considered. A freeman may aspire to be a "landholder." The landholders are a body of fifty-five (formerly there were but forty-eight) persons, each of whom holds a several plot; these plots vary in size; together they make up about forty acres; they are divided into six "hundreds"; the number of plots in the hundred varies. The freeman who wishes for a plot puts down his name at the bottom of a list; a list of applicants is kept for each hundred; he can put his name on one of these lists or on several of them; if at the same meeting of the corporation several persons wish to enter their names on the same list, then they cast lots for priority. When a vacancy occurs in one of the hundreds owing to the death of a "landholder," the applicant whose name stands highest on the list of that hundred gets the vacant plot, and if his name is on the list of a second hundred it is struck off that second list, for he is not to have two plots. So much as to the "landholders." Above them in rank stand the twenty-four "assistant burgesses," each of whom has an acre in addition to his "landholder's part" and

his "commoner's part." Vacancies in this body of twenty-four assistant burgesses are filled from among the "landholders" by co-optation[1]; "in practice they are self-elected, though it is said that the aldermen and capital burgesses have a right to interfere." Then above the twenty-four stand the twelve "capital burgesses," who are elected by co-optation. On becoming a capital burgess one gives up one's "assistant burgess's part" and one's "landholder's part," but one retains the "commoner's part" and becomes entitled to a "burgess's part." These "burgess's parts" vary in size from five to sixteen acres. There are but twelve of these, and as there are thirteen capital burgesses, including the aldermen, the junior capital burgess for the time being has to do without a part, and instead thereof receives a small sum of money; but when another vacancy occurs he takes the vacant part. This he keeps, be it large or small, though other vacancies subsequently occur, but it is said that in the past there might be a general shifting of parts among the capital burgesses when one of the plots fell vacant. Then every year the capital burgesses elect an alderman (generally the aldermanship goes in rotation among them in order of seniority), and the alderman for the time being, in addition to his "burgess's part," enjoys a

[1] On pp. 74, 75 in their Report the Commissioners make two inconsistent statements about this. In one place they speak as though the assistant burgesses were a self-elected body, in another they speak as though the landholders became assistant burgesses in order of seniority. It is clear, however, from the evidence that the former statement is the more correct; see Questions, 5396–5400, 6286–6300, 6495–6500.

plot of five acres, known as "the alderman's kitchen"; out of the profits of it he is expected to provide a feast. The corporation also holds thirty-nine small leasehold properties, which are said to be vested in the capital burgesses and alderman; they are let at quit rents, at about £1 each, upon premiums which are paid to the alderman and capital burgesses. The various allotments lie together without fences or ditches between them; each man grows what he pleases, "wheat and potatoes and beans, and all sorts of things." "Very like a parish allotment?" "Yes, something of everything."

Very curious all this is, but I do not think that we have any warrant for supposing that any part of this elaborate system of allotment is of very great antiquity. When Domesday Book was made the burgesses of Malmesbury, as was often the case, were divided between the king and other lords, but most of them held of the king[1]. Then John granted the borough in fee farm to the Abbot of Malmesbury[2], and the abbey thenceforth drew a considerable revenue of burgage rents[3]. In the thirteenth century the burgesses of Malmesbury of the Merchant Gild held the heath known as "Portmaneshethe," and granted part of it to the abbot[4], but that they held any arable land by any communal title we do not know. With magnificent impudence they forged a charter whereby King Æthelstan, in consideration of their services against the Danes, granted them five hides of heath near his vill of Norton, by the counsel of Master Wolsinus his

[1] D. B. I. 64 b.
[2] *Rot. Cart.* I. 213.
[3] *Registr. Malmesb.* I. 117.
[4] *Ibid.* II. 150–5.

Chancellor and Odo his Treasurer[1]. To make free with Æthelstan's name was becoming fashionable in the boroughs: had not the men of Beverley, of Axbridge, of Barnstaple, charters from the same illustrious monarch[2]? Of this charter the men of Malmesbury procured a confirmation from Richard II, and another from Henry IV[3]. It is amazing that the king's chancery should have been deceived by this extravagantly clumsy imposture. Other royal charters, so far as I can learn, they had none until they obtained an elaborate instrument from Charles I and another from William III[4]. I am not disputing their title to the heath. Very probably they did but forge in support of ancient usage and prescriptive right. But as to the system of arable allotments we may well doubt whether any part of it belongs to the middle ages. In Charles I's day there was, and "from time immemorial" had been, a class of burgesses known as the "landholders." In William III's day the aldermen and capital burgesses were, and "for time immemorial" had been, holding certain tenements apart from the lands held by the burgesses, and to confirm their title a second corporation, to be called "The Alderman and Capital Burgesses," was erected by the side of the old corporation, known as "The Alderman and Burgesses," and was provided with a seal of its own. But we know what

[1] Kemble, *Cod. Dipl.* No. 1128 (vol. 5, p. 251).

[2] For Beverley see *Municipal Corporations Report of* 1835, p. 1453; for Axbridge, *ibid.* 1091; for Barnstaple, Hallam, *Middle Ages* (ed. 1837), vol. III. p. 46.

[3] Charter Roll, 12 Henry IV (2 July), memb. 1.

[4] Patent Roll, 11 Car. I (24 July) part 30; Patent Roll, 8 Will. III (14 Nov.) part 1.

"from time immemorial" means in such a context. Why should not what happened in 1832 have happened more than once in earlier centuries? The burgesses have been using land as pasture ground, and somehow or another, by ancient or modern title, by purchase or prescription, the corporation which they form has become—or at all events they think that it has become —the owner of the ground. They enclose part of it and invent a scheme (even in 1832 such schemes could be invented) for providing alderman, capital burgesses, assistant burgesses, ordinary burgesses, with cultivable allotments. My own belief is that were the pressure of the Municipal Corporations Act removed, and had our borough corporations nowadays as few members as they had sixty years ago, such schemes would be very fashionable at the present moment, and were I a burgess, and were the choice given to me of receiving my "dividend" in the form of money, or in the form of pasture rights, or in the form of a small "severalty," I for my part should choose a several close. And then if there were not enough land to provide for all the burgesses without reducing each plot to an unprofitably small size, recourse would be had to some plan of rotation, or perhaps to the "archaic" drawing of lots.

Then to my eyes the scheme that came down into modern times at Malmesbury does not look very ancient; it speaks to us of the last of the middle ages or of the Tudor time, for it speaks to us of an elaborately differentiated corporation, a constitution in which class rises above class, a tripartite or quadripartite corporation. Now I think that those who have made a study of our boroughs will bear me out if I say that

this will hardly be as old as the thirteenth century. In that age many boroughs have as their governing body (under the mayor or the bailiffs) a body of twelve "law-men," twelve "capital port-men," twelve "chief burgesses," or the like. Such a body as this may in some cases be very ancient, though in others we can actually see its birth; but the appearance of a second and subordinate class of ruling burgesses is characteristic of a later time. Some boroughs, even great and opulent boroughs, never get beyond the first stage in the evolution of a governing body; to the end they have but a mayor and twelve aldermen. Most boroughs go further than this; below the twelve they develop a twenty-four (other numbers are sometimes found, but this duodecimal system is very common); below the twelve or twenty-four aldermen will appear the twenty-four or forty-eight common councillors, or perhaps there will be twelve capital burgesses and twenty-four assistant burgesses, or again these bodies will be known simply as "The Twelve" and "The Twenty-Four," or "The Twenty-Four" and "The Forty-Eight[1]." Occasionally, though this is much rarer, there are three classes: thus at Derby, nine aldermen, fourteen brethren, fourteen capital burgesses; at Lancaster seven aldermen, twelve capital burgesses, twelve common councillors; at York twelve aldermen, a body called the Twenty-Four, and seventy-two common councilmen; at Bury (to take a smaller town) six assistants, twelve capital burgesses, twenty-four burgesses of the common council. Now on the whole we

[1] Thus at Beccles the Twelve and the Twenty-Four; at Salisbury the Twenty-Four and the Forty-Eight.

may safely say that the more complex the ruling body, the later is its constitution—later that is according to the normal order of events. Judged by this standard the constitution of Malmesbury, with its alderman, capital burgesses, assistant burgesses, landowners and commoners, is a modern constitution, and those who regard it as of great antiquity should admit that the burden of the proof lies upon them. There is nothing in the charters of Richard II and Henry IV, nothing in that wondrous document the forged charter of Æthelstan, to prove or even to suggest that it existed in the fourteenth century. When asked to call it or any part or trait of it prehistoric, I feel as if I were being told that Henry VII's chapel at Westminster was the work of "neo-lithic man[1]."

I am not contending that we must read this Malmesbury inscription as A[iken] D[rum's] L[ang] L[adle], but certainly there seems to me to be an

[1] Mr Gomme supposes (pp. 197–8) that the 280 commoners and the 24 assistant burgesses are relatively modern, so that "we have left as representatives of the archaic tribal constitution of Malmesbury the forty-eights and the thirteen." I cannot myself see any proof or probability that the forty-eight "landowners" are older than the twenty-four "assistant burgesses"; nor can I follow Mr Gomme in his argument that the commoners are a new class, a class that has come into existence since 1685, for it seems to flatly contradict the evidence that he has himself adduced on p. 188. Nor can I follow him in treating as "archaic" a certain rhyming formula about Æthelstan, which the burgesses are said to repeat when the plots of land are transferred, for even if we consent to call Æthelstan "archaic" we can hardly do the same for an English verse that rhymes. The one trait of the Malmesbury constitution that seems to me very rare is the division of the burgesses into six "hundreds."

almost infinite number of modes in which it may be deciphered without our being compelled to refer it to the age of Agricola. There are many reasons why the Monkbarns who is digging in an English borough should be careful to have an Edie by his side, or, still better, be his own Edie. In the first place, as I have been trying to explain, arrangements which may look to us very quaint—quaint because the number of land-owning boroughs will not be very large—can in quite modern times be the natural outcome of the fact that the borough owns land while the burgesses for the time being are entitled to get profit or enjoyment out of that land. In the second place, our English boroughs have been exercising for a long time past not merely a considerable power of regulating by express bye-laws the use of their proprietary rights, but also (and here lies the snare for the archaeologist) a large and indefinite power of declaring their own customs, of making the old look new and the new look old, of ascribing to time immemorial—even to the reign of King Æthelstan or, for the matter of that, King Arthur—arrangements which have existed for but eighty years or less. In the third place, whatever may be the case in a court of law, in a court of history the borough that would trace back its ownership of land even into the thirteenth century, should, so I think, be called upon to prove its assertion. This I say because in very many instances we know that a borough's title to its land is not so old as that century, and because in the voluminous records which bear on the manner in which land was owned in that century, we can, if I am not much mistaken, read but very

little of land being owned by *communitates*. Lastly, when we are speaking of the boroughs a leap from any century later than the thirteenth to any much earlier age is the most hazardous of all leaps, for the time which is thus skipped is, or at all events seems to me, the time when Englishmen are gradually and painfully, under the teaching of canonists and civilians, not without many a slip and blunder, learning to frame and use a new idea, that of the *universitas*, the *persona ficta*, learning (even Bracton could hardly do this) to distinguish between *res civitatis* and *res omnium civium*— a grand intellectual achievement comparable to the discovery of the differential calculus. I am not saying that until that achievement had been performed an ownership of land that might in some sort be called a communal ownership was impossible (far from it), but I do say that inferences drawn from an age when the borough "community" is a definite person, quite distinct from the mass of men who are the burgesses for the time being, to an age when this distinction was hardly, if at all, perceived, are perilous inferences[1].

II. The Aston Case.

The hunter after relics of very ancient times—I speak of those spiritual things that we call "institu-

[1] I cannot follow Mr Gomme in his account of the Chippenham case; for one thing because he refers (p. 180) to Chippenham in Wiltshire a passage in the *Hundred Rolls* (II. 506) that belongs to the less known Chippenham in Cambridgeshire. This triumph over space seems to me hardly bolder than some of his triumphs over time.

tions," not of material potsherds—is, for reasons that I have tried to give, much less likely to be deceived by the pseudo-archaic when he is at work in the open country than when he is within the walls of a borough. Life has been slower in the village than it has been in the town; changes have been fewer; the piles of débris are neither so numerous nor so variegated; there will be fewer faults in the stratification: nevertheless, even when we are out in the fields it behoves us to be cautious. There is, or there should be, a broad gulf between the "Here is a funny old custom" of the antiquarian amateur and the "Here is a survival from the Norman, the Anglo-Saxon, the Celtic, the pre-Celtic, the pre-Aryan, the pre-historic age" of the scientific explorer. Nowadays many things are old, too old to be easily explicable, which none the less are not even mediaeval. Six centuries divide us from the Hundred Rolls, eight from Domesday Book, near thirteen from the laws of Æthelbert, and even the tiller of the soil sometimes—but I am wasting ink in these generalities.

The famous case of the Aston "village community" deserves a careful discussion, for the interpretation that we put upon it is likely to tinge our conception of large tracts of English history, economic and legal.

The English township of the fourteenth and later centuries, if it be not one of those privileged and be-franchised townships that are called boroughs, is no corporation; the law does not personify it; it cannot hold land; it cannot sue or be sued. But further, it is not a "jurisdictional community." By this I mean that it has no court in which its members, or its "best and most

lawful" members, can declare and enforce the common law or the village custom. Nay, the vill is not even a jurisdictional district, though it is a police district: there is no court of any sort or kind of or for the vill as such. Lastly (so far as I can see) the township is not a self-governing community; it has no governing body; it has no assembly. Often, it is true, the vill is also a parish, and during the last of the middle ages, as the permanent endowments of the parish churches, tithes and lands are absorbed by the religious houses, church rates become necessary, and with church rates assemblies of parishioners collected in the vestry of the church and presided over by the parson or churchwardens; but mediaeval law does not confuse the parish with the township; for it the parish is a purely ecclesiastical institution.

Would it were so nowadays! Why are we to be cursed with "parish councils"? I hasten to say that I am not about to meddle with any burning question of contemporary politics—I know my place—this is but an outbreak of pedantry. And yet perhaps there is something a little better than pedantry in it. Is our legal geography so rational, so simple, that we can afford to throw good words away? Is it necessary, now that the legal relief of the poor is no longer a semi-ecclesiastical matter, that we should ever be distinguishing (with such help as interpretation clauses may give) between the ecclesiastical parish and the civil parish and condemning ourselves to live in two parishes at once. "Civil parish" is about as good a term as "lay bishop" or "civil archdeacon" or "temporal diocese" would be. Might we not profitably

learn a lesson from America; might we not restore the township? This however is ultra-crepidation.

To return to our middle ages—it is well known that much that we have denied to the township, we must concede to the manor. It has a court, and that court is not merely a court of justice, it is also a bye-law-making and a precept-issuing assembly; the manor, we may say, has certain powers of self-government. True that when we examine it in the thirteenth century, the jurisdictional, legislative and governmental powers which this court has over one class of its "justiciables"—the freeholders, if any freeholders there be, are exceedingly feeble (upon very slight provocation the freeholder will be off to the king's court, where his individualistic complaints will find favourable audience), while over the other class of its justiciables—the holders in villainage—its powers, which are mighty enough, are regarded by the law as the mere will of the lord; but then it is possible for us to represent this state of things as being pretty modern, as the outcome in part of recent seignorial usurpations and in part of the yet more recent activity of a distinctively royal or national justice. The lord, it may be said, has mastered or even dispossessed the village assembly, but in so doing has been compelled to let slip from all effective control those lucky members of the community who can persuade the king's justices that their tenure is freehold.

I will not here argue either for or against this theory; rather I will point out one of the limits within which it is confined. Where manor and vill are coincident, it will give us what is in some sort a village

assembly. But manor and vill are by no means always coincident. I am not referring to the cases, common in the north of England, in which the manor comprised several vills. These might be accounted for by the supposition that the lord for his convenience had succeeded in fusing several village assemblies into one manorial court. But it might very well happen that the manor would comprise only a part of a village, that the manor would be made up of parts of different villages, that some part of the village would be in no manor at all.

I am not speaking of rarities. If when we take all England as a whole we can treat the coincidence of manor and vill as normal, this we cannot do if we confine our view to certain large districts of England. One of these districts is Cambridgeshire. Of many a Cambridgeshire village we may safely say that never —at all events never since some time remoter than that of the Norman Conquest—has the whole village coincided with a single manor or formed part of a single manor, that never has it had a single lord, save that lord of all lords, the king. The various freeholders who had land in it, including those who had villain tenants and kept courts for them, often traced their titles up to the king by very different routes, and it was a common thing that part of the village territory should belong to one great honour and part to another.

But more; there can I think be very little doubt that in the Cambridgeshire village the arable lands of the various manors and even of the various honours were often intermixed; that the manor like the virgate lay scattered about in the common fields—an acre here

and an acre there. So far as I can see on maps made before the modern inclosures, the village, though it may contain three or four manors, will usually have but one expanse of arable land, an expanse unbroken by ditch or hedge, an expanse that is known as "the field" of that village.

Now these cases seem to me to be cases of critical importance. They seem to put us to our choice between two paths, and, whether we pursue the one or the other we shall come to a conclusion which must govern our whole notion of English village history. Either, despite the provoking silence of our documents, we must find, or if we cannot find, then we must postulate, some organization of the township that is not manorial, some assembly of the township that cannot be explained by feudal principles; or else we must admit that the system of common field husbandry may be carried on from century to century—perhaps for six or seven centuries—though there is no village tribunal, no village assembly, capable of regulating and controlling it.

It is in this context that the famous case of the village of Aston in Oxfordshire should teach us something. What we know of it is gathered partly from a statement, which in 1657 was submitted to two eminent lawyers, Sir Orlando Bridgman and Mr Jeffrey Palmer, partly from a custumal compiled in 1583[1]. I will briefly set forth the principal facts, as I understand them,

[1] See the papers by Benjamin Williams in *Archaeologia*, vol. XXXIII. p. 269, vol. XXXV. p. 470; the case and opinion printed by Joshua Williams in *The Jurist*, New Series, vol. XII. pt. 2, p. 103, also Joshua Williams, *Rights of Common*, p. 86; Giles, *History of Bampton*; Gomme, *Village Community*, p. 157.

premising a few words as to the whereabouts of Aston.

In the county of Oxford lies the hundred of Bampton, which contains some 42,070 acres. It comprises seventeen parishes, one of which is Bampton. The whole parish of Bampton with its hamlets contains 8,750 acres, and is composed of the following parts:—

	ACRES.
Bampton with Weald . . .	4,970
Aston and Cote	1,870
Brighthampton (part of)[1] . .	410
Chimney	620
Shifford	880

Aston with Cote, then, is a hamlet of Bampton; in 1831 it contained 157 inhabited houses, while the whole parish contained 523.

Now in 1657 there were in Aston and Cote 16 hides of arable land, and four yard-lands or virgates were reckoned to the hide, so that there were 64 yard-lands. The size of an arable yard-land varied from 24 to 28¾ acres[2]. The affairs of the owners of these lands were regulated by a body of sixteen persons known as "the sixteens." "The sixteens" was not, I think, an

[1] Part of Brighthampton is in Bampton parish, part in Standlake parish.

[2] *Archaeologia*, XXXIII. 270–1. It seems evident that a considerable part of the lands with which we have to deal cannot have lain in what now is deemed the hamlet of Aston with Cote, for if, as Mr Benjamin Williams says, the arable yard-land at Aston contained on an average twenty-seven acres, then the sixty-four yard-lands contained 1,728 acres, but according to modern computation Aston with Cote contains but 1,870 acres, and so hardly any room is left for the meadows and the commons, which we are told were extensive.

elected body; each hide had a representative in it, and the practice seems to have been that the various persons interested in each particular hide should take it in turns to represent that hide for one year[1]. On the eve of Lady Day all "the inhabitants" of Aston and Cote met at Aston Cross "to understand who should serve for the sixteens for that year coming, and to choose other officers for the same year." These elected officers seem at this time to have been three grass-stewards and two "water-haywards." Before electing them the tenants divided themselves into two parties: the "hundred tenants" chose one grass-steward and one water-hayward; the "lord tenants" chose two grass-stewards and one water-hayward. The meaning of these terms "hundred tenants" and "lord tenants" will become plainer hereafter; meanwhile let us see what "the sixteens" had to do. Each yard-land consisted, as we have seen, of some 27 acres of arable land; these acres were intermixed in the common fields in strips of half an acre or less; but besides this, each yard-land comprised or had annexed to it a right of common for twelve rother-beasts or six horses and also for forty sheep. Then also each yard-land carried with it a right to a lot-mead. The meadow was laid out in sixty-four portions, and in every year each yard-land had one of these portions assigned to it. This assignment was effected by a lottery. Each yard-land had a wooden mark belonging to it, bearing some device;

[1] "Sixteen persons, one for every hide, take their turn yearly in the authority of the sixteen": Case for the opinion of Sir O. Bridgman. But the case goes on to speak of the sixteen as chosen, so this point is not very clear.

the marks were placed in a hat and the owner of the first mark that came out of the hat became entitled to the piece of meadow that was known as "the first set." Each owner then went to the meadow and cut in the grass of the portion allotted to him the device proper to his yard-land; he possessed that portion in severalty from the 1st of March to the 3rd of May, and was entitled to the crop of hay. Then also there were certain hams or home-closes of meadow, namely the Bull-ham, the Hayward's ham, the Worden-ham, the Wonter's-ham, the Grass-Stewards-ham, the Water-haywards-ham, the Homage-ham, the Smith's-ham, the Penny-ham, and the Brander's-ham, &c., which were "disposed of at the discretion of the sixteens; some to the officers whose names they bear, some to the public use of the town, as for the making of gates, bridges, &c., and some were sold [that is to say, the crops off them were sold] to buy ale for the merry-meeting of the inhabitants." Then also lying in the common fields were "several leyes of greensward...two years mowed and the other fed" that were disposed of at the discretion of the sixteens.

Thus the function of the sixteens was to supervise the allotment of the lot-meads, and to dispose according to their discretion of the hams and the leyes of greensward. We further find attributed to them a power of making such orders as they should "conceive beneficial for the inhabitants of Aston and Cote." They were to hold ordinary meetings three times a year, in Rogation week, in Whitsun week and upon Lammas Eve; but special meetings might be summoned for the redress of grievances, and the sixteens, or a majority of

them, might inflict amercements for breaches of their orders; they themselves also might be amerced "by the stewards and the body of the town," though the sum exacted was not to exceed fourpence. From the evidence before us it is impossible to say exactly what limits were conceived to exist to this power of making ordinances and decreeing punishments, but the sixteens do not seem to have aspired to act as a court of law; nor can we tell what authority they claimed over such of the "inhabitants" of Aston and Cote as had no proprietary interest in any of the sixty-four yard-lands. The custumal of 1593 was signed "by most of the substantial inhabitants of Aston and Cote"; the number of signatures was but eighteen. On the whole we have little reason for calling this community a governing community; rather it is a proprietary community.

The amount of communalism that is involved in it should neither be understated nor yet overstated. Each holder of a yard-land holds his arable land by a separate title, a title that is in no sense communal. Annexed to his arable land he has a right of pasture; this also he holds by a title that is in no sense communal. Again his title to a lot-mead is communal only in this sense, that the whereabouts for the time being of his "moveable freehold" or "moveable copyhold" is determined by a process of casting lots in which he takes part with his fellows. On the other hand "the sixteens" deal at their discretion with the "hams" and the "leyes of greensward." To judge by the names of the hams, there had at one time been more village officers than there were in the seventeenth century; for instance, there had been a village smith and a village wonter or

mole-catcher, and to each of these a ham had been allotted. Even in the seventeenth century there were grass-stewards, who were bound to see that the mounds and fences were in good repair, and who also had to provide four bulls to run on the common pasture, in return for which provision they received eighteenpence for every cow that fed on the common. But whether we suppose the sixteens to have had all along a free power to decide who should occupy and take the profit of these hams, or whether we suppose that each ham had been devoted to the endowment of some communal office, we have in either case a state of things that cannot easily be expressed in the forms of our common law. Who owned these hams?

From the device of placing the ownership of the soil in some obvious lord of a manor we are precluded. This is the most remarkable feature of this remarkable case—the community at Aston was not a manorial community. Of the sixty-four yard-lands, forty belonged to the manor of Aston-Boges, or more correctly Aston-Pugeys, which was then held by a Mr Horde. Of these forty yard-lands, twelve were in the hands of copyholders, while the others had been let by the lord to tenants for terms of years from which we may gather that they had formerly been in his own hand. Of the remaining twenty-four yard-lands, nine were parcel of the manor of Shifford—they had formerly been copyhold, but of late had been enfranchised; four more yard-lands belonged to the manor of Bampton-Deanery, while "about twelve yard-lands" were "ancient freehold" held by some yet other title or set of titles not fully explained by the documents that are before us.

Those members of the community who were tenants of the manor of Aston-Pugeys seem to have been known as "the lords tenants," while the others were known as "the hundred tenants," probably because though they owed no suit to the manor of Aston-Pugeys, they did owe suit to the court of the hundred of Bampton.

If now we turn to the Hundred Rolls[1] and look for this community, though we shall fail in being able to identify with accuracy all of our sixty-four yard-lands and shall read nothing about the sixteens, we shall see the manor of Aston-Pugeys, or Bampton-Pugeys, which is in the hands of Robert Pugeys, Mr Horde's predecessor in title[2], the manor of Shifford which is held by the Abbot of Eynsham, and the manor of Bampton-Deanery, or Bampton-Exoniae, which belongs to the Dean and Chapter of Exeter. On the whole it seems that the occupants of the Aston fields are for the more part customary tenants of these three manors; those of the Pugeys manor are called "servi," those of the Exeter manor "villani"; but probably there are among them a few freeholders, some holding of the Abbot of Eynsham, while a very few may hold either immediately of the king, or of William of Valence, who has a manor of Bampton, to which the Pugeys manor is subordinate[3].

Now it has been stated by a learned and careful

[1] *R. H.* II. 688; and see 703, where the manor of Shifford appears. A correcter transcript is given by Vinogradoff, *Villainage*, p. 450.

[2] The title is traced in *Archaeologia*, XXXIII. 270.

[3] It is difficult to discover from the record which of the virgates mentioned in it are in the Aston fields.

writer, who seems to have had access to documents not open to the public, that the manors of Aston-Pugeys, Bampton-Deanery, and Shifford were all of them held of this superior manor of Bampton[1]. Were this so, then the curiosity of the phenomenon that is before us would be much diminished. We might then explain the case in the following way—Once upon a time there was a great manor of Bampton which comprised (as great manors sometimes did) various sets of common fields, and therefore various groups of cultivators; one of these groups was the Aston group; the owner of this great manor created various sub-manors by interposing various mesne lords between himself and the cultivators. Let us say, for example, that the king has the manor of Bampton, he gives part of it to Imbert de Pugeys, part to Eynsham Abbey, part to the Dean of Exeter; each of the sub-manors thus created comprises part of the Aston group; the members of that group were then divided between various lords—no one court had a direct control over them all; some organization was necessary for the regulation of the course of agriculture, the definition of pasture rights and the like, and either by some definite treaty the lords created that organization of "the sixteens" which we see in the seventeenth century, or else they suffered it to grow up as a convenient machinery for preventing the disputes which would arise among their tenants, disputes which being inter-manorial could not have been determined by any manorial court. As to the

[1] Williams, *Rights of Common*, p. 87. "The hundred and manor of Bampton, which comprised all those three several manors, was a superior lordship."

few freeholding occupants of the Aston lands, if (as seems possible) they did not hold of any of these sub-manors, their presence might none the less be easily accounted for: if at any time after the passing of the statute *Quia Emptores* one of the lords enfranchised a yard-land, that yard-land would no longer be held of him, but would fall out of his manor.

One part of this hypothetical story is true. William the Conqueror had as part of the ancient demesne of the crown a great manor at Bampton (Bentone) worth the very large sum of £82 a year[1]. Out of this Henry III carved the Pugeys manor, by enfeoffing Imbert de Pugeys with thirty librates of land[2]. Then the same king granted the superior manor and the hundred of Bampton to William of Valence[3]. But in the face of such documents as have been accessible to me, it is not proved that either the Abbot of Eynsham's manor of Shifford or the Dean of Exeter's manor of Bampton-Deanery were held of the royal manor of Bampton. It is true that both the Abbot's men and the Dean's men had to attend the court of William of Valence; but then that court was a hundred court. The Abbot of Eynsham claimed the "villa" of Shifford under a charter of Æthelred the Unready, which confirmed yet earlier grants: but whether that charter comprised all or any of the Aston lands it would now be hard to say[4]. The case of the Exeter manor is

[1] D. B. I. 154 b.

[2] *P. Q. W.* 664.

[3] *P. Q. W.* 668; Giles, *History of Bampton*, p. 128.

[4] Kemble, *Cod. Dip.* No. 714 (III. p. 339). Shifford was given to the Abbey by Æthelmar, to whom it was given by Leofwin; King Edgar had given it to Brithnoth. See D. B. I. 155, where, for

somewhat clearer—the church of Exeter seems to have claimed it under a gift of Æthelstan[1], and we have a charter whereby William the Conqueror confirming a gift of Edwy gave to the church of Exeter a stretch of land at Bampton, Aston and Chimney[2]. If then we look for a time (I am far from saying we ought to do this) when the sixty-four yard-lands of Aston were all at the disposal of a single man, it is probable that we must go back far behind the Norman Conquest.

Still of course the question arises—Why should we not go back to an extremely remote age? And here it is that the argument from "survivals" shows its weakness. The case before us may be explained as readily by the hypothesis of an originally servile community which attained an unusual degree of freedom by being partitioned among various lords, as by the hypothesis of an originally free village upon which the manorial system has been clumsily superimposed. Then on the other hand we have no warrant for saying that our sixty-four arable yard-lands had any

reasons given in *Monast.* III. 1, the land appears as held by the Bishop of Lincoln. As Æthelred's book seems to treat the estate at Shifford as lying in a ring fence, as Domesday estimates this estate at but three hides, and as in Edward I's day the Abbot had at least twelve hides at Shifford apart from what he had at Aston, it seems probable that the Aston lands came to him in other ways, and in the *Monasticon* are notices of several charters giving him lands at "Estone." One virgate at Aston he held of Robert Pugeys, another he held in frankalmoigne "quo warranto nescimus."

[1] *R. H.* II. 690.

[2] This charter is No. 16 among the Exeter documents reproduced in Part II of the Anglo-Saxon MSS. (Ordnance Facsimiles). The land comprised in it seems to lie within a ring fence. See also D. B. I. 155.

existence as arable lands even at the date of Domesday Book. We read of Bampton and of Shifford, but it seems very doubtful whether this Aston is mentioned[1]. Is it not possible that the village or hamlet of Aston is of comparatively modern origin, that some time after the Conquest the lords of several neighbouring manors combined to "assart" a tract of waste land, partitioned it among their manors in such wise that each should have land of every quality—good, bad, indifferent—and for the settlement of their intermanorial affairs instituted an intermanorial congress of tenants or suffered such congress to institute itself? Such suppositions are easily made. Further research may at any moment disprove many of them; but others will grow in their places. The antiquary has always to be learning that an infinite number of meanings may be set on the mystical letters "A.D.L.L."

But the lessons that a prudent antiquary may learn from the village of Aston are not unimportant. In the first place we see that a cultivating group, and one which displays some unusually communal traits, may exist without a court capable of deciding disputes as to the titles by which the various members hold their shares. Some little power of imposing pecuniary penalties for breaches of customary rules may be requisite, will at all events be useful; but the power of imposing penalties, which is freely exercised in modern clubs of all sorts and kinds, must be carefully distinguished from a power of issuing execution for penalties, seizing the offender's goods or the like, and

[1] Besides this Aston there are at least three others in Oxfordshire —North Aston, Steeple Aston, and Aston Rowant.

it is not said that the Aston "sixteens" aspired to this latter, this coercive, power. At any rate, over questions concerning title they had no jurisdiction. This being so, what at first sight looks to modern eyes like a very remarkable communalism, becomes less communal when it is examined. Each member holds his arable land, his pasture rights, even his lot-mead by a several title. He does not hold them because he is a member of this "field-community"; on the contrary, he is a member of this community because he holds them, because he has come to them by inheritance, by purchase, by devise, or by the grant of a manorial lord. Thus we conclude that it is possible for a village community to exist and to go on existing for some centuries, and to exhibit all those peculiar features that we see at Aston, though it is not a jurisdictional community, or at all events has but very few and very slight jurisdictional powers. All this is so, though the acres lie intermixed in the open fields, though this acre is copyhold of one manor, the next acre copyhold of another manor, the next ancient freehold which, so far as any one knows, belongs to no manor at all.

But more, so I think, can be learnt. When we speak of a "survival" we seem to imply that the phenomenon in question, though now it be rare and curious, has in the past been common; what is abnormal in one age was normal in another. In every particular case however the inference, which is thus shrouded from view by a fashionable term, may be required to make itself explicit and may be put upon its defence. In any particular case our curio—be it potsherd, be it institution—may turn out to have always

been a curio, may turn out to have been from first to last as unique a thing as any thing can be in this imitative world. Now to say that so far as one's own reading goes, the Aston case stands alone, would—this I fully admit—be no very grave argument. Besides retorts of a more personal kind, it is open to the answer—and in this I can see some plausibility—that while from the thirteenth century onwards the proceedings of courts of law, even of very petty courts, have been diligently recorded and preserved in large numbers, the proceedings of such a body as the Aston "sixteens" would not be put into writing, or no great heed would be taken of the books in which they were noted. Reasons again might be given—I am not sure that they would be very good reasons—why these non-manorial village assemblies have left hardly a mark in such cartularies, monastic annals and Year Books, as have yet been published. But these attempts to shift the burden of the proof backwards and forwards, and to draw inferences from silence, are not likely to compass any very satisfactory conclusion. It seems to me, however, that of the rarity of any institution or arrangement which can in any degree affect men's legal rights, we have one good test. If it be not rare, the law will have an obvious place for it, and will know exactly what to make of it. Of course some arrangement, some mode of conducting business, some class of transactions may, as it were, stand outside the sphere of law for a considerable time. Its legal consequences remain uncertain, possibly there will even be doubts as to whether it be lawful or unlawful. So far from denying this, I think that just in this context we ought to

insist upon it. Litigious as Englishmen are and have been for many centuries past, a great deal will always be going on even in England about which the law, if I may so speak, will have not yet made up its mind; but I think that in such cases if we have not to deal with rarities we have to deal with novelties. I think, for example, that if at the end of the middle ages our law, our exceedingly conservative common law, has no obvious place for a certain institution, we must, until the contrary be proved, incline to the conclusion that this institution cannot have been both very ancient and very common.

And now returning to Aston, we will ask once more the question—it is far from being a frivolous question—Who owned these "hams" and "leyes of greensward" which "the sixteens" claimed to dispose of "at their discretion"? or, to be more technical—Who was seised of them? In whom were the freehold and the fee? Mr Horde, when he sought Sir Orlando's advice, observed that the sixteens, being no corporation, could have no legal estate in the said hams. Bridgman, one is happy to say it, found an answer—"If the custom be a good custom, as I take it to be, the same custom will give the officers an interest as incident to their offices and [such an interest] may belong to an office, as in the case of the Warden of the Fleet." The great lawyer has recourse to the notion of official property; the owners of these hams are the sixteens; not the community itself, but the officers of the community; each year the land passes from one set of sixteen co-tenants to another set of sixteen co-tenants, as the tenancy of the Fleet gaol and (so it seems) certain

satellitic shops passes from warden to warden. Now this may have been a very happy use of the only category that was at Bridgman's command, the only category by means of which the common law of his day could have done substantial justice to the men of Aston. Still we cannot but feel that its application to the facts in question is an artifice; an artifice worthy of a great lawyer, it well may be, an artifice that the courts may approve, and which will bring them to a much desired result; but still an artifice. Our "village community" is saved, because the relation in which its "archaic moot" stands to its land, is so like the governorship of a gaol.

That Sir Orlando had to fetch his analogy from a remote field seems plain enough; but to this we must add—so I think—that he had to find it in an unfertile field, and in one that had but recently been brought under cultivation. Of course in his day it was undoubted law that "land may be appurtenant to an office"; but if we look for the cases which illustrated this proposition, we shall, I believe, find very few. There is just one standing illustration of it which does duty in report after report and text-book after text-book—there is land appurtenant to the Wardenship of the Fleet. Now I think that we have grave cause for doubting whether this classical instance was a very old one; but I am more concerned to insist upon its extreme rarity than upon its novelty. Our mediaeval law had little, if any, room for "official property." Within the sphere of ecclesiastical arrangements, it had by slow degrees developed the notion of the "corporation sole." At first the saint owns the land that has been given to him; in later and more rationalistic times his

ownership is transferred to the personified "church"; and thence in yet later days it is transferred either to a "corporation aggregate" or to a somewhat analogous creature of the law, which here in England bears the odd title "corporation sole," while elsewhere it appears as the personified *dignitas* or *sedes*. But outside the ecclesiastical sphere, there has been no need, little room, for these feats of "juristic construction." Even the personification of "the crown" has been a slow process, and has never gone very far; he who would distinguish between "the crown" and the king, unless he be very cautious, is likely even in Coke's day to fall into "a damned and damnable opinion," is likely in earlier times to lose his head as a traitor. We got on well enough without official property, without "corporations sole" of a temporal kind. The non-hereditary royal officer, whose office involved an occupation of or a control over land, was seldom, if ever, conceived as being the owner, or to speak more accurately, the freeholder, of that land; he was but its *custos*, and the freehold was in the king. On the other hand, the offices—they were chiefly ornamental offices—which had become hereditary—were but seldom connected in any inseverable fashion with the tenancy of lands, save where the discharge of the office was regarded as the service due from the land, and in that case it was the office that was appurtenant to—or rather that was due from or issuing out of—the land, and not the land that was appurtenant to the office. I cannot but think that there must have been some highly peculiar and almost unique facts in the case of the Warden of the Fleet, which prevented it from falling into one

of these well-known categories. But at any rate the title "land appurtenant to an office" has, so far as I can see, been from first to last somewhat of a *caput mortuum* in our books; and yet it is under this heading that Sir Orlando Bridgman is constrained to bring the case of the Aston villagers.

Could he have worked out his theory in the thirteenth century? I seriously doubt it. If "the sixteens" existed in the Aston of that age—and I am not denying that they did—most of them were unfree men. Would it not have been grotesque to attribute to men, who had but precariously customary rights in their arable virgates, the freehold in the accessory hams and leyes? And then is it not law that if my villain acquires a freehold, I may seize it and appropriate it? And what if the sixteen co-owners misconduct themselves and refuse to perform their "official" duties? Has thirteenth-century law any mode of bringing them to book? Court of Chancery there is none for the enforcement of a trust. The king will hardly be induced to set in motion those prerogative processes of administrative law which can be brought to bear upon royal officers, including the ruling officers of the boroughs. The villagers must trust to pure common law, to the writs that are "of course," and I think that in easily conceivable circumstances they will have the greatest difficulty in enforcing their custom against their freeholding "officers."

Now the argument that the law of the later middle ages had no place, or at all events no obvious and convenient place, for such an arrangement as is discovered at Aston, might, were it tendered as a direct

proof that such an arrangement cannot be very ancient, be encountered by the assertion that, on the contrary, the incapacity of the law to explain the phenomena may well be the incapacity of modern law to explain ancient phenomena, may well, in this particular instance, be the incapacity of feudal law to compass facts that belong to a prefeudal age, or (to use another set of terms) the incapacity of individualistic law to compass facts that belong to a communistic age. In the debate that would thus be raised much might be said on the one side and on the other; in particular, were I to enter into the discussion, I should like to raise the question whether it is very probable that these ideas of corporate ownership and official ownership, which we seem to see our English lawyers laboriously constructing in the fourteenth and fifteenth centuries, are in truth very ancient and even primitive ideas which have for a while been submerged and even destroyed by a flood of feudalism and individualism. But waiving this general question, we may yet learn a valuable lesson from the grave difficulties that our common law finds in the Aston case. Whatever we may think of very remote times, we seem to be driven to the conclusion that for several centuries before Bridgman's day arrangements similar to those which existed in this Oxfordshire village, had been exceedingly uncommon. The learned conveyancer, the future chief justice and lord keeper, does not tell Mr Horde that what is seen at Aston may be seen in a hundred other villages, that the ownership of land by "sixteens" or similar officers is a well-known thing; he does not suggest that the Aston community could make itself a corporation by

prescription; he sends his client all the way to the Fleet gaol for an analogy. But during the past centuries the open field system of husbandry had been, and in Bridgman's day it still was, exceedingly common, and this too in many a village which as a whole was not subject to any manorial control.

It seems to me that some of our guides in these matters are in danger of exaggerating the amount of communalism that is necessarily implied in the open field system of husbandry. We have of course the clearest proof that the system can go on subsisting in days when manorial control has become hardly better than a name, that it can subsist even in the eighteenth and nineteenth centuries. We have also, so I think, fairly clear proof that it can subsist from century to century in many a village that has no court, no communal assembly. No communal bye-laws and indeed no legal recognition of the communal custom are absolutely necessary for the maintenance of the wonted course of agriculture; the common law of trespass maintains it. As a matter of fact, a man cannot cultivate his own strips without trespassing on the intermixed strips of his neighbours. He must let them trespass on his land at the usual times and seasons, because at the usual times and seasons he will want to trespass on their land. The effect of this may be that his right to till his land as and when he thinks best will be much restricted; but the restraint will be set by the rights of other individuals, not by the rights or the bye-laws of a community[1]. In the village which

[1] *Report on Commons Enclosure, Parl. Papers*, 1844, vol. v. Qn. 4100, "The horses of one party ploughing, would unavoidably

has open fields we may see each of the neighbours owning his arable strips by a several title, enjoying his pasture rights by a several title. Even if there be lot-meads, each of these "moveable freeholds" may be held by a several title, and their rotation may be regarded as having been fixed once for all, and as being alterable by nothing short of an unanimous agreement or a statute of the realm. Open field husbandry has shown itself to be not incompatible with a very perfect individualism, a very complete denial that the village community has any proprietary rights whatever or even any legal organization.

This having been so in modern times, this (to all appearance) having been so throughout the later middle ages, are we quite certain that it has not been so from the beginning? I do not aspire to answer this question, still I cannot but think that some of our current theories are finding it too simple a question, are failing to notice the ease with which a common field husbandry, when once established by some original allotment of land, can maintain itself even though there be in the case nothing that we dare call a proprietary corporation or a self-governing community.

For my own part I cannot assume, as some in the

tread down and destroy the crop which was growing on his neighbour's land?" Mr T. S. Woolley—"Yes; it is almost impossible that land so intermixed should be cultivated with different crops; it becomes an almost necessary consequence that all must sow the same crops, and at the same time; unless all the lands be cultivated by one horse." This "almost necessary consequence" is one that is drawn by the common law of trespass.

heat of controversy seem apt to assume, that concerning the ancient history of the typical English village (I say "typical," for no one supposes that all our townships have had a similar history), we have just two theories to choose between and no more; that if we cannot accept as the normal starting point "great property," widespread servility and the Roman villa, we must begin by ascribing land-ownership to free village communities. The free village, the village which as a whole is free from seignorial control, I can somewhat easily believe in, for—so it seems to me—I can see many such a village in the pages of Domesday Book, many a village full of sokemen, who may fairly be described as free land-owners, though they have been commending themselves, one to this lord, another to that. Whether such a state of things is common or rare, typical or abnormal, a survival or a novelty—these are serious questions; but the village full of free land-owners we can readily conceive. On the other hand the village land-owning corporation, can we conceive this and carry back our concept into—I will not say archaic, I will say—Anglo-Saxon times? Did men distinguish between co-ownership (which in truth is just as "individualistic" as any several ownership can be) and ownership vested in corporations? Did they distinguish between the corporation and the group of corporators, between the *universitas* and the aggregate of *singuli*? Did the villager feel that when he reaped a crop, or turned out his beasts to pasture, he was exercising not a *dominium* but a *jus in re aliena*, that he was using land that belonged neither to him, nor yet to him and his neighbours, but

to a quite other person, an invisible being, a thought? Did he again distinguish between manifestations of proprietary right and manifestations of governmental power? Was he certain—are we certain—that when the village moot (if any village moot there was) prescribed a particular course of agriculture, it was exercising land-ownership and not merely governing a district, not merely behaving as a modern town council behaves when it decides what buildings may be set up within the limits of the borough? May it not again be that such communalism as we find in the ordinary village of later times is in a large measure the result of seignorial pressure? In fine, is it not very possible that the formula of development should be neither "from communalism to individualism," nor yet "from individualism to communalism," but "from the vague to the definite"?—England, owing to its theoretically perfect feudalism, may not be so good a field for the pursuit of these questions as some other countries in which they are being diligently discussed. There is all the more reason why we should expressly raise them and keep them before our minds; otherwise it may fall out that we shall turn history topsy-turvey, and attribute to primitive man many an idea that he could not for the life of him have grasped.

NOTES.

1. *Township-moot and Vestry.*

So far as I am aware our only authorities for the term "township-moot" are a very few charters of the Angevin kings, such as Richard's for Wenlock Priory (Eyton, *Shropshire*, III. 237), Richard's for Chertsey Abbey (*Monasticon*, I. 433), and John's for Chertsey Abbey

(*Rot. Cart. Joh.* p. 6), in which the grantees are freed "ab omnibus schiris et hundredis requirendis, et placitis et querelis, et hustingis et portmanemot et tunsipemot." This will seem very remarkable when we consider the hundreds and thousands of instances in which the English names of other local assemblies, shire, hundred and halimot, are mentioned. The occurrence of the "tunsipemot," in close connexion with the "hustings" and the "portmanemot" suggests, so I think, that it was chiefly within the cities and boroughs that an assembly called a "townshipmoot" was to be found. But I am quite ready to believe that a manorial court sometimes bore this name. Often enough a manorial court was as a matter of fact a court of and for a vill. In Latin it will be called *Curia villae de X*, and, since we know that down to the end of the middle ages the word "moot" was the common English equivalent for "curia," it would be somewhat strange if a manorial court was never called a "townshipmoot." But though this be granted, we are still far enough from the proposition that every township as such has a moot, while the leap from the "townshipmoot" to the vestry seems to me a most perilous feat. After weighing all that has been said to the contrary by that able and zealous pioneer of history, Mr Toulmin Smith, it still seems to me that the vestry is a pretty modern institution; that we shall hardly trace it beyond the fourteenth century, that it belongs to the parish, a purely ecclesiastical entity, not to the township; that it is the outcome of the church rate, which in its turn is the outcome of the appropriation of tithes and the poverty of the parochial clergy; that the churchwardens also are pretty modern. Gradually the vestry may take upon itself to interfere with many things; the manorial courts are falling into decay, and the assembly which can impose a church rate may easily aspire to impose other rates; but the germ of the vestry is an ecclesiastical germ. The vestry belongs to the parish, and the temporal law of the thirteenth century knows nothing of the parish. If we take up a plea roll of that period we shall find the *villa* mentioned on almost every membrane; of the *parochia* we shall read no word unless we happen to stumble upon a dispute about tithes.

2. *The Warden of the Fleet.*

The Wardenship of the King's House and the Fleet Gaol was a hereditary office which was held in fee. In Edward I's day it was so held by one Ralph of Grendon (*Calend. Genealog.* I. 294). In Edward IV's day it seems to have been so held by a woman, Elizabeth Venur (Y. B. 4 Edw. IV, f. 6. Pasch. pl. 7). Charles II made a grant of the fee simple; Mr Huggins, of infamous memory, held it for two lives. I cannot say that never during the middle ages was it held at the king's will, but I believe that the well-known dicta about it refer to an office that is usually held in fee simple by one who not unfrequently demises it for lives or for years. I do not know of any very ancient dicta about it; but in the Year Books of Henry VII we come upon the now familiar example more than once. "Land may be appendant to an office as in the case of the Warden of the Fleet" (1 Hen. VII, f. 29. Trin. pl. 6). This is said in a case which seems to show that the same doctrine had been, and could be applied to some other offices, such as the wardenship of certain royal forests. "The Wardenship of the Fleet has land annexed to it, and this passes by grant of the office without any livery of seisin of the land" (8 Hen. VII, f. 4. Trin. pl. 1). "It has often been seen that the Warden of the Fleet has pleaded that he was seised of the office of the Fleet by the king's grant, and that he and all those whose estate he has have used to take a certain sum of money from everyone who had a place in this Hall for the sale of his merchandise" (12 Hen. VII, f. 15. Pasch. pl. 1). I should not be surprised if the shops in Westminster Hall were the main foundation for the whole doctrine. There, under the very eyes of the justices, the warden, his deputy or lessee, was taking rent from the occupants of the stalls. One had to ascribe to him some sort of interest in those stalls, but this sort had to be an odd sort, for it would have been impossible to hold that he was seised of the soil on which the king's palace was built. He has an official interest in the shops; it is a freehold interest, for he holds his office in fee or for life; and yet he is not seised of the land. There may have been some forest wardens, who were in much the same position, having a right to let land and pocket the rent arising therefrom, though the king was seised of that land; but I do not believe that the case was common. For the more part in our mediaeval law the link between land and office is tenure by serjeanty; a man holds the land by the service of filling the office.

THE HISTORY OF A CAMBRIDGESHIRE MANOR[1]

It is not often that one has the good fortune of being able to study a series of mediaeval documents at one's own time and in one's own house; but this was given to me by the late Mr O. C. Pell, lord of the manor of Wilburton, in the county of Cambridge. He committed to my care a splendid line of court and account rolls which, though there were some gaps in it, stretched from Edward I to Henry VII, and now, the consent of his successor, Mr Albert Pell, having been very kindly given, I am able to lay before the readers of this Review a fairly continuous history of a particular English manor during the later middle ages; and to me it seems that at the present time we have some need for histories of particular manors, for I am convinced that the time has not yet come when generalities about *the* English manor and its fortunes will be safe or sound.

The manor of Wilburton, on the edge of the fen, formed part of the ancient estates of the church of Ely. It is fully described in two "extents," the one made in

[1] *English Historical Review*, July, 1894.

1221, the other in 1277[1]. Of these its late lord, who was deeply interested in its history, gave an account in the Proceedings of the Cambridge Antiquarian Society[2]. I shall here speak of them very briefly, for they are but the prelude to those documents which are the theme of this essay.

The two extents begin by describing the demesne land—that is, the land which is in the lord's own hand. In the extent of 1277 he has 216 acres ("by the lesser hundred and the perch of 16½ feet") of arable land, and besides this he has meadow land and a wide expanse of fen. In the next place an account is given of the holdings of the "freeholders" and "hundredors" (*de hundredariis et libere tenentibus*). Of these there are nine, one with 16 acres *de wara*, four with 12 acres *de wara* apiece, two with 6 acres apiece, two with 2½ acres apiece. This arrangement remained constant during the half-century which elapsed between the two surveys. These "freeholders and hundredors" pay small money rents—the holder of 12 acres pays 2*d.* a year—they owe two days' ploughing in Lent and two in winter, for which they receive 1*d.* a day; they have to attend the great boon day in autumn. They owe suit to the court of Wilburton and must attend the hundred court, which is in the bishop's hand; hence their designation as *hundredarii*. In the later extent it is expressly stated that they owe a heriot (best beast, or 32*d.*), a fine for marrying their daughters (32*d.*), leyrwite and tallage; the *gersuma*, or

[1] MS. Cott. Tib. B. 2; Claud. C. 11.

[2] *Report and Communications*, 1887, p. 162.

fine for marrying a daughter, is mentioned in the earlier extent.

In the court rolls the existence of freeholders can from time to time be detected. They owe suit of court; they are often amerced for not doing it or compound for it with a small sum of money. There are entries also which show that they still owe ploughing service and that some of them are very lax in performing it. Again, descents and alienations are sometimes presented and the heriot is still due. But on the whole these freeholders seem to have played only a small part in the manor; the names which occur on the court rolls are chiefly those of customary tenants.

In the extents the description of the freehold tenements is followed by the heading "De Operariis et Plenis Terris." The full land (*plena terra*) consists of 12 acres *de wara*. Of this thorny phrase *de wara* I will here say nothing—its interest lies in a remote past—save this, that as a matter of fact the full land at Wilburton really consisted of 24 acres. Of these full lands there are fifteen and a half. The holder of such a tenement pays 19*d.* a year—12*d.* as wite penny, 6*d.* as sedge silver, 1*d.* as ward penny. From Michaelmas to Hokeday he does two works a week according to the earlier survey, three according to the later; from Hokeday to Lammas three works a week, from Lammas to Michaelmas five works a week; and besides all this there is a good deal to be done which is not computed as part of the regular week work. On the whole the services, which are more elaborately described in the later than in the earlier of the two surveys, and

which perhaps have become heavier during the interval, are of the familiar type[1].

Then there were 10½ cottage tenements, which even in Henry VII's day still preserved a relic of the Domesday terminology in the name "cossetles." The holder of each such tenement paid *7d.* a year—*4d.* for wite pound, *2d.* for sedge silver, *1d.* for ward penny—and did two works in every week. The holders of the full lands and the cottiers owe suit to the lord's mill, a fine for marrying their daughters, leyrwite and tallage; they cannot sell colt or ox without the lord's leave.

We already see that a basis has been fixed for the commutation of labour into money. Every "work" in autumn is, we are told, worth one penny, and out of autumn every work is worth a halfpenny; we also see that one half-*cotaria* is held by a tenant who "at the will of the lord" pays *2s.* a year in lieu of his labours; but the profit of the manor is reckoned mainly in "works." In the way of money rents the lord draws but *31s.* a year from the manor, besides some small dues; on the other hand 377 3½ "works" are owed to him, by a "work" being meant the work of one man for one day.

From 1221 down to the very end of the middle

[1] As it seemed that in 1277 the bishop was exacting from the Wilburton tenants a greater amount of "week work" than he exacted in 1221, I looked through some of the extents of other manors given in the two Cottonian manuscripts, and I found the same phenomenon at Lyndon, Stretham, and Thriplow. Apparently in all these cases the bishop had put on an extra work-day in every week between Michaelmas and Hoketide—and this in the thirteenth century. These Ely extents ought to be printed as soon as possible.

ages the manor seems to have kept with wonderful conservatism what we may call its external shape—that is to say, at the end of this period the distribution of the customary tenements into "full lands" and "cossetles," or cottier tenements, was still preserved, though the "full land" was often broken into two "half-lands."

At the beginning of the fourteenth century we see that some of the "works" were done in kind, while others were "sold to the homage." Thus there is an account for seventeen weeks in the winter of 1303–4 during which the temporalities of the see of Ely were in the king's hand; in this the bailiff and reeve, after charging themselves with the rents of assize (i.e. the fixed money rents), proceed to account for 10*s.* 10*d.* for 260 "winter works sold to the homage at the rate of a halfpenny per work." In a later part of the account we see how this number of "works" is arrived at:—the officers account for 1385 works arising from 15½ "full lands" and 10 cottier tenements; they then set against this number the 260 works sold to the homage, 355 works sold to the executors of the late bishop, 57 works excused to the reeve and reaper, 38 works excused to the smith, 19 works due from a half-*cotaria* which has been let at a fixed rent, 14½ works excused on account of the Christmas holiday, 363½ works the amount of ploughing done, 258 works the amount of harrowing done, 20 works in repairing the ditch round the park at Downham, thus getting out the total of 1385 works.

A little later comes a series of accounts for some consecutive years in Edward II's reign. The basis of

these accounts, so far as works come in question, is that 2943 winter and summer works, valued at a halfpenny apiece, are due, and 845 autumn works valued at a penny. These numbers seem subject to some slight fluctuations, due to the occurrence of leap years and other causes. Then the accountants have to show how in one way or another these works have been discharged, and in the first place they must account for "works sold." In the year ending at Michaelmas 1322 the accountants charge themselves with the value of 1213 winter and summer works and 60½ autumn works which have been "sold"; in the next year with the value of 1297½ winter and summer works and 170½ autumn works; in the next year with the value of 1496 winter and summer works and 149 autumn works; in the next year with the value of 1225½ winter and summer works and 218½ autumn works; in the next year with the value of 1023 winter and summer works and 247½ autumn works; in the next year with the value of 1381 winter and summer works and 63½ autumn works. In these and in the later accounts it is not usual to state to whom or in what manner these "works" were "sold"; but there can be little doubt that they were sold to those who were bound to do them—that is to say, when the lord did not want the full number of works he took money instead at the rate of a halfpenny for a winter or summer work and of a penny for an autumn work. The phrase "works sold to the homage," which occurs in the accounts of Edward I's time, may perhaps suggest that the whole body of tenants were jointly liable for the money which thus became due in lieu of works.

It will be seen that the number of "works sold" does not amount to half the number of works due. How were the rest discharged? In the first place some were released; thus the reeve, the reaper, and the smith stood excused; and then again holidays were allowed on festivals; thus the occurrence of the feasts of St Lawrence and St Bartholomew serves to discharge a certain number of the autumn works. But very many of the works were actually done; thus in one year 203 "diets" of ploughing between Michaelmas and Hokeday discharge 406 works; in the previous year 377 works had been discharged in similar fashion, in the year before that 406, in the year before that 420½. Ploughing, mowing, harrowing, and the like are always wanted; other works are accounted for now in one fashion, now in another. In one year 26 works were spent on the vineyard at Ely, in another 3 works were spent in catching rabbits; but on the whole the *opera* are laid out in much the same manner in each successive year.

I have examined the accounts for the last six years of Edward II's reign; their scheme is as follows: the accountant is the reeve; his year runs from Michaelmas to Michaelmas. He begins by debiting himself with the arrears of previous years. The next item consists of "Rents of Assize." These are the old money dues payable by freeholders and customary tenants; they amount to no great sum—about £2—but show a slight tendency to increase, owing to the "arrentation" of some of the minor services; for instance, 19*d.* is accounted for in respect of a release of the duty of collecting sticks in the park at Somersham. Next

comes "Farm of Land," a single item of 32*s.* in respect of 24 acres of demesne land which have been let at a rent. By far the most important item is "Sale of Crops," a very variable item, fluctuating between £8 and £54. Then follows "Sale of Stock." Then comes "Issues of the Manor" ("Exitus Manerii"). Under this head the reeve accounts for the number of "works" that have been "sold," also on occasion for the price of fowls and turf. The "Perquisites of the Court" comprise not only the amercements, but also the fines payable on alienation of the customary tenements and the like. The last item consists of "Sales accounted for on the back of the Roll"; these seem to consist chiefly of sales of malt. The total income varies between very wide limits, rising to £66, falling to less than £20.

On the credit side the first heading is "Allowances" or "Acquittances." A sum of 3*d.* has to be allowed because the reeve is excused that sum from his rent. Under "Custus Carucarum" stand the cost of making and repairing ploughs, shoeing horses, and so forth. About 5*s.* per annum is spent in paying 2*d.* per plough per day for every one of the sixteen ploughs of the tenants engaged in the "boon ploughing" for winter seed and for spring seed. The "Cost of Carts" is sometimes separately accounted for; the cost of "Repairs of Buildings" is by no means heavy. Under "Minute Necessaries" fall the price of various articles purchased, also the wages of the only money-wage-receiving labourers who are employed on the manor —namely, a swineherd at 4*s.* 4*d.* per annum and an occasionally employed shepherd at 5*s.* a year.

"Threshing and Winnowing" are paid for as piece work. "Purchase of Corn" and "Purchase of Stock" are headings that need no comment. Under "Mowing and Harvesting" ("Falcatio et Autumpnus") we find no heavy charge; all that has to be paid for is the tenant's harvest dinner, and the wages during harvest of the reeve and "repereve." Sometimes under the head of "Forinsec" (or Foreign) "Expenses" occur a few small sums not expended directly on the manor.

The reeve then accounts for the money that he has paid into the exchequer at Ely, and then the account is balanced and generally leaves him in debt. Apparently the annual profit of the manor varied between very wide limits. The reason of this fluctuation is to be found chiefly in the sales of corn. The highest prices of the wheat sold in these six years are as follows:—

	s.	*d.*			*s.*	*d.*	
1321–2 .	12	0	per quarter.	1324–5 .	7	0	per quarter.
1322–3 .	11	0	„	1325–6 .	5	0	„
1323–4 .	7	2	„	1326–7 .	3	4	„

Such figures as these, though they may be familiar enough to economists, are worth notice, for they show us that however stable an institution the manor may have been from century to century, agriculture involved a very high degree of risk.

On the back of the account roll the reeve proceeds to account for the produce of the manor and the "works" of the tenants. First comes "Compotus Grangie" ("Barn Account"). The reeve has received so many quarters of wheat from the barn; so many have gone in seed, so many in provender for the

manorial servants, so many remain in the barn. Rye, barley, pease, oats, and malt have to be similarly accounted for; the account is checked by tallies between the reeve, the reaper, and the barn-keeper. There are four ploughmen and one shepherd who are *famuli manerii* and in receipt of corn, each of them getting one quarter per week during some twelve weeks of the year. Next comes "Compotus Stauri" ("Account of Live Stock"), under which heading the horses, oxen, and pigs are enumerated. Then under "Compotus Operum" ("Account of Works") the reeve has to show, as explained above, how some 3700 works have been discharged, the autumn works, worth a penny apiece, being distinguished from the winter and summer works, worth a halfpenny. Thus in one of these years he has to account for 814 autumn works; he does so thus:—

Excused to reeve, reaper, smith	58 works
Excused in respect of a cottary let at a rent	7½ ,,
Excused on account of festivals	58 ,,
Sold	246½ ,,
Reaping, binding, and stacking 128 acres at 2 works per acre	256 ,,
Carrying	96 ,,
Garnering[1]	22 ,,
Stacking pease	10 ,,
Carrying dung	58 ,,
	812

Thus out of this batch of works more than half have actually been done.

[1] *In bladis mayand' in grangia.* The word *mayare* is new to me.

Now, glancing at the manor as a whole, we see that to a very large extent it is still dependent on the labours of its villains. The whole amount received by way of rent is but £2. 10*s*., or thereabouts, while the price of works sold brings in some £3 or £4. Almost all the regular agricultural work, with the exception of threshing and winnowing, is done for the lord by his tenants. He is as yet no great "employer of labour" in the modern sense; wages are a comparatively trifling item in his accounts. He generally employs a hired swineherd and a hired shepherd, and during some part of the year he has ploughmen, who are paid in grain. But the main part of his ploughing, reaping, mowing, harrowing is done by those who are bound to do it by status or tenure.

From the reign of Edward III there are no accounts; but turning to those of Richard II's time we find that the theory of the account, so far as "works" are concerned, is still the same. It is now reckoned that there are 2970 winter and summer works, worth a halfpenny apiece, and 813 autumn works, worth a penny apiece, to be accounted for. Some of these works are "sold," some not sold; thus in the year ending Michaelmas 1393 we find 183 works of the one class and 93 of the other class accounted for as sold. The number of works sold varies much from year to year. Many hundred works are still done in kind; but the number so done has been diminished, because no less than four full lands and nine cottier tenements "are in the lord's hand" and have been let out at money rents. This has introduced into the account a new element—

namely, "Rent of Bond Land" ("Firma Terre Native" or "Firma Terre Nativorum"), which brings in about £9 a year. A large number of *opera* has, therefore, to be subtracted on this score, e.g. 528 winter and summer works in respect of the said 4 full lands and 836 similar works in respect of the said 9 cottier tenancies. Exactly when or how the change occurred the extant accounts do not show. Already in the first year of Richard II there were 3 full lands and 8½ cottier tenements let at a rent for short terms of years and doing no work. But by connecting the accounts with the court rolls we are enabled to infer that these lands were vacated by villains who fled late in the reign of Edward III; thus the first full land on the list is that of John Thorold, who fled in 1376 or thereabouts, and of whose flight the court rolls continue to talk for the next forty years.

Turning, therefore, to the court rolls, we find many entries which seem to show that during the last half of the fourteenth century and the first quarter of the fifteenth the lord had great difficulty in keeping and finding customary tenants on the old terms. Some examples shall be given.

(1364) J. W., who held a full land, has eloigned himself outside the dominion of the lord, and altogether relinquished the said land, which has, therefore, remained in the lord's hand for default of a tenant; N. R. now comes and takes the land. (1365) N. R., mentioned in the last entry, has now relinquished (*omnino reliquit*) the land; his goods are seized into the lord's hand; they include beasts, swine, household utensils, &c., valued at 33*s.* 10*d.*, exclusive of the corn. (1366) H. G., who held a half-land and cottage, has eloigned himself outside the lord's demesne; his goods and

crops are seized into the lord's hand. (1366) R. O., who held a full land, has eloigned himself and abandoned his land, taking with him a plough and a pair of quern stones, against the custom of the manor; let him be attached. (1370) J. C. held a cottage, but has relinquished it because of his poverty (*propter impotenciam*); so it has been seized into the lord's hand and is now let to J. G. for twelve years at a money rent. The tenement abandoned by R. O. is let in the same way. (1370) J. W. takes for twenty years a full land which is in the lord's hand for default of a tenant. In similar circumstances A. L. takes a half-land for twelve years. Several similar entries follow. (1371) S. T. takes for his life a half-land which is in the lord's hand for default of a tenant; he pays no fine, for he takes it unwillingly (*quia invito capit*). Other lands which are in the lord's hands are granted out provisionally until permanent tenants can be found. (1372) One full land, three half-lands, three cottages, and six half-cottages are in the lord's hand for default of tenants, but some of them have been temporarily let; tenants ought to be found for them, and let proclamation be made that any heir or other person who has any right in them do come and claim them. Proclamations to this effect are made at several successive courts. (1380) W. W., who held a messuage and a full virgate of customary land, has left the manor, waived his land, and carried off his chattels to Chesterton [which is ancient demesne]. J. M. removed the chattels for him, knowing him to be the lord's tenant. Let J. M. be distrained to answer for these chattels, and let a writ be sued out against W. W. [for being on the ancient demesne there can be no talk of seizing him]. (1384) W. S. surrenders a cottage and two acres of "native land," which he held for 5*s.* a year, for that this was too dear (*eo quod nimis cara*), as the whole homage testifies; it is granted to J. P. and his wife and their sequel at 3*s.* a year. A case of surrender follows, in which the new tenant is to pay 3*s.*, instead of 5*s.*, paid by his predecessor, the whole homage again testifying that the rent had been too high. (1387) It is ordered in many successive courts that a tenant be found for the lands lately held by J. A., which he has abandoned (*reliquit fugitive*). (1392) It is presented by the reeve that S. T., who holds a messuage and half a "cossetle," is unable to maintain the said tenement and do the services (*impotens est predictam terram et*

tenementum manutenere et defendere versus dominum); therefore the lord's officers must find a new tenant, and in the meantime answer for the issues.

Throughout the court rolls of Henry IV's reign cases continue to occur in which lands have been abandoned or "waived," and other cases in which rents are reduced. Thus (1401) it is presented that Agnes D., who holds a half-land, is unable to maintain it and do the services due to the lord, and that the jurors have provided R. N. to take the land; he is to pay 12*s.* rent instead of doing the services which Agnes did, and only pays 2*s.* by way of fine for admittance, because he is an unwilling tenant. The house is ruinous; the land is out of cultivation; one of his neighbours provides him with the requisite seed. (1409) Mariota, widow of J. N., who held a full virgate for life, has left the lord's domain, gone to Haddenham, taken a husband, and "waived" the land, so that it has come to the lord's hand. (1410) A cottier tenement formerly held at a rent of 4*s.* is granted out at a rent of 2*s.*

It is not necessary, perhaps not justifiable, to infer from this evidence that the customary tenants of Wilburton were in any absolute sense badly off, that they could not live and thrive upon their tenements. The true explanation may be, not that they were in distress, but that they saw a more attractive prospect elsewhere. An increased demand for hired labour and a consequent rise of wages may have been the forces which drove the peasantry to desert their holdings. Unfortunately there are neither accounts nor court rolls which testify to the immediate effects of the Black Death; but, so far as I can see, the bishop's

difficulty in finding tenants, who will take the full lands on the old terms, begins at a somewhat later time and thenceforth increases.

Nor need we suppose that none of the tenants were contented with their lot. During the same period we find cases in which an heir or surrenderee is willing to promise the old services and to pay a fine on admission. To give a fair idea of the situation I will make notes of the various entries which relate to changes among the tenants of the 15½ full lands between 1364, when the court rolls begin, and the accession of Henry of Lancaster.

(1364) William Starling surrenders half a full land to the use of John Osbern. John Walter, who held a full land, late that of Andrew Cateson, has eloigned himself and relinquished his land; Nicholas of Roydon takes it, to hold at the accustomed services. (1366) Nicholas of Roydon has relinquished a full land; it is seized into the lord's hand. Aubin Willay has eloigned himself and relinquished one half-land; Henry Greneleaf has relinquished another. (1367) Richard Leycester takes the half-land formerly Aubin Willay's, to hold at a rent of 13*s.* until a permanent tenant can be found. (1367) Robert Osbern, who held a half-land, has deserted it. (1368) There are now in the lord's hand for default of tenants a full land late of Nicholas of Roydon, a full land late of John Thorold, a full land late of Robert Osbern, a half-land late of Aubin Willay, a half-land late of Henry Greneleaf, and two cottage tenements. (1369) Robert Tates takes the full land of Nicholas of Roydon for a term of seven years; he is to pay 5*s.* rent and to spend 2*s.* a year on improvements; he pays a fine of 3*d.* (1370) John Frost takes the half-land late of Robert Osbern for a term of twelve years at a rent of 13*s.* 4*d.*; he pays a fine of 6*d.* Aubin Willay takes as tenant for life a half-land, seemingly that which he relinquished in 1366. For half of it he is to pay a rent of 6*s.*; for the other he is to do the accustomed services. He pays a fine of 6*s.* John Atwell takes the full land

late of John Thorold for twenty years at a rent of 26*s.* 8*d.*; fine, 12*d.* Andrew Lessi takes the half-land late that of Edmund Prat, now in the lord's hand for default of a tenant, to hold for twelve years at a rent of 14*s.*; fine, 12*d.* Richard Cokayne takes the half-land late of Henry Greneleaf for twelve years at a rent of 15*s.*; fine, 12*d.* John Downham takes a half-land late that of Nicholas of Roydon for twelve years, rendering in the first year 4*s.* for half of it and the accustomed services for the other half, and afterwards the accustomed services for the whole; fine, 12*d.* (1371) Simon Teye takes a half-land, late that of Nicholas of Roydon, for his life at the accustomed services; no fine, for he is unwilling. John Downham, junior, takes a half-land, late that of Nicholas of Roydon, until a tenant shall be found who will do the accustomed services, to hold at a rent of 15*s.*; fine, 6*d.* There are now in the lord's hand a full land late of John Thorold, a full land late of Robert Osbern, a half-land late of Richard in the Lane, a half-land late of Henry Greneleaf, a half-land late of Nicholas of Roydon, besides seven of the cottage tenements

[*Hiatus in the rolls.*]

(1379) Walter Wiseman marries Alice, widow of Richard Sewyne, tenant of a full land, and is admitted for his wife's life; fine, 2*s.* (1381) Walter Wiseman has fled with his chattels to Chesterton; let a writ be sued out against him. The full land known as Thorold's is divided into four portions; one is granted to Richard Tates, another to Nicholas Dony, another to Richard Walter and John Scot, another to John Downham, senior, and John Parsce; in each case the tenure is for ten years at a rent of 6*s.* 8*d.*; fine, 6*d.* John Atwell has been holding the lands, but he could not do the services. (1382) Alice Cokayne surrenders a half-land, late that of Henry Greneleaf; it is granted to Aubin Willay and John Scot, at a rent of 14*s.*, to hold for their lives or until a tenant be found who will do the ancient services. (1382) Richard Downham marries Ellen, widow of John Newman, tenant of a full land; he is admitted; fine, 13*s.* 4*d.* The full land "waived" by Walter Wiseman is granted to John Arnold and Margaret, his daughter, for their lives,

and the life of the survivor, at a rent of 26*s.* 8*d.* and suit of court in lieu of all service. (1382) John Atwell surrenders a full land to the use of John Warwick, who takes it from the lord for a term of twelve years at the accustomed services; fine, 18*d.* (1384) The tenement relinquished by John Arnold is in the lord's hand; the manorial officers answer for the issues. (1385) Anna Foldyng surrenders a messuage and a full land, for which she has been paying a rent of 29*s.* 4*d.*, to the use of John Pontefyssche, who is admitted to hold at the same rent; fine, 8*s.*; John is to erect a chamber which Anna is to hold for her life, and is to demise to her an acre of the said land for life. (1386) Alice Cokayne, who held a full land for life as widow of Richard Cokayne, is dead; her son Andrew is admitted; fine, 6*s.* 8*d.* The tenement relinquished by John Arnold is still vacant. Nicholas Dony surrenders a parcel of a full land held by him at a rent of 6*s.* 8*d.* to the use of Richard Downham, who is admitted to hold to him and his at the said rent; fine, 12*d.* Simon Teye, who holds a half-land at the ancient services, is too feeble to do them; John Crombred takes the tenement to hold to him and his at the ancient services; fine, 6*s.* 8*d.* (1387) John Arnold's tenement is still vacant. (1389) John Downham, senior, tenant of a full land, is dead; his widow, Anna, is to hold for her life. Richard Downham and Ellen his wife, who in Ellen's right hold a full land, are too feeble to maintain the said land, and they surrender it, Ellen being separately examined; the lord grants it to Jacob Frost, to hold to him and his sequela at the accustomed services; fine, 3*s.* 4*d.*, and no more, for he is an unwilling tenant; and since Richard and Ellen have let the tenement go out of repair and cultivation, Jacob is to have from them two mares (*iumenta*), price 15*s.*, and four quarters of drage, price 8*s.*, and they are to hear no more about the waste of which they have been guilty. Aubin Willay, who holds a half-land jointly with John Scot, surrenders his moiety to the use of John Downham, junior, who is admitted to hold at a rent of 7*s.* until a tenant be found who will do the ancient services; fine, 8*d.* Richard Downham surrenders his share of Thorold's tenement to the use of William Breche and Catherine his wife, who are admitted to hold to them and their sequela, at the rent of 6*s.* 8*d.*, at which Richard held; fine, 8*d.* (1389) John Arnold's tenement is still vacant. (1390) John Atwell surrenders

a full land, since he is too feeble to maintain it, to the use of John Warwick, who is admitted to hold to him and his sequela at the accustomed services; fine, 6*s.* 8*d.* John Arnold's tenement is still vacant. (1392) John Arnold's tenement is still vacant. (1393) Anna, widow of John Downham, senior, who held a full land for her life, is dead; her son, John Downham, junior, is admitted to hold to him and his sequela at the accustomed services; fine, 6*s.* 8*d.* John Arnold's tenement is still vacant. (1396) At the last court it was presented that Aubin Willay, who held a half-land, had gone away and waived it. He is now present, and on being examined states that he refuses and relinquishes the land, and he surrenders it to the use of Richard Scot, to whom it is granted at a rent of 12*s.*, to hold to him and his sequela until some one shall come to take it at the accustomed services; and in case such a one appears, Richard is to have an option of continuing to hold at the said services, and should he reject this option is to receive from the incoming tenant the costs that he has laid out on the tenement; fine, 12*d.*, and no more, because he is to build. John Arnold's tenement is still vacant. (1398) John Crombred, who held a full land, is dead; his widow, Ellen, is admitted to hold for her life; no fine. Richard Dony and Ellen, his wife, late widow of John Crombred, who hold a full land for the life of the said Ellen, surrender their estate, and the lord grants the said land to them and their heirs at the accustomed services; fine 2*s.* Nicholas Dony, holder of a half-land, is dead; his widow, Agnes, is admitted to hold for her life at the accustomed services; no fine. (1399) John Starling, holder of a full land, is too feeble to maintain the land, and surrenders it; the lord grants it to John Newman, to hold to him and his sequela at the accustomed services; fine, 6*s.* 8*d.* The outgoing tenant "demises" to the incoming tenant farming utensils and tillages, and pays 60*s.* to the incoming tenant in respect of waste, which money the incoming tenant is to spend in repairs. John Arnold's tenement is still vacant.

On the whole, after reading these entries our conclusion will probably be that, in the then state of the markets for land, labour, and food, the value of a full

land copyhold of the manor of Wilburton, to be held by the ancient services, was extremely small, and was often accounted a negative quantity by the tenant—that is to say, he would rather not have the land than have it. Happy in their posterity were those who endured and got their services commuted into rents.

We may now compare the accounts of Richard II's reign with those of Edward II's. The scheme remains the same, but some new headings have made their appearance. The "Rents of Assize" now bring in £2. 3*s*. 0¾*d*.; there is here a trifling increase. The old "Farm of Land," which brought in £1. 12*s*., is replaced by two headings—"Farm of Demesne Land" and "Farm of the Natives' Land." Under the former there is an increase during Richard's reign from 6*s*. 9*d*. to £1. 1*s*. 11½*d*. A good many small pieces, two or three acres apiece, of the old demesne have been granted out by entries on the court roll at money rents of about 1*s*. per acre. Under the "Farm of the Natives' Land" fall the rents paid for those relinquished full lands, half-lands, and cottages which have fallen into the lord's hand and been granted out at money rents; the amount of these rents rises during the reign from £7. 10*s*. to near £10. "Sale of Corn" brings in some £20, and "Sale of Stock" a very variable amount. The "Issues of the Manor" bring in some £2 and the "Sale of Wool" some £3. The "Sale of Works" is separately accounted for, and at the beginning of the reign still brings in £3 or £4. The "Perquisites of the Court" have fallen rather

than risen, and cannot be relied on for more than £2. There are now some sundry receipts which may raise the total by £1 or £2.

The credit side of the account presents some new phenomena. Under "Acquittances and Decay of Rent" we find that the rents with which the reeve now debits himself are by no means pure gain. As tenements fall into the lord's hand and are let out at new rents—rack rents—the old dues have to be forborne; they are not at once struck out of the account, but appear on both sides: it is conceived that the old rents have "decayed." Under this heading also various allowances to the tenants are comprised, and a sum is thus shown which rises from 9*s.* to 15*s.* Other headings of discharge are "Purchase of Corn and Stock" (very variable), "Cost of Ploughs" (£1 to £2), "Cost of Carts," "Repair of Buildings and Gates" (usually less than 10*s.*, but rising to £5 when a new pigeon house is built), "Cost of Sheep and Fold" (less than £1), "Necessaries," "Threshing," "Servants' Wages" (there is a shepherd, sometimes a boy to help him; the whole of this item is 10*s.* to 15*s.*), and besides this there is the cost of the "Boon Ploughing" and of the "Harvesting" (the tenants' dinner).

An attempt has been made to bring out the net result of these accounts in a tabular form, in which are stated (1) the total of the items of charge, less arrears, (2) the total of the items of discharge, less money paid to the lord's use. During the fifteen years of Richard's reign for which accounts exist the excess of income over outgo varies between £23 and £50; its average is about £37.

	Year ending Michaelmas		
	1378	1379	1381
Income	47 1 10	45 18 2¼	57 12 0¾
Outgo	7 9 1¾	8 18 11¼	16 13 7
Balance	39 12 8¼	36 19 3	40 18 5¾
	1382	1384	1385
Income	49 19 10¼	48 2 0½	53 6 11
Outgo	12 17 1½	12 8 7	10 10 2½
Balance	37 2 8¾	35 13 5½	42 16 8½
	1386	1387	1392
Income	36 19 3¾	46 0 4¼	60 17 9½
Outgo	13 12 6¼	15 17 5¼	11 17 0
Balance	23 6 9½	30 2 11	49 0 9½
	1394	1395	1396
Income	40 13 11¾	57 18 6	45 7 4¼
Outgo	7 9 10¾	25 6 11¼	14 9 9¾
Balance	33 4 1	32 11 6¾	30 17 6½
	1397	1398	1399
Income	48 16 0¼	47 4 6½	61 8 1½
Outgo	7 7 9	9 15 11	10 10 2¾
Balance	41 8 3¼	37 9 7¼	50 17 10¾

On the back of the roll, as of old, appear the "Barn Account," "Stock Account," and "Account of Works." The "Account of Works" for the year ending Michaelmas 1381, the year which saw the peasants' rebellion, is as follows :—

Ploughings :—[He accounts for] 232½ diets of ploughing, proceeding from 15½ full lands for 30 weeks and two days between Michaelmas and Hokeday, falling this year on the last day of April, from each full land every other week one diet of ploughing reckoned as two works.

Total, 232½ diets.

Of which in acquittance of the reeve and reaper, each of whom holds a half-land in respect of his office, 15 diets; and in default of 4 full

lands in the lord's hand and at farm, 60 diets; and in acquittance of 10½ full lands which are in work, in respect of the fortnight at Christmas, 10½ diets; and in ploughing the demesne land for wheat seed, 12 diets; and for spring sowing, 17 diets; and for diets sold, 118 diets.

Balanced.

Somererthe:—15½ diets of ploughing, called Somererthe, proceeding from the said 15½ full lands; to wit, for each full land, 1 acre ploughed and reckoned as 1 work as per the terrier.

Total, 15½ diets.

Of which in acquittance of the reeve and reaper, each of whom holds a half-land in respect of his office, and of the 4 full lands in the lord's hand and at farm, 5 diets of ploughing; and in ploughing the demesne land 10½ diets.

Balanced.

Benerthe:—56 diets of ploughing proceeding from the *custumarii*, as well free as native, according to the teams that they yoke; in the year from each *custumarius* with all the beasts that he yokes, 4 diets, at 1*d.* per diet, as per the terrier.

Total, 56 diets, accounted for by ploughing of the demesne land.

Nederthe:—15½ acres of ploughing and harrowing proceeding from 15½ full lands at two seasons called Nederthe, from each full land at each season ½ acre ploughed and harrowed without food and without being reckoned as a work.

Total, 15½ acres.

Of which in acquittance of the reeve and reaper, each of whom holds a half-land in respect of his office, and of the 4 full lands in the lord's hand and at farm, 5 acres ploughed and harrowed; and in ploughing of the demesne land 10½ acres.

Balanced.

Winter and summer works:—[He accounts] for 2936¼ works proceeding from 15½ full lands and 10½ cottaries, from Michaelmas to Lammas (1 Aug.); from each full land 3 works per week and from each cottary 2 works per week; price of each work, a halfpenny.

Total, 2936¼ works; price of a work, one halfpenny.

Whereof in acquittance of the reeve and reaper, each of whom holds a half-land in respect of his office, 130½ works; and in default of the 4 full lands in the lord's hand and at farm, together with the full land of Walter Wiseman, which fell this year into the lord's hand at the end of November, 498½ works; and in default of the 8½ cottaries in the lord's hand and at farm 639½ works, and in acquittance of 10½ full lands which are *in opere* for 147 diets of ploughing, arising from the same as mentioned above, at 2 works per diet, 294 works; and in acquittance of the said 10½ full lands which are *in opere* for "somererthe" as per the terrier, 10½ works; and in cutting 760 bundles of thatch, called lawthatch, among the full lands that are *in opere*—to wit, each 100 bundles reckoned as 1 work—9 works; in cleansing wheat and rye for seed, 12 works; in harrowing the demesne land for sowing wheat and rye, 46 works; in making a new *murs*[1] for enlarging the lord's sheepfold, 37 works; in covering the same sheepfold, 32 works; in cutting the brushwood in the grove at Hadenham for inclosing the gardens, rabbit warren, "et le ponyerd," 36 (?) works; in aiding the carrying of the said brushwood to the carts which had been brought there, 6 works; in aid in "shredding" (*shridando*) of the said brushwood at the rabbit warren at Wilburton and drawing it inside, 12 works; in securing the ditch round the said warren, 3 works; in carrying dung outside the manor to the fields within the Christmas fortnight, 40 works; in repairing the wall round the manor, which had fallen down, 61 works; in scouring the ditch round the ponyard, 13 works; in digging the lord's vineyard at Ely, 13 works; in harrowing the lord's land for spring sowing, 102 works; in breaking the ground for the same sowing, 22 works; in carrying pease from the rick in the manor to the barn for threshing, 6 works; in weeding the lord's corn, 60 works; in shearing 173 sheep of the lord, 32 works; in scouring the ditch round the park at Downham, 15 works; in mowing, 7a. 3r. of meadow in Emedwe, 20 works; in cutting, binding, and shocking the forage there, 20 works; in mowing 24½ acres in Landmedwe, 38 works; in making the hay there, in addition to the help given by the servants, 38 works; in carriage of the said forage and hay with two carts for two days, 20 works; in stacking the

[1] I can only read the word thus.

forage and hay in the manor, 8 works; in collecting dung in the manor in July, 6 works; in winnowing 161 qrs. 2 bus. of divers grain of the issue of the barn, as above, besides the 30 qrs. of barley for malting, 62 works; and in works sold, 484¾ works; and in 23½ works upon the account.

Balanced.

Autumn works:—[He accounts] for 814 works proceeding from the said 15½ full lands and 10½ cottages from Lammas to Michaelmas, during 8 weeks and 3 days, during which each full land works 5 days per week—to wit, Monday, Tuesday, Wednesday, Thursday, and Friday—and each cottaria works two days per week on days chosen by the bailiff.

Total, 814 works; price of each work, one penny.

Of which in acquittance of the reeve and reaper, each of whom holds a half-land in respect of his office, 41 works; and in default of 4 full lands in the hands of the lord, and at farm, 164 works; and in default of 8½ cottaries in the hands of the lord and at farm, 144½ works; and in acquittance of the 10½ full lands which are *in opere* for two festivals falling on their work days within the said time—to wit, the Assumption of St Mary, on a Thursday, and the Decollation of St John, on a Thursday [21 works]; and in reaping, binding, and shocking 96½ acres of divers grain at two works per acre, 193 works; and in carrying the lord's corn, 28 works, besides the help of the manor carts; and in stacking the lord's corn, as well in the barn as outside, 12 works; and in driving the lord's plough while the servant (*famulus*) of the manor was thatching a rick of pease, 3 works; and in carrying dung out of the manor, 38 works; and in works sold, 169½ works.

Balanced.

We see, then, that at the very end of the fourteenth century many of the old "works" were exacted. In some years more were "sold," in some less. In the year ending Michaelmas 1397 only 8 out of 2970 winter and summer works were sold: some 800 were actually done; many of the others were discharged by

the fact that four of the full lands and no less than ten of the cottage tenements had fallen into the lord's hand and had been let by him either permanently or temporarily at money rents. And on the whole the economy of the manor is far from being an economy of cash payments. The lord is no great payer of wages. For the regular field work he has no need of hired labourers; his only permanent wage-receiving hind is a shepherd, but there are ploughmen who receive allowances of grain.

Passing on now to Henry IV's reign, we find that the old mode of reckoning is still preserved. There are still 2970 winter and summer works due, but 5 full lands and 10 cottier tenements have fallen into the lord's hand and bring in nothing but money; more than £10 has now to be accounted for as "Rent of Bond Lands," and a proportionate number of works has to be subtracted. Of the other works some are sold; in one year 204 of the winter and summer works are sold, while 114 have been discharged by harrowing. In 1407, however, the basis of the account was changed; it became a recognised fact that 6 full lands were no longer *in opere*, and the total number of winter and summer works to be accounted for was reduced to 1188, and that of autumn works to 378.

A great change seems to have taken place soon after this, during a period for which we have no accounts. In the first year of Henry VI (1423) the "Rent of Bond Lands" has risen to £22. All the "works" seem now to be released (*relaxantur custumariis domini*) except the boon ploughing:—76 "diets" of ploughing due from the customers, whether free or

bond. Very shortly after this, in or about 1426, another great change was made. The demesne of the manor, containing 246 acres of arable land and 42 acres of meadow, was let to farm at a rent of £8, and the demise of the land which had been actually in the lord's hand seems to have carried with it the right to the ploughing service; that service, therefore, no longer concerns the bishop while the lease lasts (*nichil hic quia conceditur firmario terre dominice cum firma sua*). The demesne land is let *cum operibus et consuetudinibus omnium custumariorum operabilium.* This soon leads to a great simplification and abbreviation of the accounts, an abbreviation to be measured in feet. The receipts are now the old assize rents, the rent of the demesne, the rents of the bond lands, the perquisites of the court; the *opera* are no longer brought into the account, and the purchases and sales of stock and crops disappear, for these of course concern the *firmarius*, not the lord. The *firmarius*, it may be noted, is just one of the men of the vill, one of the copyholders, as we now may call them; in the first instance he is the same man who is acting as reeve.

Thenceforward the bishop seems to have been able to keep the demesne land in lease, now one and now another of the copyholders taking it for a term of years: thus under Edward IV it was let for 16 years at a rent of £7. It is always recognised that the subject of this demise comprises "the customs and works of the customary tenants of the lord." Meanwhile the "Rent of Bond" or "Natives' Land," which has declined from £22 to about £17, remains constant.

Under Henry VII the situation is but little altered; the bond land brings in its £17, the demesne land £8, the demises of the latter are still described as including "all the works and customs of the customary tenants of the lord."

The evidence, therefore, seems to point to a great change under Henry V (1413-22). In the last year of Henry IV the rent of bond lands is entered at £11. 5*s.* 6*d.*; it is still reckoned that 1056 halfpenny works and 336 penny works are due; many of these are actually done in kind, though some are "sold." When the accounts begin again under Henry VI the rent of bond lands is £22. 2*s.* 10*d.*, almost exactly double the old amount, and all the works that are accounted for are 76 diets of ploughing. This change was immediately followed by another—namely, the letting of the demesne—the *scitus manerii*, as it is sometimes called—together with the benefit of whatever *opera* remained uncommuted. Whether the commutation under Henry V was originally regarded as more than a temporary or revocable measure does not appear; practically it seems to have been a final step.

Two cases of commutation which occurred in the reign of Henry IV are noticed on the court rolls. J. N., who holds a full land by services and customs, has requested the lord that he may have his land at farm and not for customs and services, and the lord, seeing his weakness and poverty (*inopiam et debilitatem*) of his special grace has granted that he may hold his land at farm; and upon this comes J. N. and takes the land to hold to him and his by the rod at the

will of the lord, according to the custom of the manor, rendering yearly to the lord 20*s.* rent for all labour services to the said lord belonging, and he gives the lord 2*s.* The other case is of a similar character: the lord of his special grace grants to J. D. a half-land, to hold to him and his sequela at a rent of 12*s.* for all services and customs, which land the said J. D. hitherto held by services and customs. It is specially noticed in this case that no fine (*gersuma*) is taken for this new grant.

Then, as already said, we find that in the first year of Henry VI (1422–3) all the customary tenants are paying money rents. It may be interesting to note the fate of the full lands.

The reeve accounts for 26*s.* 8*d.* from John Downham and his fellows for the full land late of John Thorold.

For 13*s.* 4*d.* from Andrew Somerset for a half-land.

For 13*s.* 0*d.* from Thomas Stoney for a half-land, formerly Pratt's.

For 12*s.* 0*d.* from Simon Dauntre and William Philip for a half-land, formerly of Henry in the Lane, demised to them for life.

For 13*s.* 0*d.* from John Downham, senior, for a half-land, formerly of Henry Greneleaf.

For 26*s.* 0*d.* from the full land called Sewyne's, demised to various tenants.

For 12*s.* 0*d.* from Robert Scot for a half-land.

For 12*s.* 0*d.* from Robert Newman for a half-land demised to him and his.

For 12*s.* 0*d.* from Thomas Downham for a half-land demised to him and his sequela.

For 24*s.* 0*d.* from John Newman for a full land.

For 24*s.* 0*d.* from John Downham, senior, for the works of a full land recently released to him.

For 24*s.* 0*d.* from Andrew Cokayne for the works of a full land recently released to him.

For 24*s.* 0*d.* from John Frost for the works of a full land recently released to him.

For 24*s.* 0*d.* from John Downham for the works of a full land recently released to him.

For 24*s.* 0*d.* from Richard Dony for the works of a full land recently released to him.

For 24*s.* 0*d.* from Andrew Frost for the works of a full land recently released to him.

For 24*s.* 0*d.* from Andrew Lessy for the works of a full land recently released to him.

For 24*s.* 0*d.* from Jacob Frost for the works of a full land recently released to him.

For 24*s.* 0*d.* from John Warwick for the works of a full land recently released to him.

Thus the basis of the commutation effected under Henry IV and Henry V seems to have been 24*s.* for the full land—that is to say, a shilling per acre with the messuage thrown in. During the fourteenth century the lord seems to have been able to obtain a higher rent—namely, 26*s.* 8*d.*—for the full land, and 13*s.* 4*d.* for the half-land. But even 24*s.* was too high a rent to be permanently maintained; before the end of Henry VI's reign it had been very generally reduced to 20*s.*, and the total "Rent of Natives' Land" had fallen from £22 to £17. It might be an anachronism to say that these copyholders of the fifteenth century were paying "rack rents," but they were paying "the best rents that could reasonably be gotten."

When once the commutation has been effected and the demesne demised to a farmer, the manorial accounts cease to have any great legal interest. The lord of the manor has, in effect, become a landlord of the modern type. It can be no part of my undertaking

to trace the ups and downs of his income; many of its items were now irrevocably fixed, while the rent that could be obtained for the demesne varied from time to time and lease to lease. On the whole his income seems to have fallen. About the years 1428 to 1432 the excess of income over outgo generally amounts to £30 or little less; thirty years later it has fallen to some £25, and it seems never to recover from this fall. An abstract of the account for the year ending Michaelmas 1507 will show how the matter stood at the beginning of another century.

Debit.	£	s.	d.
Rents of assize	2	3	2¾
Rents of "Natives' Land"	17	16	1
Rents of pieces of demesne land	1	6	10
New rent for small parcels of demesne		1	8
Farm of the manor	8	0	0
Issues of the manor (only one item, for liberty of fold demised)		1	0
Perquisites of court		15	8
Total	30	4	5¾

Credit.	£	s.	d.
Allowance and decay of rent		14	0
Repairs of barns	1	0	0
Paid to the lord's use	28	8	6¾
	30	2	6¾
Balance due		1	11
Total	30	4	5¾

The manor was granted by Bishop Martin Heton to Queen Elizabeth in the forty-second year of her reign (1599–1600). This appears from a survey of 8th Aug. 1609, when the manor was in the hand of

King James. Its revenue was then estimated as follows:—

	£	s.	d.
Rents of assize	2	3	2¾
Rents of assize of "native tenants"	17	16	1
Farms of demesne lands in the occupation of tenants	1	16	10
New rent		1	8
Issues of the manor		1	0
Farm of the "scite of the manor" let for a term of years by indenture	8	0	0
Perquisites of the court upon an average	3	9	11¼
Total	33	8	9

But the surveyor adds, "Ther is yearly allowed and deducted out of the value aforsayde for a decay of rente within the sayde mannor the some of xvij.^{s} 9^{d} ob. but whether it may be repayred or not I have noe knowledge."

A good many of the ancient tenements have still to all appearance kept their shape; they are still held as integral wholes, though several are sometimes in the hand of one man. The full tenement, or "virgate," still pays in general a rent of 20*s.*; it consists of a house and curtilage, of twenty-four acres of arable scattered about in the common fields, of a few acres of meadow, and of rights of common of pasture. What is more, it still owes some labour service, the remains, so it would seem, of the old "boon works." Against the names of several of the tenants, in addition to the amounts of their rents, is set "*j. opera seminand' tritici et alt' pro seminand' ordei*," "*j. opera tritici alt' ordei ut supra*," "*iiij. opera ut supra*," "4 daye workes *cum*

carucca firmarii," "*iiij. opera cum caruca.*" The benefit of these is enjoyed by the farmer (*firmarius*) of the demesne, of the *scitus manerii.* But while rents have remained fixed, the annual values of the copyholds, reckoned in money, have in all probability increased enormously. Against each tenement is set not only its rent but what seems to be an estimate of the amount beyond its rent that it might be expected to bring in if let at a rack rent. Thus of one small tenement the rent is 12*d.*, while after this stands *ann' val' dimittend'* 9*s. ultra r*—that is, the annual value of it if demised at a full rent is 9*s.* beyond the rent actually paid; in other words, the actual rent is but a tenth of the possible rack rent. In some cases the virgate which brings in £1 per annum is reckoned as worth £6 or £7 more. Even the demesne seems to be held by the termor on very beneficial terms (probably he has paid a substantial fine); as of old he pays but £8, while the annual value of his tenement seems to be estimated at £66. 13*s.* 4*d.* From a copy of the deed whereby King James sold the manor it would seem that he got £1261. 18*s.* 4*d.* for it, an absurdly large price if the purchaser was going to get but £33 a year. But whatever the purchaser could get by reletting the demesne or cultivating it himself, the time was past when he could hope to increase his receipts from the "natives' lands," and the evidence goes to show that the economic catastrophe of the sixteenth century, the influx of the precious metals, not to mention the debasement of the coinage, had greatly benefited the representatives of the "natives" at the cost of their lord.

At the risk of making this paper intolerably long I must add a few words about the legal status of the villains of Wilburton. There can be no doubt that in the thirteenth century the customary tenants, the holders of the full lands, half-lands, and other tenements, were serfs, *nativi*. This theory was kept up during the whole of the next century, and was brought home to them in practice. Thus in or about the fiftieth year of Edward III a number of *nativi* relinquished their lands and fled; for many years afterwards orders were given at every successive court for their recapture.

(1369) Andrew Thorold, a *nativus* of the lord, dwells at Lindon, Andrew in the Lane at Hidingham, Nicholas Bande at Hempstead, William Coppe at Cottenham; let them be seized and brought to the next court. (1372) Andrew in the Lane, Nicholas Bande, John Thorold and Robert his brother, Andrew Thorold, John and Nicholas, sons of Andrew Frost, *nativi domini*, are missing and ought to be seized. Such entries as these are found on the rolls of the fifteenth century also. (1467) Several *nativi domini* dwell at Crowland, Isleham, and elsewhere, and pay no clevage (head money); let them be attached. (1480) A similar entry. In Henry VII's day care is taken to record the fact that certain persons are serfs, and to state the whereabouts of their progeny. (1491) A. C., a native by blood of the lord, dwells on the lord's demesne, and has three sons and one daughter, whose names and ages are stated; J. B., another native, has two sons and one daughter; R. F., another native, has one daughter; another R. F. has a daughter; Agnes D.,

a nieve, dwells with W. B.; Joan D., a nieve, dwells at Chatteris; Ellen D., a nieve, dwells at Wilburton; let them be attached by their bodies to do fealty to the lord. Such an entry as this suggests that by this time it has become necessary to enumerate the "natives"; it is no longer to be assumed that all holders of customary lands are serfs; the difficulty that there had been of finding tenants had probably brought into the manor a number of outsiders who were not the bishop's born bondmen.

The practical incidents of servility are enforced during the fourteenth century. True that when a serf has once run away he is not recaptured; but there is a good deal of talk about recapturing him, though nothing seems to come of it. The "natives," however, who remain behind cannot marry their daughters, educate their sons, or sell their beasts without the lord's leave.

(1364) It is presented that H. N. sold a foal of his own increase (*de proprio incremento*) without the lord's licence; therefore he is amerced. (1367–9) Several similar entries. So in 1384 an amercement for selling foals to strangers without leave of the lord or supervision of the bailiff. (1372) Presentment that Richard Cokaygne has put his son John, aged eight years, to school without the lord's leave; he is amerced in 40*d.* At a later court Richard is licensed to send his son to school on condition that he does not take any holy orders without the lord's leave, the condition being enforced by a penalty of 100*s.* (1380) A. L., a *nativus* of the lord, at the time when he was reeve acquired, without leave of the lord, a messuage and some free-

hold land from W. S.; he now makes fine to the lord with 20*s.*, that he may hear no more about this matter (*ne occasionetur*). (1384) A *nativus* pays 13*s.* 4*d.* for leave to marry a *nativa*, a widow who holds a full land, and for leave to hold that land jointly with his wife. (1385) Presentment that A. L. married his daughter to R. H., a *nativus* of the lord; A. L. pays 3*s.* 4*d.* that he may hear no more of this (*ne occasionetur de maritacione predicta*). (1394) J. F., a *nativus domini de corpore*, pays 18*d.* for leave to marry his daughter, *nativam domini*, to J. C., *nativo domini*; he pays no more because his daughter has been guilty of fornication—*comisit leyrwyght*—by reason whereof the lord had 5*s.* These marks of servility seem to disappear in the fifteenth century.

The terminology employed in the earliest surrenders and admittances is not stereotyped. The land is sometimes *terra nativa*, sometimes *terra custumaria*, sometimes simply a "full land" or "half-land," as the case may be. The *tenendum* is sometimes *sibi et suis*, sometimes *sibi et sequele sue*; "*secundum consuetudinem manerii*" appears at times, and occasionally "*ad voluntatem domini.*" In Richard II's day, in the case of a grant to a man and his wife, we already find the full form, *tenendum J. et M. et heredibus et assignatis eorundem per virgam et ad voluntatem domini secundum consuetudinem manerii faciendo servicia antiqua pro predicto integro cotagio.* Thenceforward it is common to mention the rod, the will of the lord, and the custom of the manor; but the phrases "*sibi et sequele sue*," "*sibi et suis*" do not at once give way before "*sibi et heredibus suis.*" In the middle of the fifteenth century

it became common to describe the tenant as holding *per copiam.*

The conclusions to which these rolls would lead us may now be stated in a summary fashion.

Before 1350 *or thereabouts.* The lord gets very little by way of money rent. His demesne is cultivated for him by the "works" of his customary tenants. More works are due than are wanted, and each year he "sells" a certain number of works at a customary rate—that is to say, he takes from the person liable to work a penny or, as the case may be, a halfpenny in respect of each work that he does not want. The customary tenants are for the more part, if not altogether, unfree men, and are treated as such.

From 1350 *to* 1410 *or thereabouts.* There is as yet no permanent commutation of work for rent. The lord, however, finds the greatest difficulty in keeping old and obtaining new tenants; his tenants, more especially the cottagers, run away and relinquish their tenements. The lord still hopes to obtain tenants on the old terms, but in the meanwhile has to make temporary grants or leases at money rents, and from time to time to reduce those rents. From the tenants who still hold on the old terms he still exacts a considerable number of works, while other works he "sells" to them year by year. Many of the tenants are still unfree, and are treated as such.

After 1410 *or thereabouts.* It having at last been recognised that many of the tenements are no longer *in opere,* and that there is no prospect of a return to the old state of things, a general commutation of all

works (except some ploughing) takes place. Perhaps this is not at once conceived as a final change, but practically it is irrevocable. The rents are the best rents that the lord can get, and in course of time it is necessary to reduce them. The demesne land, together with the benefit of such works as are uncommuted, is now let, for short terms of years, to a farmer. The lord of the manor becomes, in effect, little more than a receiver of rent. Very few practical traces of personal servitude remain, but we read of no formal emancipation of the bondmen, and the lord is careful to preserve a record of their bondage.

In the sixteenth century. Owing to the fall in the value of money, the copyholder gradually acquires a valuable right in his holding. His rent—less than a shilling an acre—becomes light. I will not generalise, but to me it seems that in this instance the copyholder's vendible interest is almost entirely an unearned increment, the product of American mines.

THE ORIGIN OF USES[1]

THE following account of the origin of our English *Use* forms part of a projected sketch of English law as it stood at the accession of Edward I. It will there follow some remarks upon the late growth of any doctrine of informal agency, by which I mean an agency which is not solemnly created by a formal *attornatio*. I have long been persuaded that every attempt to discover the genesis of our *use* in Roman law breaks down, and I have been led to look for it in another direction by an essay which some years ago Mr Justice Holmes wrote on Early English Equity (*Law Quarterly Review*, vol. I.). Whether I have been successful, it is not for me to say. I will first state my theory and then adduce my evidence.

The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the "use, trust or confidence." In tracing its embryonic history we must first notice the now established truth that the English word *use* when it is employed with a technical meaning in legal documents is derived, not from the Latin word *usus*, but from the Latin word *opus*, which

[1] *Harvard Law Review*, 1894.

in Old French becomes *os* or *oes*. True that the two words are in course of time confused, so that if by a Latin document land is to be conveyed to the use of John, the scribe of the charter will write *ad opus Johannis* or *ad usum Johannis* indifferently, or will perhaps adopt the fuller formula *ad opus et ad usum*, nevertheless the earliest history of "the use" is the early history of the phrase *ad opus*. Now this both in France and in England we may find in very ancient days. A man will sometimes receive money to the use (*ad opus*) of another person; in particular money is constantly being received for the king's use. Kings must have many ministers and officers who are always receiving money, and we have to distinguish what they receive for their own proper use (*ad opus suum proprium*) from what they receive on behalf of the king. Further, long before the Norman Conquest we may find a man saying that he conveys land to a bishop to the use of a church, or conveys land to a church to the use of a dead saint. The difficulty of framing a satisfactory theory touching the whereabouts of the ownership of what we may loosely call "the lands of the churches" (a difficulty that I cannot here pause to explain) gives rise to such phrases. In the thirteenth century we commonly find that where there is what to our eyes is an informal agency, this term *ad opus* is used to describe it. Outside the ecclesiastical sphere there is but little talk of "procuration"; there is no current word that is equivalent to our *agent*; John does not receive money or chattels "as agent for" Roger; he receives it to the use of Roger (*ad opus Rogeri*).

Now in the case of money and chattels a certain haziness in the conception of ownership, which I hope to discuss elsewhere, prevents us from making a satisfactory analysis of the notion that this *ad opus* implies. William delivers two marks or three oxen to John, who receives them to the use of Roger. In whom, we may ask, is the ownership of the coins or of the beasts? Is it already in Roger; or, on the other hand, is it in John, and is Roger's right a merely personal right against John? In the thirteenth century this question does not arise in a clear form, because possession is far more important than ownership. We will suppose that John is the bailiff of one of Roger's manors, that in the course of his business he has gone to a market, has sold Roger's corn, has purchased cattle with the price of the corn and is now driving them home. We take it that if a thief or trespasser swoops down and drives off the beasts, John can bring an appeal or an action and call the beasts his own proper chattels. We take it that he himself cannot steal the beasts; even in the modern common law he cannot steal them until he has in some way put them in his employer's possession. We are not very certain that if he appropriates them to his own use Roger has any remedy except in an action of debt or of account, in which his claim can be satisfied by a money payment. And yet the notion that the beasts are Roger's, not John's, is growing and destined to grow. In course of time the relationship expressed by the vague *ad opus* will in this region develop into a law of agency. In this region the phrase will appear in our own day as expressing rights and duties which the common law can protect and

enforce without the help of any "equity." The common law will know the wrong that is committed when a man "converts to his use" (*ad opus suum proprium*) the goods of another; and in course of time it will know the obligation which arises when money is "had and received to the use" of some person other than the recipient.

It is otherwise in the case of land, for there our old law had to deal with a clearer and intenser ownership. But first we must remark that at a very remote period one family at all events of our legal ancestors have known what we may call a trust, a temporary trust, of lands. The Frank of the Lex Salica is already employing it; by the intermediation of a third person, whom he puts in seisin of his land and goods, he succeeds in appointing or adopting an heir. Along one line of development we may see this third person, this "saleman," becoming the testamentary executor of whom this is not the place to speak; and our English law by forbidding testamentary dispositions of land has prevented us from obtaining many materials in this quarter. However, in the England of the twelfth century we sometimes see the lord intervening between the vendor and the purchaser of land. The vendor surrenders the land to the lord "to the use" of the purchaser by a rod, and the lord by the same rod delivers the land to the purchaser. Freeholders, it is true, have soon acquired so large a liberty of alienation that we seldom read of their taking part in such surrenders; but their humbler neighbours, for instance, the king's sokeman, are constantly surrendering land "to the use" of one who has bought it. What if the

lord when the symbolic stick was in his hand refused to part with it? Perhaps the law had never been compelled to consider so rare an event; and in these cases the land ought to be in the lord's seisin for but a moment. However, we soon begin to see what we cannot but call permanent "uses." A slight but unbroken thread of cases, beginning while the Conquest is yet recent, shows us that a man will from time to time convey his land to another "to the use" of a third. For example, he is going on a crusade, and wishes that his land shall be held to the use of his children, or he wishes that his wife or his sister shall enjoy the land, but doubts, it may be, whether a woman can hold a military fee or whether a husband can enfeoff his wife. Here there must be at the least an honourable understanding that the trust is to be observed, and there may be a formal "interposition of faith." Then, again, we see that some of the lands and revenues of a religious house have often been devoted to some special object; they have been given to the convent "to the use" of the library or "to the use" of the infirmary, and we can hardly doubt that a bishop will hold himself bound to provide that these dedications, which are sometimes guarded by the anathema, shall be maintained. Lastly, in the early years of the thirteenth century the Franciscan friars came hither. The law of their being forbade them to own anything; but they needed at least some poor dormitory, and the faithful were soon offering them houses in abundance. A remarkable plan was adopted. They had come as missionaries to the towns; the benefactor who was minded to give them a house,

would convey that house to the borough community "to the use of" or "as an habitation for" the friars. Already when Bracton was writing, a considerable number of plots of land in London had been thus conveyed to the city for the benefit of the Franciscans. The corporation was becoming a trustee. It is an old doctrine that the inventers of "the use" were "the clergy" or "the monks.' We should be nearer the truth if we said that to all seeming the first persons who in England employed "the use" on a large scale were, not the clergy, nor the monks, but the friars of St Francis.

Now in few, if any, of these cases can the *ad opus* be regarded as expressing the relation which we conceive to exist between a principal and an agent. It is intended that the "feoffee to uses" (we can employ no other term to describe him), shall be the owner or legal tenant of the land, that he shall be seised, that he shall bear the burdens incumbent on owners or tenants, but he is to hold his rights for the benefit of another. Such transactions seem to have been too uncommon to generate any definite legal theory. Some of them may have been enforced by the ecclesiastical courts. Assuredly if the citizens of London had misappropriated the lands conveyed to them for the use of the friars, those darlings of popes and kings, they would have known what an interdict meant. Again, in some cases the feoffment might perhaps be regarded as a "gift upon condition," and in others a written agreement about the occupation of the land might be enforced as a covenant. But at the time when the system of original writs was taking its final form "the

use" had not become common enough to find a comfortable niche in the fabric. And so for a while it lives a precarious life until it finds protection in the "equitable" jurisdiction of the chancellors. If in the thirteenth century our courts of common law had already come to a comprehensive doctrine of contract, if they had been ready to draw an exact line of demarcation between "real" and "personal" rights, they might have reduced "the use" to submission and found a place for it in their scheme of actions; in particular, they might have given the feoffor a personal, a contractual, action against the feoffee. But this was not quite what was wanted by those who took part in these transactions; it was not the feoffor, it was the person whom he desired to benefit (the *cestui que use* of later days) who required a remedy, and moreover a remedy that would secure him not money compensation but the specific enjoyment of the thing granted. "The use" seems to be accomplishing its manifest destiny when at length after many adventures it appears as "equitable ownership."

I will now put in some of the evidence that I have collected:—

I. The employment of the phrase *ad opus meum* (*tuum, suum*) as meaning on my (your, his) behalf, or for my (your, his) profit or advantage can be traced back into very early Frankish formulas. See Zeumer's quarto edition of the *Formulae Merovingici et Karolini Aevi* (*Monumenta Germaniae*), index s.v. *opus*. Thus, *e.g.*:—

p. 115 "ut nobis aliquid de silva ad opus ecclesiae nostrae...dare iubeatis." (But here *opus ecclesiae* may mean the fabric of the church.)

p. 234 "per quem accepit venerabilis vir ille abbas ad opus monasterio suo [= monasterii sui]...masas ad commanendum."

p. 208 "ad ipsam iam dictam ecclesiam ad opus sancti illius... dono."

p. 315 (An emperor is speaking) "telonium vero, excepto ad opus nostrum inter Q et D vel ad C [*place names*] ubi ad opus nostrum decima exigitur, aliubi eis ne requiratur."

II. So in Carolingian laws for the Lombards. *Mon. Germ. Leges*, IV. Liber Papiensis Pippini 28 (p. 520): "De compositionibus quae ad palatium pertinent: si comites ipsas causas convenerint ad requirendum, illi tertiam partem ad eorum percipiant opus, duos vero ad palatium." (The *comes* gets "the third penny of the county" for his own use.)

Lib. Pap. Ludovici Pii 40 (p. 538): "Ut de debito quod ad opus nostrum fuerit wadiatum talis consideratio fiat."

III. From Frankish models the phrase has passed into Anglo-Saxon land-books. Thus, *e.g.*:—

Coenulf of Mercia, A.D. 809, Kemble, *Cod. Dipl.* v. 66: "Item in alio loco dedi eidem venerabili viro ad opus praefatae Christi ecclesiae et monachorum ibidem deo servientium terram..."

Beornwulf of Mercia, A.D. 822, Kemble, *Cod. Dipl.* v. 69: "Rex dedit ecclesiae Christi et Wulfredo episcopo ad opus monachorum... villam Godmeresham."

IV. It is not uncommon in Domesday Book. Thus, *e.g.*:—

D. B. I. 209: "Inter totum reddit per annum xxii. libras...ad firmam regis....Ad opus reginae duas uncias auri...et i. unciam auri ad opus vicecomitis per annum."

D. B. I. 60 b: "Duae hidae non geldabant quia de firma regis erant et ad opus regis calumniatae sunt."

D. B. II. 311: "Soca et saca in Blideburh ad opus regis et comitis."

V. A very early instance of the French *al os* occurs in *Leges Willelmi*, I. 2. § 3: "E cil francs hom...seit mis en forfeit el cunté afert al os le vescunte en Denelahe xl. ores....De ces xxxii ores averad le vescunte al os le rei x. ores." The sheriff takes certain sums for his own use, others for the king's use. This document can hardly be of later date than the early years of cent. xii.

VI. In order to show the identity of *opus* and *os* or *oes* we may pass to Britton, II. 13: "Villenage est tenement de demeynes de chescun seignur baillé a tenir a sa volunté par vileins services de emprouwer al oes le seignur."

VII. A few examples of the employment of this phrase in connection with the receipt of money or chattels may now be given.

Liberate Roll 45 Hen. III (*Archaeologia*, XXVIII. 269): Order by the king for payment of 600 marks which two Florentine merchants lent him, to wit, 100 marks for the use (*ad opus*) of the king of Scotland and 500 for the use of John of Brittanny.

Liberate Roll 53 Hen. III (*Archaeologia*, XXVIII. 271): Order by the king for payment to two Florentines of money lent to him for the purpose of paying off debts due in respect of cloth and other articles taken "to our use (*ad opus nostrum*)" by the purveyors of our wardrobe.

Bracton's *Note Book*, pl. 177 (A.D. 1222): A defendant in an action of debt confesses that he has received money from the plaintiff, but alleges that he was steward of Roger de C. and received it *ad opus eiusdem Rogeri*. He vouches Roger to warranty.

Selby Coucher Book, II. 204 (A.D. 1285): "Omnibus...R. de Y. ballivus domini Normanni de Arcy salutem. Noveritis me recepisse duodecim libras...de Abbate de Seleby ad opus dicti Normanni, in quibus idem Abbas ei tenebatur....Et ego...dictum abbatem...versus dominum meum de supradicta pecunia indempnem conservabo et adquietabo."

Y. B. 21–2 Edw. I, p. 23: "Richard ly bayla les chateus a la oeus le Eveske de Ba."

Y. B. 33–5 Edw. I, p. 239: "Il ad conté qe eux nous livererent meyme largent al oes Alice la fille B."

VIII. We now turn to cases in which land is concerned:—

Whitby Cartulary, I. 203–4 (middle of cent. xii.): Roger Mowbray has given land to the monks of Whitby; in his charter he says "Reginaldus autem Puer vendidit ecclesiae praefatae de Wyteby totum ius quod habuit in praefata terra et reliquit michi ad opus illorum, et ego reddidi eis, et saisivi per idem lignum per quod et recepi illud."

Burton Cartulary, p. 21, from an "extent" which seems to come to us from the first years of cent. xii.: "tenet Godfridus viii. bovatae [*corr.* bovatas] pro viii. sol. praeter illam terram quae ad ecclesiam iacet quam tenet cum ecclesia ad opus fratris sui parvuli, cum ad id etatis venerit ut possit et debeat servire ipsi ecclesiae."

Ramsey Cartulary, II. 257–8, from a charter dated by the editors in 1080–7: "Hanc conventionem fecit Eudo scilicet Dapifer Regis cum Ailsio Abbate Rameseiae...de Berkeforde ut Eudo habere deberet ad opus sororis suae Muriellae partem Sancti Benedicti quae adiacebat ecclesiae Rameseiae quamdiu Eudo et soror eius viverent, ad dimidium servitium unius militis, tali quidem pacto ut post Eudonis sororisque decessum tam partem propriam Eudonis quam in eadem villa habuit, quam partem ecclesiae Rameseiae, Deo et Sancto Benedicto ad usum fratrum eternaliter...possidendam...relinqueret." In D. B. I. 210 b, we find "In Bereforde tenet Eudo dapifer v. hidas de feodo Abbatis [de Ramesy]." So here we have a "Domesday tenant" as "feoffee to uses."

Ancient Charters (Pipe Roll Soc. p. 21) (*circ.* A.D. 1127); Richard Fitz Pons announces that having with his wife's concurrence disposed of her marriage portion, he has given other lands to her; "et inde saisivi Milonem fratrem eius loco ipsius ut ipse eam manuteneat et ab omni defendat iniuria."

Curia Regis Roll No. 81, Trin. 6 Hen. III, m. 1 d. Assize of mort d'ancestor by Richard de Barre on the death of his father William against William's brother Richard de Roughal for a rent. Defendant alleges that William held it in *custodia*, having purchased it to the use of (*ad opus*) the defendant with the defendant's money. The jurors say that William bought it to the use of the defendant, so that William was seised not in fee but in wardship (*custodia*). An attempt is here made to bring the relationship that we are examining under the category of *custodia*.

Bracton's *Note Book*, pl. 999 (A.D. 1224): *R*, who is going to the Holy Land, commits his land to his brother *W* to keep to the use of his (*R*'s) sons (*commisit terram illam W ad opus puerorum suorum*); on *R*'s death his eldest son demands the land from *W*, who refuses to surrender it; a suit between them in a seignorial court is compromised; each of them is to have half the land.

Bracton's *Note Book*, pl. 1683 (A.D. 1225): *R* is said to have bought land from *G* to the use of the said *G*. Apparently *R* received the land from *G* on the understanding that he (*R*) was to convey it to *G* and the daughter of *R* (whom *G* was going to marry) by the way of a marriage portion.

Bracton's *Note Book*, pl. 1851 (A.D. 1226–7): A man who has

married a second wife is said to have bought land to the use of this wife and the heirs of her body begotten by him.

Bracton's *Note Book*, pl. 641 (A.D. 1231): It is asserted that *E* impleaded *R* for certain lands, that *R* confessed that the land was *E*'s in consideration of 12 marks, which *M* paid on behalf of *E*, and that *M* then took the land to the use (*ad opus*) of *E*. Apparently *M* was to hold the land in gage as security for the 12 marks.

Bracton's *Note Book*, pl. 754 (A.D. 1233): Jurors say that *R* desired to enfeoff his son *P*, an infant seven years old; he gave the land in the hundred court and took the child's homage; he went to the land and delivered seisin; he then committed the land to one *X* to keep to the use of *P* (*ad custodiendum ad opus ipsius Petri*) and afterwards he committed it to *Y* for the same purpose; *X* and *Y* held the land for five years to the use of *P*.

Bracton's *Note Book*, pl. 1244 (A.D. 1238–9): A woman, mother of *H*, desires a house belonging to *R*; *H* procures from *R* a grant of the house to *H* to the use (*ad opus*) of his mother for her life.

Assize Roll No. 1182, m. 8 (one of Bracton's Devonshire rolls): "Iuratores dicunt quod idem Robertus aliquando tenuit hundredum illud et quod inde cepit expleta. Et quaesiti ad opus cuius, utrum ad opus proprium vel ad opus ipsius Ricardi, dicunt quod expleta inde cepit, sed nesciunt utrum ad opus suum proprium vel ad opus ipsius Ricardi quia nesciunt quid inde fecit."

Chronicon de Melsa, II. 116 (an account of what happened in the middle of cent. xiii. compiled from charters): Robert confirmed to us monks the tenements that we held of his fee; "et insuper duas bovatas cum uno tofto...ad opus Ceciliae sororis suae et heredum suorum de corpore suo procreatorum nobis concessit; ita quod ipsa Cecilia ipsa toftum et ii. bovatas terrae per forinsecum servitium et xiv. sol. et iv. den. annuos de nobis teneret. Unde eadem toftum et ii. bovatas concessimus dictae Ceciliae in forma praescripta."

IX. The lands and revenues of a religious house were often appropriated to various specific purposes, *e.g. ad victum monachorum*, *ad vestitum monachorum*, to the use of the sacrist, cellarer, almoner or the like, and sometimes this appropriation was designated by the donor. Thus, *e.g. Winchcombe Landboc*, I. 55, "ad opus librorum"; I. 148, "ad usus infirmorum monachorum"; I. 73, certain tithes are devoted "in usum operationis ecclesiae," and in 1206 this devotion

of them is protected by a ban pronounced by the abbot; only in case of famine or other urgent necessity may they be diverted from this use. So land may be given "to God and the church of St German of Selby to buy eucharistic wine (*ad vinum missarum emendum*)"; *Selby Coucher*, II. 34.

In the ecclesiastical context just mentioned *usus* is a commoner term than *opus*. But the two words are almost convertible. On Curia Regis Roll No. 115 (18–9 Hen. III), m. 3 is an action against a royal purveyor. He took some fish *ad opus Regis* and converted it *in usus Regis*.

X. In the great dispute which raged between the archbishops of Canterbury and the monks of the cathedral monastery one of the questions at issue was whether certain revenues, which undoubtedly belonged to "the church" of Canterbury, had been irrevocably devoted to certain specific uses, so that the archbishop, who was abbot of the house, could not divert them to other purposes. In 1185 Pope Urban III pronounces against the archbishop. He must restore certain parochial churches to the use of almonry. "Ecclesiae de Estreia et de Munechetun...ad usus pauperum provide deputatae fuissent, et a...praedecessoribus nostris eisdem usibus confirmatae.... Monemus quatenus...praescriptas ecclesias usibus illis restituas." So the prior and convent are to administer certain revenues which are set apart "in perpetuos usus luminarium, sacrorum vestimentorum et restaurationis ipsius ecclesiae, et in usus hospitum et infirmorum." At one stage in the quarrel certain representatives of the monks in the presence of Henry II received from the archbishop's hand three manors "ad opus trium obedientiariorum, cellerarii, camerarii et sacristae." See *Epistolae Cantuarienses*, pp. 5, 38, 95.

XI. We now come to the very important case of the Franciscans.

Thomas of Eccleston, De adventu Fratrum Minorum (*Monumenta Franciscana*, I.), p. 16: "Igitur Cantuariae contulit eis aream quandam et aedificavit capellam...Alexander magister Hospitalis Sacerdotum; et quia fratres nihil omnino appropriare sibi voluerunt, facta est communitati civitatis propria, fratribus vero pro civium libitu commodata...Londoniae autem hospitatus est fratres dominus Johannes Ywim, qui emptam pro fratribus aream communitati civium appropriavit, fratrum autem usumfructum eiusdem pro libitu

dominorum devotissime designavit...Ricardus le Muliner contulit aream et domum communitati villae [Oxoniae] ad opus fratrum." This account of what happened in or about 1225 is given by a contemporary.

Prima Fundatio Fratrum Minorum Londoniae (*Monumenta Franciscana*, I.), p. 494. This document gives an account of many donations of land made to the city of London in favour of the Franciscans. The first charter that it states is one of 1225, in which John Iwyn says that for the salvation of his soul he has given a piece of land to the *communitas* of the city of London in Frankalmoin "ad inhospitandum [*a word missing*] pauperes fratres minorum [minores?] quamdiu voluerint ibi esse."

XII. The attempt of the early Franciscans to live without property of any sort or kind led to subtle disputations and in the end to a world-shaking conflict. At one time the popes sought to distinguish between ownership and usufruct or use; the Franciscans might enjoy the latter but could not have the former; the *dominium* of all that was given to their use was deemed to be vested in the Roman church and any litigation about it was to be carried on by papal procurators. This doctrine was defined by Nicholas III in 1279. In 1322 John XXII did his best to overrule it, declaring that the distinction between use and property was fallacious and that the friars were not debarred from ownership. Charges of heresy about this matter were freely flung about by and against him, and the question whether Christ and His Apostles had owned goods became a question between Pope and Emperor, between Guelph and Ghibelline. In the earlier stages of the debate there was an instructive discussion as to the position of the third person, who was sometimes introduced as an intermediary between the charitable donor and the friars who were to take the benefit of the gift. He could not be treated as agent or procurator for the friars unless the ownership was ascribed to them. Gregory IX was for treating him as an agent for the donor. See Lea, *History of the Inquisition*, III. 5–7, 29–31, 129–154.

XIII. It is very possible that the case of the Franciscans did much towards introducing among us both the word *usus* and the desire to discover some expedient which would give the practical benefits of ownership to those who could yet say that they owned

nothing. In every large town in England there were Minorites who knew all about the stormy controversy, who had heard how some of their foreign brethren had gone to the stake rather than suffer that the testament of St Francis should be overlaid by the evasive glosses of lawyerly popes, and who were always being twitted with their impossible theories by their Dominican rivals. On the continent the battle was fought with weapons drawn from the armoury of Roman law. Among these were *usus* and *usufructus*. It seems to have been thought at one time that the case could be met by allowing the friars a *usufructus* or *usus*, these terms being employed in a sense that would not be too remote from that which they had borne in the old Roman texts. Thus it is possible that there was a momentary contact between Roman law—mediaeval, not classical, Roman law—and the development of the English *use*. Englishmen became familiar with an employment of the word *usus* which would make it stand for something that just is not, though it looks exceedingly like, *dominium*. But we hardly need say that the *use* of our English law is not derived from the Roman "personal servitude"; the two have no feature in common. Nor can I believe that the Roman *fideicommissum* has anything to do with the evolution of the English *use*. In the first place, the English *use* in its earliest stage is seldom, if ever, the outcome of a last will, while the *fideicommissum* belongs essentially to the law of testaments. In the second place, if the English *use* were a *fideicommissum* it would be called so, and we should not see it gradually emerging out of such phrases as *ad opus* and *ad usum*. What we see is a vague idea, which developing in one direction becomes what we now know as agency and developing in another direction becomes that *use* which the common law will not, but equity will, protect. Of course, again, our "equitable ownership" when it has reached its full stature has enough in common with the praetorian *bonorum possessio* to make a comparison between the two instructive; but an attempt to derive the one from the other would be too wild for discussion.

OUTLINES OF ENGLISH LEGAL HISTORY, 560—1600[1]

Old English Law.

When we speak of a body of law, we use a metaphor so apt that it is hardly a metaphor. We picture to ourselves a being that lives and grows, that preserves its identity while every atom of which it is composed is subject to a ceaseless process of change, decay, and renewal. At any given moment of time—for example, in the present year—it may, indeed, seem to us that our legislators have, and freely exercise, an almost boundless power of doing what they will with the laws under which we live; and yet we know that, do what they may, their work will become an organic part of an already existing system.

Already, if we look back at the ages which are the most famous in the history of English legislation—the age of Bentham and the radical reform, the age which appropriated the gains that had been won but not secured under the rule of Cromwell, the age of Henry VIII, the age of Edward I ("our English

[1] *Social England*, ed. H. D. Traill. Cassell & Co., 1893.

Justinian")—it must seem to us that, for all their activity, they changed, and could change, but little in the great body of law which they had inherited from their predecessors. Hardly a rule remains unaltered, and yet the body of law that now lives among us is the same body that Blackstone described in the eighteenth century, Coke in the seventeenth, Littleton in the fifteenth, Bracton in the thirteenth, Glanvill in the twelfth. This continuity, this identity, is very real to us if we know that for the last seven hundred years all the judgments of the courts at Westminster have been recorded, and that for the most part they can still be read. Were the world large enough to contain such a book, we might publish not merely a biography, but a journal or diary, of English law, telling what it has done, if not day by day, at least term by term, ever since the reign of Richard I; and eventful though its life may have been, it has had but a single life.

Beyond these seven centuries there lie six other centuries that are but partially and fitfully lit, and in one of them a great catastrophe, the Norman Conquest, befell England and the law of England. However, we never quite lose the thread of the story. Along one path or another we can trace back the footprints, which have their starting-place in some settlement of wild Germans who are invading the soil of Roman provinces, and coming in contact with the civilisation of the old world. Here the trail stops, the dim twilight becomes darkness; we pass from an age in which men seldom write their laws to one in which they cannot write at all. Beyond lies the realm of guesswork.

About the year 600, Ethelbert, king of the Kentish-men, by the counsel of his wise-men, caused the laws of his people to be set down in writing. He had just received the Christian faith at the hands of Roman missionaries, and it was in imitation of the Romans that he and his folk desired to have written laws. His reign overlaps the reign of Justinian, and perhaps he had heard how in the Far East the Roman Emperor had been legislating on a magnificent scale. English law begins to speak just when Roman law has spoken what will, in a certain sense, be its final words. On the continent of Europe the same thing had been happening. No sooner did the barbarian tribe feel the influence of Rome than it wished for a written code of laws. Ethelbert and his Jutes in Kent are doing what the Salian Franks did a century earlier when they wrote down their famous Lex Salica; but while on the Continent the laws of the conquering Germans are written in the Latin language of the conquered, in England the barbarians from the first write down their law in the language that they speak, the language which is to become English.

Ethelbert's laws have come down to us, though only in a copy made after the Norman Conquest. They may seem to us primitive enough. The emperor at Byzantium, could he have seen them, would assuredly have denied that they had any points in common with the Roman law-books, save that they were laws, and were in writing. Nevertheless, we cannot call them primitive in any absolute sense of that term. They are Christian. Let us look at the first sentence, the first recorded utterance of English law:—"God's fee

[property] and the church's, twelve-fold; bishop's fee, eleven-fold; priest's fee, nine-fold; deacon's fee, six-fold; clerk's fee, three-fold." Churches, bishops, priests, deacons, clerks—these are no archaic German institutions; they are Latin, they have Latin names which must be taken up bodily into the Teutonic speech of the new converts. Unfortunately (so we may now think), Germanic law has no written memorials of the days of its heathenry. Every trace but the very faintest of the old religion has been carefully expurgated from all that is written, for all that is written passes under ecclesiastical hands. Thus we may guess that a new force is already beginning to transfigure the whole sum and substance of barbaric law, before that law speaks the first words that we can hear. It is a wild plant that has already been torn from its native soil and set to grow in a garden. The change of faith, and the substitution of one order of religious rites for another, would in any case mean much, for we have reason to believe that the old law had in it a strong sacral element; but as it is, they mean the influence of the old civilised world upon the new barbarian world.

Ethelbert's laws consist of ninety brief sentences. Two will serve as samples:—"If one man strike another with the fist on the nose—three shillings." "If the eye be struck out let boot [*i.e.* amends] be made with fifty shillings." To call this brief tariff a code may seem strange, but there are not wanting signs that the wise-men of Kent are committing to writing as much of their traditional law as they can remember in the form of abstract propositions. No

doubt much more law—in particular, a law of procedure—is known to them implicitly. If a concrete case were to occur, they would be ready with a doom; but when asked for general rules, these ninety are all that they can call to mind. Thus we may say that our legal history starts with an act of codification. This code became the basis of Kentish law. Subsequent kings in the course of the seventh century, Lothair, Edric, Wihtred, with the counsel of the wise, add some fifty new dooms to the written law of the men of Kent.

Then the scene changes to Wessex. In the middle of the seventh century the West Saxons received Christianity; before its end they had written laws, the laws of Ine. By the advice of his bishops and of the oldest and wisest men, Ine published a set of laws which tell us a good deal more than we can learn from the Kentish series.

The next legislator whose work has come down to us is the great Alfred. His laws are divided from those of his ancestor Ine by a period of two centuries or thereabouts. This is the one great gap in our continuous legal history. In the history of religion and learning and letters these centuries are far from being the darkest. They cover the time when Northumbria was for a while a centre of light—not for England only, but for the world at large. It may be that we have lost some things. It is fairly certain that Offa of Mercia, in the days of Mercia's greatness, issued written laws. When Alfred is king, when all England is becoming united under the vigorous princes of the West Saxon house, the three legislators whose names

are still remembered are Ethelbert of Kent, Ine of Wessex, and Offa of Mercia. From the manner in which Alfred speaks of them and of their laws we may gather that, heavy though our losses may have been, we have lost no document that testified to any revolutionary change in the law. Though nearly three hundred years have gone by since Ethelbert's death, his dooms are still in force among the Kentish people. Alfred tells us that he dared to add but little of his own to the work of his three great forerunners; and though we can see that during the last two centuries some new legal ideas have emerged, still the core of the law is what it was. What can be put in writing is for the more part a tariff of the sums that must be paid when deeds of violence are done.

The Alfred of sober truth is not the Alfred of legal legend—for the history of law has its legends—the inventive architect of a British Constitution; but his laws are the first member of a grand series—the capitularies, we might call them, of the English kings of the West Saxon house. Edward the Elder, Ethelstan, Edmund, and Edgar, with the counsel of their wise-men, legislate in a bold, masterful fashion. For the better maintenance of the peace, they sharpen the old rules and they make new rules. Written law accumulates somewhat rapidly; it is expected by this time that the doomsmen will be able to find in the "doom-book," the book of written law, judgments apt for most of the cases which come before them. This series extends from the beginning to the end of the tenth century. The laws of Ethelred continue it into the eleventh century. His laws were many, for he had

to say the same thing over and over again; we can see on their face that they were ineffectual. He begs and prays men to keep the peace and desist from crime; he must beg and pray, for he cannot command and punish. The Danes were ravaging and conquering; the State tottered; the house of Cerdic fell. It was left for the mighty Canute to bring to a noble close the first great period in the history of English law, the period during which laws were written in the English language, the period which it is convenient to call Anglo-Saxon. Canute's code we must, if we have regard to the age in which it was issued, call a long and a comprehensive code. It repeats, with improvements, things that have been said before; the great Dane was able to enforce as laws rules which in the mouth of his predecessor had been little better than pious wishes; but it also contained many things that had not been said before. The whole economic and political structure of society was undergoing a great change. If by any two words we could indicate the nature of this elaborate process, we might say that tribalism was giving place to feudalism. Had Canute's successors been his equals in vigour and wisdom, perhaps the change might have been consummated peacefully, and by means of written laws which we now might be reading. As it was, there came to the throne the holy but imbecile Edward. In after days he won not only the halo of the saint, to which he may have been entitled, but the fame, to which he certainly was not entitled, of having been a great legislator. In the minster that he reared, king after king made oath to observe the laws of the Confessor. So far as we

know, he never made a law. Had he made laws, had he even made good use of those that were already made, there might have been no Norman Conquest of England. But then had there been no Norman Conquest of England, Edward would never have gained his fictitious glories. As it was, men looked back to him as the last of the English kings of the English—for of Harold, who had become the perjured usurper, there could be no talk—and galled by the yoke of their French masters, they sighed for St Edward's law, meaning thereby the law that had prevailed in a yet unvanquished England.

Now these enacted and written laws of our forefathers, representing as they do some four centuries and a half, representing as long a period as that which divides us from the Wars of the Roses, will seem a small thing to the first glance of a modern eye. They might all be handsomely printed on a hundred pages such as that which is now before the reader. A session of Parliament which produced no larger mass of matter we should nowadays regard as a sterile session. In the Georgian age many more words than are contained in the whole code of Canute would have been devoted to the modest purpose of paving and lighting the borough of Little Peddlington. It is but fair to our ancient kings and their wise-men to say that when they spoke, they spoke briefly and pointedly. They had no fear that ingenious lawyers would turn their words inside out. "God's fee and the Church's, twelve-fold"—they feel that they need say no more than this about one very important matter. Also, we have to remember that life was simple; men could do,

men could wish to do, but few things. Our increasing mastery over the physical world is always amplifying the province of law, for it is always complicating the relationships which exist between human beings. Many a modern Act of Parliament is the product of the steam-engine, and there is no great need for a law of copyright until long after the printing-press has begun its work. For all this, however, it is true that these old written and enacted dooms contain but a part of the law which was enforced in England.

If we say that law serves three great purposes, that it punishes crime, redresses wrong, and decides disputes—and perhaps we need not go into the matter more deeply than this—then we may go on to say that in ancient days the two first of these three purposes are indistinguishably blended, while with the third the legislator seldom troubles himself. If he can maintain the peace, suppress violence and theft, keep vengeance within moderate bounds, he is well satisfied; he will not be at pains to enact a law of contract or of inheritance, a law of husband and wife, a law of landlord and tenant. All this can safely be left to unwritten tradition. He has no care to satisfy the curiosity of a remote posterity which will come prying into these affairs and wish to write books about them. Thus, to take one example, the courts must have been ready to decide disputes about the property of dead men; there must have been a general law, or various tribal or local laws, of inheritance. But the lawgivers tell us nothing about this. If we would recover the old rules, we must make the best that we may of stray hints and chance stories, and of those archaisms which we find embedded in the law of later days.

The laws of the folk, the "folk-right"—"law" is one of those words which the Danes bring with them —is known to the men of the folk, but more especially to the old and wise. The freemen, or the free landowners, of the hundred are in duty bound to frequent the "moot," or court, of the hundred, to declare the law and to make the dooms. The presiding alderman or sheriff turns to them when a statement of the law is wanted. As yet there is no class of professional lawyers, but the work of attending the courts is discharged chiefly by men of substance, men of thegnly rank; the small folk are glad to stay at home.

Also, some men acquire a great reputation for legal learning, and there was much to be learnt, though no one thought of setting it in writing. We should assuredly make a great mistake were we to picture to ourselves these old hundred-courts as courts of equity, where "the natural man" administered an informal "law of Nature." For one thing, as will be said elsewhere, the law of the natural man is supernatural law, a law which deals in miracles and portents. But then, again, it is exceedingly formal. It is a law of procedure. The right words must be said without slip or trip, the due ceremonial acts must be punctiliously performed, or the whole transaction will go for naught. This is the main theme of the wise-man's jurisprudence. One suspects that sometimes the man who, in the estimate of his neighbours, has become very wise indeed, has it in his power to amplify tradition by devices of his own. We hear from Iceland a wonderful tale of a man so uniquely wise that though he had made himself liable to an action of a particular kind, no one could bring that action against him, for he and

only he knew the appropriate words of summons: to trick him into a disclosure of this precious formula is a feat worthy of a hero. But formalism has its admirable as well as its ludicrous side. So long as law is unwritten, it must be dramatised and acted. Justice must assume a picturesque garb, or she will not be seen. And even of chicane we may say a good word, for it is the homage which lawlessness pays to law.

We have called the written laws "tariffs." They prescribe in great detail the various sums of money which must be paid by wrong-doers. There are payments to be made to the injured person or the kinsfolk of the slain man; there are also payments to be made to the king, or to some other representative of the tribe or nation. The growth of this system of pecuniary mulcts gradually restricts the sphere of self-help and vengeance. The tie of blood-relationship has been the straitest of all bonds of union. If a man of one family was slain by the man of another, there would be a blood-feud, a private war. The State steps in and compels the injured family to accept the dead man's "wergild"—the dead man's price or worth, if it be duly tendered. King Edmund goes so far as to insist that the vengeance of the dead man's kinsfolk is not to comprise the guiltless members of the slayer's clan. The law's last weapon against lawlessness is outlawry. The contumacious offender is put outside the peace; he becomes the foe of all law-abiding men. It is their duty to waste his land and burn his house, to pursue him and knock him on the head as though he were a beast of prey, for "he bears the wolf's head." As the State grows stronger, less clumsy modes of

punishment become possible; the criminal can be brought to trial, and definitely sentenced to death or mutilation. We can watch a system of true punishments—corporeal and capital punishments—growing at the expense of the old system of pecuniary mulcts, blood-feud, and outlawry; but on the eve of the Norman Conquest mere homicide can still be atoned for by the payment of the dead man's price or "wergild," and if that be not paid, it is rather for the injured family than for the State to slay the slayer. Men of different ranks had different prices: the thegn was worth six ceorls, and it seems very plain that if a ceorl killed a thegn, he had to die for it, or was sold into slavery, for a thegnly wergild was quite beyond the reach of his modest means. In the twelfth century the old system perished of over-elaboration. The bill that a man-slayer ran up became in the days of feudalism too complex to be summed, too heavy to be paid; for the dead man's lord, the lord of the place where the blood was shed, and it may be many other lords, would claim fines and forfeitures. He had to pay with his eyes or with his life a debt that he could not otherwise discharge.

As yet our Germanic law had not been exposed to the assaults of Roman jurisprudence, but still it had been slowly assuming and assimilating the civilisation of the old world. This distinction we must draw. On the one hand, there has been no borrowing from the Roman legal texts. We have no proof whatever that during the five centuries which preceded the Norman Conquest any one copy of a Roman law-book existed in England. We hear faint and vague tidings

of law being taught in some of the schools, but may safely believe that very little is meant thereby. The written dooms of our kings have been searched over and over again by men skilled in detecting the least shred of Roman law under the most barbaric disguise, and they have found nothing worthy of mention. That these dooms are the purest specimens of pure Germanic law has been the verdict of one scholar after another. Even the English Church, though its independence may often have been exaggerated, became very English. On the other hand, as already said, to become Christian was in a certain sense to become Roman. Whether, had an impassable wall been raised round England in the last quarter of the sixth century, England would not be a barbarous country at this day —that is a question which cannot be answered. As a matter of fact, we had not to work out our own civilisation; we could adopt results already attained in the ancient world. For example, we did not invent the art of writing, we adopted it; we did not invent our alphabet, we took the Roman. And so again—to come nearer to our law—we borrowed or inherited from the Old World the written legal document, the written conveyance, the will. The written conveyance was introduced along with Christianity; to all seeming, Ethelbert himself began the practice of "booking" lands to the churches. We have a few genuine "land-books" from the seventh and eighth, many from the later centuries. For the more part they are written in Latin, and they were fashioned after Italian models; but at the same time we can see that those models have been barbarised and misunderstood; the English

scribes pervert the neat devices of Roman lawyers. Any phrase which draws a contrast between a nation's law and its civilisation is of course open to objection. But let us suppose that at the present day a party of English missionaries is setting forth to convert a savage tribe: perhaps no one of them would know enough of English law to carry him through the easiest examination, and yet they would take with them many ideas that are in a certain sort the ideas of English law. Without being able to define murder, they would know that in this country murderers are condemned to death; they would think that a written expression of a man's last will should be respected, though they might well doubt whether a will is revoked by the testator's marriage. So it was in the seventh century. From the days of Ethelbert onwards English law was under the influence of so much of Roman law as had worked itself into the tradition of the Catholic Church.

English Law under Norman and Angevin.

The Normans when they invaded England were in one important particular a less civilised race than were those English whom they came to subjugate. We may say with some certainty that they had no written laws. A century and a half ago a king of the Franks had been compelled to cede a large province to a horde of Scandinavian pirates. The pirates had settled down as lords of a conquered people; they had gradually adopted the religion, the language, and the

civilisation (such as it was) of the vanquished; they had become Frenchmen. They may have paid some reverence to the written laws of the Frankish race, to the very ancient Lex Salica and the capitularies of Merovingian and Carlovingian kings. But these were fast becoming obsolete, and neither the dukes of the Normans nor their nominal overlords, the kings of the Franks or French, could issue written dooms such as those which Canute was publishing in England. Some excellent traditions of a far-off past, of the rule of Charles the Great, the invaders could bring with them to England; and these transplanted into the soil of a subject kingdom, could burst into new life and bear new fruit—the great record that we call "Domesday Book" is a splendid firstfruit—but written laws they had none.

To all seeming, the Conqueror meant that his English subjects should keep their own old laws. Merely duke of the Normans, he was going to be king in England, and he was not dissatisfied with those royal rights which, according to his version of the story, had descended to him from King Edward. About a few points he legislated. For example, the lives of his followers were to be protected by the famous murder-fine. If a Frenchman was found slain, and the slayer was not produced, a heavy sum was to be exacted from the district in which the crime was done. The establishment of a presumption that every murdered man is a Frenchman until the contrary is proved—a presumption highly advantageous to the king's exchequer—gave rise in later days to the curious process known as "the presentment of Englishry."

The hundred had to pay the fine unless the kinsfolk of the dead man would testify to his English birth. But this by the way. William had also to regulate the scope of that trial by battle which the Normans brought with them, and in so doing he tried to deal equitably with both Normans and English. Also it was necessary that he who had come hither as in some sort the champion of Roman orthodoxy should mark off the sphere of spiritual from that of temporal law by stricter lines than had yet been drawn in England. Much, again—though by no general law—he altered in the old military system, which had lately shown itself to be miserably ineffectual. Dealing out the forfeited lands amongst his barons, he could stipulate for a force of armoured and mounted knights. Some other changes he would make; but in the main he was content that the English should live under their old law, the law that now bore the blessed Edward's name.

And so again when on the death of Rufus—from Rufus himself we get and we expect no laws—Henry seized the crown, and was compelled to purchase adherents by granting a charter full of all manner of promises, made to all manner of people—the promise by which he hoped to win the hearts of Englishmen was that he would restore them to Edward's law with those amendments that the Conqueror had made in it. Henry himself, great as a governor, was no great legislator. A powerful central tribunal, which is also an exacting financial bureau, an "exchequer," began to take definite shape under the management of his expert ministers; but very few new laws were

published. The most characteristic legal exploits of the Norman period are the attempts made by various private persons to reconstruct "the law of St Edward." They translate some of the old English dooms into Latin as best they can—a difficult task, for the English language is rapidly taking a new shape. They modify the old dooms to suit a new age. They borrow from foreign sources—from the canon law of the Catholic Church, from Frankish capitularies, now and again from the Roman law-books. But in Henry I's reign they still regarded the Old English dooms, the law of King Edward, as the core of the law that prevails in England. They leave us wondering how much practical truth there is in what they say; whether the ancient criminal tariffs that they transcribe are really observed; whether the Frenchmen who preside in court pay much attention to the words of Canute, even when those words have been turned into Latin or into French. Still, their efforts assure us that there has been rather a dislocation than a complete break in the legal history of England; also that the Frenchmen have not introduced much new law of a sufficiently definite kind to be set down in writing.

As yet the great bulk of all the justice that was done, was done by local courts, by those shire-moots and hundred-moots which the Conqueror and Henry I had maintained as part of the ancient order, and by the newer seignorial courts which were springing up in every village. The king's own court was but a court for the protection of royal rights, a court for the causes of the king's barons, and an ultimate tribunal at which a persistent litigant might perhaps arrive

when justice had failed him everywhere else. Had it continued to be no more than this, the old English law, slowly adapting itself to changed circumstances, might have cast off its archaisms and become the law for after-times, law to be written and spoken in English words. Far more probably "St Edward's law" would have split into a myriad local customs, and then at some future time Englishmen must have found relief from intolerable confusion in the eternal law of Rome. Neither of these two things happened, because under Henry II the king's own court flung open its doors to all manner of people, ceased to be for judicial purposes an occasional assembly of war-like barons, became a bench of professional justices, appeared periodically in all the counties of England under the guise of the Justices in Eyre. Then begins the process which makes the custom of the king's court the common law of England. Ever since the Conquest the king's court had been in a very true sense a French court. It had been a French-speaking court, a court whose members had been of French race, and had but slowly been learning to think of themselves as Englishmen. Its hands had been very free. It could not, if it would, have administered the Old English written laws in their native purity: for one thing they were unintelligible; for another thing in the twelfth century they had become barbarous—they dealt with crime in a hopelessly old-fashioned way. On the other part, there was, happily, no written Norman code, and the king did not mean to be in England the mere duke he had been in Normandy. And so the hands of his court were very free; it could

be a law unto itself. Many old English institutions it preserved, in particular those institutions of public law which were advantageous to the king—the king, for instance, could insist that the sheriffs were sheriffs, and not hereditary *vicomtes*—but the private law, law of land tenure, law of possession, of contract, of procedure, which the court develops in the course of the twelfth century, is exceedingly like a *coutume* from Northern France. Hundreds of years will elapse before anyone tries to write about it in English; and when at length this is done, the English will be an English in which every important noun, every accurate term, is of French origin.

We may say a little more about the language of our law, for it is not an uninteresting topic. From the Conquest onwards until the year 1731 the solemnest language of our law was neither French nor English, but Latin. Even in the Anglo-Saxon time, though English was the language in which laws were published and causes were pleaded, Latin was the language in which the kings, with Italian models before them, made grants of land to the churches and the thegns. In 1066 the learned men of both races could write and speak to each other in Latin. We shall be pretty safe in saying that anyone who could read and write at all could read and write Latin. As to French, it was as yet little better than a vulgar dialect of Latin, a language in which men might speak, but not a language in which they would write anything except perhaps a few songs. The two tongues which the Conqueror used for laws, charters and writs were Latin and English. But Latin soon gets the upper hand, and

becomes for a while the one written language of the law. In the king's Chancery they write nothing but Latin, and it is in Latin that the judgments of the king's courts are recorded. This, as already said, is so until the year 1731; to substitute English for Latin as the language in which the king's writs and patents and charters shall be expressed, and the doings of the law-courts shall be preserved, requires a statute of George II's day.

Meanwhile there had been many and great changes. Late in the twelfth or early in the thirteenth century French was beginning to make itself a language in which not only songs and stories but legal documents could be written. About the middle of the thirteenth century ordinances and statutes that are written in French began to appear. Just for one moment England puts in a claim to equality. Henry III "þurȝ Godes fultume king on Engleneloande" issued one proclamation in English. But this claim was either belated or premature. Under Edward I French, though it cannot expel Latin from the records of litigation, becomes the language in which laws are published and law-books are written. It continues to be the language of the statute-book until the end of the Middle Ages. Under Henry VII English at length becomes the speech in which English lawgivers address their subjects, though some two hundred and fifty years must yet pass away before it will win that field in which Latin is securely entrenched.

As the oral speech of litigants and their advisers, French has won a splendid victory. In the king's own court it must prevail from the Conquest onwards, but

in the local courts a great deal of English must long have been spoken. Then, however, under Henry II began that centralising movement which we have already noticed. The jurisprudence of a French-speaking court became the common law, the measure of all rights and duties, and it was carried throughout the land by the journeying justices. In the thirteenth century men when they plead or when they talk about law, speak French; the professional lawyer writes in French and thinks in French. Some power of speaking a decent French seems to have been common among all classes of men, save the very poorest; men spoke it who had few, if any, drops of foreign blood in their veins. Then in 1362, when the prolonged wars between England and France had begun, a patriotic statute endeavoured to make English instead of French the spoken tongue of the law-courts. But this came too late; we have good reason for thinking that it was but tardily obeyed, and at any rate, lawyers went on writing about law in French. Gradually in the sixteenth century their French went to the bad, and they began to write in English; for a long time past they had been thinking and speaking in English. But it was an English in which almost all the technical terms were of French origin. And so it is at the present day. How shall one write a single sentence about law without using some such word as "debt," "contract," "heir," "trespass," "pay," "money," "court," "judge," "jury"? But all these words have come to us from the French. In all the world-wide lands where English law prevails, homage is done daily to William of Normandy and Henry of Anjou.

What Henry did in the middle of the twelfth century was of the utmost importance, though we might find ourselves in the midst of obsolete technicalities were we to endeavour to describe it at length. Speaking briefly, we may say that he concentrated the whole system of English justice round a court of judges professionally expert in the law. He could thus win money—in the Middle Ages no one did justice for nothing—and he could thus win power; he could control, and he could starve, the courts of the feudatories. In offering the nation his royal justice, he offered a strong and sound commodity. Very soon we find very small people—yeomen, peasants—giving the go-by to the old local courts and making their way to Westminster Hall, to plead there about their petty affairs. We may allow that in course of time this concentrating process went much too far. In Edward I's day the competence of the local courts in civil causes was hemmed within a limit of forty shillings, a limit which at first was fairly wide, but became ever narrower as the value of money fell, until in the last century no one could exact any debt that was not of trifling amount without bringing a costly action in one of the courts at Westminster. But the first stages of the process did unmixed good—they gave us a common law.

King Henry and his able ministers came just in time—a little later would have been too late: English law would have been unified, but it would have been Romanised. We have been wont to boast, perhaps too loudly, of the pure "Englishry" of our common law. This has not been all pure gain. Had we

"received" the Roman jurisprudence as our neighbours received it, we should have kept out of many a bad mess through which we have plunged. But to say nothing of the political side of the matter, of the absolute monarchy which Roman law has been apt to bring in its train, it is probably well for us and for the world at large that we have stumbled forwards in our empirical fashion, blundering into wisdom. The moral glow known to the virtuous schoolboy who has not used the "crib" that was ready to his hand, we may allow ourselves to feel; and we may hope for the blessing which awaits all those who have honestly taught themselves anything.

In a few words we must try to tell a long story. On the continent of Europe Roman law had never perished. After the barbarian invasions it was still the "personal law" of the conquered provincials. The Franks, Lombards, and other victorious tribes lived under their old Germanic customs, while the vanquished lived under the Roman law. In course of time the personal law of the bulk of the inhabitants became the territorial law of the country where they lived. The Roman law became once more the general law of Italy and of Southern France; but in so doing it lost its purity, it became a debased and vulgarised Roman law, to be found rather in traditional custom than in the classical texts, of which very little was known. Then, at the beginning of the twelfth century, came a great change. A law-school at Bologna began to study and to teach that Digest in which Justinian had preserved the wisdom of the great jurists of the golden age. A new science spread outwards from

Bologna. At least wherever the power of the emperor extended, Roman law had—so men thought—a claim to rule. The emperors, though now of German race, were still the Roman emperors, and the laws of their ancestors were to be found in Justinian's books. But further, the newly discovered system—for we may without much untruth say that it was newly discovered—seemed so reasonable that it could not but affect the development of law in countries such as France and England, which paid no obedience to the emperors.

And just at this time a second great system of cosmopolitan jurisprudence was taking shape. For centuries past the Catholic Church had been slowly acquiring a field of jurisdiction that was to be all her own, and for the use of the ecclesiastical tribunals a large body of law had come into being, consisting of the canons published by Church Councils and the decretal epistles—genuine and forged—of the Popes. Various collections of these were current, but in the middle of the twelfth century they were superseded by the work of Gratian, a monk of Bologna. He called it "The Concordance of Discordant Canons," but it soon became known everywhere as the Decretum. And by this time the Popes were ever busy in pouring out decretal letters, sending them into all corners of the western world. Authoritative collections of these "decretals" were published, and the ecclesiastical lawyer (the "canonist" or "decretist") soon had at his command a large mass of written law comparable to that which the Roman lawyer (the "civilian" or "legist") was studying. A Corpus Juris Canonici begins to take its place beside the Corpus Juris Civilis.

Very often the same man had studied both; he was a "doctor of both laws"; and, indeed, the newer system had borrowed largely from the older; it had borrowed its form, its spirit, and a good deal of its matter also.

The canonical jurisprudence of the Italian doctors became the ecclesiastical law of the western world. From all local courts, wherever they might be, there was an appeal to the ultimate tribunal at Rome. But the temporal law of every country felt the influence of the new learning. Apparently we might lay down some such rule as this—that where the attack is longest postponed, it is most severe. In the thirteenth century the Parliament of Paris began the work of harmonising and rationalising the provincial customs of Northern France, and this it did by Romanising them. In the sixteenth century, after "the revival of letters," the Italian jurisprudence took hold of Germany, and swept large portions of the old national law before it. Wherever it finds a weak, because an uncentralised, system of justice, it wins an easy triumph. To Scotland it came late; but it came to stay.

To England it came early. Very few are the universities which can boast of a school of Roman law so old as that of Oxford. In the troubled days of our King Stephen, when the Church was urging new claims against the feeble State, Archbishop Theobald imported from Italy one Vacarius, a Lombard lawyer, who lectured here on Roman law, and wrote a big book that may still be read. Very soon after this Oxford had a flourishing school of civil and canon law. Ever since William the Conqueror had solemnly

sanctioned the institution of special ecclesiastical courts, it had been plain that in those courts the law of a Catholic Church, not of a merely English Church, must prevail; also that this law would be in the main Italian law. In the next century, as all know, Henry and Becket fell out as to the definition of the province that was to be left to the ecclesiastical courts. The battle was drawn; neither combatant had gained all that he wanted. Thenceforward until the Protestant Reformation, and indeed until later than that, a border warfare between the two sets of courts was always simmering. Victory naturally inclined to those tribunals which had an immediate control of physical force, but still the sphere that was left to the canonists will seem to our eyes very ample. It comprehended not only the enforcement of ecclesiastical discipline, and the punishment—by spiritual censure, and, in the last resort, by excommunication—of sins left unpunished by temporal law, but also the whole topic of marriage and divorce, those last dying wills and testaments which were closely connected with dying confessions, and the administration of the goods of intestates. Why to this day do we couple "Probate" with "Divorce"? Because in the Middle Ages both of these matters belonged to "the courts Christian." Why to "Probate" and "Divorce" do we add "Admiralty"? Because the civilians—and in England the same man was usually both canonist and civilian—succeeded, though at a comparatively late time, in taking to themselves the litigation that concerned things done on the high seas, those high seas whence no jury could be summoned. So for the canonist

there was plenty of room in England; and there was some room for the civilian: he was very useful as a diplomatist.

But we were speaking of our English common law, the law of our ordinary temporal courts, and of the influence upon it of the new Italian but cosmopolitan jurisprudence; and we must confess that for a short while, from the middle of the twelfth to the middle of the thirteenth century, this influence was powerful. The amount of foreign law that was actually borrowed has been underrated and overrated: we could not estimate it without descending to details. Some great maxims and a few more concrete rules were appropriated, but on the whole what was taken was logic, method, spirit rather than matter. We may see the effect of this influence very plainly in a treatise on the Laws of England which comes to us from the last years of Henry II. It has been ascribed to Henry's Chief Justiciar — Viceroy, we may say — Ranulf Glanvill; and whether or no it comes from his pen (he was a layman and a warrior), it describes the practice of the court over which he presided. There are very few sentences in it which we can trace to any Roman book, and yet in a sense the whole book is Roman. We look back from it to a law-book written in Henry I's time, and we can hardly believe that only some seventy years divide the two. The one can at this moment be read and understood by anyone who knows a little of mediaeval Latin and a little of English law; the other will always be dark to the most learned scholars. The gulf between them looks like that between logic and caprice, between reason

and unreason. And then from the middle of the thirteenth century we have a much greater and better book than Glanvill's. Its author we know as Bracton, though his name really was Henry of Bratton. He was an ecclesiastic, an archdeacon, but for many years he was one of the king's justices. He had read a great deal of the Italian jurisprudence, chiefly in the works of that famous doctor, Azo of Bologna. Thence he had obtained his idea of what a law-book should be, of how law should be arranged and stated; thence also he borrowed maxims and some concrete rules; with these he can fill up the gaps in our English system. But he lets us see that not much more can now be done in the way of Romanisation. Ever since Henry II's time the king's court has been hard at work amassing precedents, devising writs, and commenting upon them. Bracton himself has laboriously collected five hundred decisions from the mile-long Rolls of the Court and uses them as his authorities. For him English law is already "case law"; a judgment is a precedent. While as yet the science of the civilians was a somewhat unpractical science, while as yet they had not succeeded in bringing the old classical texts into close contact with the facts of mediaeval life, the king's court of professional justices—the like of which was hardly to be found in any foreign land, in any unconquered land—had been rapidly evolving a common law for England, establishing a strict and formal routine of procedure, and tying the hands of all subsequent judges. From Bracton's day onwards Roman law exercises but the slightest influence on the English common law, and such influence as it exercises

is rather by way of repulsion than by way of attraction. English law at this early period had absorbed so much Romanism that it could withstand all future attacks, and pass scathless even through the critical sixteenth century.

It may be convenient, however, to pause at this point in the development of our judicial institutions, in order to trace the history of our legal procedure.

For a long time past Englishmen have been proud of their trial by jury, and proud to see the nations of Europe imitating as best they might this "palladium of English liberties," this "bulwark of the British Constitution." Their pride, if in other respects it be reasonable, need not be diminished by any modern discoveries of ancient facts, even though they may have to learn that in its origin trial by jury was rather French than English, rather royal than popular, rather the livery of conquest than a badge of freedom. They have made it what it is; and what it is is very different from what it was. The story is a long and a curious one.

Let us try to put before our eyes a court of the twelfth century; it may be a county court or a hundred-court, or a court held by some great baron for his tenants. It is held in the open air—perhaps upon some ancient moot-hill, which ever since the times of heathenry has been the scene of justice. An officer presides over it—the sheriff, the sheriff's bailiff, the lord's steward. But all or many of the free landowners of the district are bound to attend it; they owe "suit" to it, they are its suitors, they are its doomsmen; it is for them, and not for the president, "to find the

dooms." He controls the procedure, he issues the mandates, he pronounces the sentence; but when the question is what the judgment shall be, he bids the suitors find the doom. All this is very ancient, and look where we will in Western Europe we may find it. But as yet we have not found the germ of trial by jury. These doomsmen are not "judges of fact." There is no room for any judges of fact. If of two litigants the one contradicts the other flatly, if the plain "You did" of the one is met by the straightforward "You lie" of the other, here is a problem that man cannot solve. He is unable as yet to weigh testimony against testimony, to cross-examine witnesses, to piece together the truth out of little bits of evidence. He has recourse to the supernatural. He adjudges that one or other of the two parties is to prove his case by an appeal to God.

The judgment precedes the proof. The proof consists, not in a successful attempt to convince your judges of the truth of your assertion, but in the performance of a task that they have imposed upon you: if you perform it, God is on your side. The modes of proof are two, oaths and ordeals. In some cases we may see a defendant allowed to swear away a charge by his own oath. More frequently he will have to bring with him oath-helpers—in later days they are called "compurgators"—and when he has sworn successfully, each of these oath-helpers in turn will swear "By God that oath is clean and true." The doomsmen have decreed how many oath-helpers, and of what quality, he must bring. A great deal of their traditional legal lore consists in rules about this matter;

queer arithmetical rules will teach how the oath of one thegn is as weighty as the oath of six ceorls, and the like. Sometimes they require that the oath-helpers shall be kinsmen of the chief swearer, and so warn us against any rationalism which would turn these oath-helpers into "witnesses to character," and probably tell us of the time when the bond of blood was so strong that a man's kinsfolk were answerable for his misdeeds. A very easy task this oath with oath-helpers may seem in our eyes. It is not so easy as it looks. Ceremonial rules must be strictly observed; a set form of words must be pronounced; a slip, a stammer, will spoil all, and the adversary will win his cause. Besides, it is common knowledge that those who perjure themselves are often struck dead, or reduced to the stature of dwarfs, or find that they cannot remove their hands from the relics they have profaned.

But when crime is laid to a man's charge he will not always be allowed to escape with oaths. Very likely he will be sent to the ordeal. The ordeal is conceived as "the judgment of God." Of heathen origin it well may be, but long ago the Christian Church has made it her own, has prescribed a solemn ritual for the consecration of those instruments—the fire, the water—which will reveal the truth. The water in the pit is adjured to receive the innocent and to reject the guilty. He who sinks is safe, he who floats is lost. The red-hot iron one pound in weight must be lifted and carried three paces. The hand that held it is then sealed up in a cloth. Three days afterwards the seal is broken. Is the hand clean or is

it foul? that is the dread question. A blister "as large as half a walnut" is fatal. How these tests worked in practice we do not know. We seldom get stories about them save when, as now and again will happen, the local saint interferes and performs a miracle. We cannot but guess that it was well to be good friends with the priest when one went to the ordeal.

Then the Norman conquerors brought with them another ordeal—the judicial combat. An ordeal it is, for though the Church has looked askance at it, it is no appeal to mere brute force; it is an appeal to the God of Battles. Very solemnly does each combatant swear to the truth of his cause; very solemnly does he swear that he has eaten nothing, drunk nothing "whereby the law of God may be debased or the devil's law exalted." When a criminal charge is made —"an appeal of felony"—the accuser and the accused, if they be not maimed, nor too young, nor too old, will have to fight in person. When a claim for land is made, the plaintiff has to offer battle, not in his own person, but in the person of one of his men. This man is in theory a witness who will swear to the justice of his lord's cause. In theory he ought not to be, but in practice he often is, a hired champion who makes a profession of fighting other people's battles. If the hireling be exposed, he may have his hand struck off; but as a matter of fact there were champions in a large way of business. At least in some cases the arms that are used are very curious; they are made of wood and horn, and look (for we have pictures of them) like short pickaxes. Possibly they have been

in use for this sacral purpose—a sacral purpose it is—ever since an age which knew not iron. Also we know that the champion's head is shaved, but are left to guess why this is done. The battle may last the livelong day until the stars appear. The accuser has undertaken that in the course of a day he will "prove by his body" the truth of his charge; and if he cannot do this before the twilight falls, he has failed and is a perjurer. The object of each party in the fight is not so much to kill his adversary—this perhaps he is hardly likely to do with the archaic weapon that he wields—but to make him pronounce "the loathsome word," to make him cry "craven." In a criminal case the accused, if vanquished, was forthwith hanged or mutilated; but in any case the craven had to pay a fine of sixty shillings, the old "king's ban" of the Frankish laws, and, having in effect confessed himself a perjurer, he was thenceforth infamous.

But long ago the Frankish kings had placed themselves outside the sphere of this ancient formal and sacral procedure. They were standing in the shoes of Roman governors, even of Roman emperors. For themselves and their own affairs they had a prerogatival procedure. If their rights were in question, they would direct their officers to call together the best and oldest men of the neighbourhood to swear about the relevant facts. The royal officers would make an inquisition, hold an inquest, force men to swear that they would return true answers to whatever questions might be addressed to them in the king's name. They may be asked whether or no this piece of land belongs to the king; they may be asked in a general way what

lands the king has in their district; they may be asked (for the king is beginning to see that he has a great interest in the suppression of violent crime) to tell tales of their neighbours, to report the names of all who are suspected of murder or robbery, and then these men can be sent to the ordeal. This privilege that the king has he can concede to others; he can grant to his favourite churches that their lands shall stand outside the scope of the clumsy and hazardous procedure of the common courts; if their title to those lands be challenged, a royal officer will call upon the neighbours to declare the truth—in other words, to give a verdict. It is here that we see the germ of the jury.

The Norman duke in his conquered kingdom was able to use the inquest with a free hand and on a grand scale. Domesday Book was compiled out of the verdicts returned by the men of the various hundreds and townships of England in answer to a string of questions put to them by royal commissioners. We have read how the stern king thought it no shame to do what the English monk thought it shame to write, how he numbered every ox, every cow, every pig in England. Thenceforward the inquest was part of the machinery of government; it could be employed for many different purposes whenever the king desired information. He could use it in his own litigation, he could place it at the service of other litigants who were fortunate enough or rich enough to obtain this favour from him. But throughout the reigns of our Norman kings it keeps its prerogatival character.

Then Henry II, bent upon making his justice

supreme throughout his realm, put this royal remedy at the disposal of all his subjects. This he did not by one general law, but piecemeal, by a series of ordinances known as "assizes," some of which we may yet read, while others have perished. For example, when there was litigation about the ownership of land, the defendant, instead of accepting the plaintiff's challenge to fight, was allowed to "put himself upon the king's grand assize." Thereupon the action, which had been begun in some feudal court, was removed into the king's court; and twelve knights, chosen from the district in which the land lay, gave a verdict as to whether the plaintiff or the defendant had the better right. In other cases—for example, when the dispute was about the possession, not the ownership, of land—less solemn forms of the inquest were employed; twelve free and lawful men, not necessarily knights, were charged to say whether the defendant had ejected the plaintiff. Before the twelfth century was at an end, the inquest in one form or another—sometimes it was called an assize, sometimes a jury—had become part of the normal procedure in almost every kind of civil action. Still there long remained many cases in which a defendant could, if he chose, reject the new-fangled mode of trial, and claim the ancient right of purging himself with oath-helpers, or of picking up the glove that the plaintiff had thrown down as a gage of battle. Even a prelate of the Church would sometimes rely rather upon the strong arm of a professional pugilist than upon the testimony of his neighbours. Within the walls of the chartered boroughs men were conservative of all that

would favour the free burgher at the cost of the despised outsider. The Londoners thought that trial by jury was good enough for those who were not citizens, but the citizen must be allowed to swear away charges of debt or trespass by the oaths of his friends. In the old communal courts, too, the county and hundred courts, where the landowners of the district sat as doomsmen, trial by jury never struck root, for only by virtue of a royal writ could a jury be summoned: this is one of the reasons why those old courts languished, decayed, and became useless. However, before the Middle Ages were over, trial by jury had become the only form of trial for civil actions that had any vitality. So late as 1824 a lucky litigant, taking advantage of his adversary's slip, presented himself at the bar of the King's Bench, prepared to swear away a debt—"to make his law" was the technical phrase—with the aid of eleven oath-helpers, and not until 1833 was this world-old procedure abolished by statute; but long before this, if the plaintiff was well advised, he could always prevent his opponent from escaping in this easy fashion.

We have spoken of "trial by jury." That term naturally calls up before our minds a set of twelve men called into court in order that they may listen to the testimony of witnesses, give a true verdict "according to the evidence," and, in short, act as judges of those questions of fact that are in dispute. But it is very long after Henry II's day before trial by jury takes this form. Originally the jurors are called in, not in order that they may hear, but in order that they may give, evidence. They are witnesses. They are

neighbours of the parties; they are presumed to know before they come into court the facts about which they are to testify. They are chosen by the sheriff to represent the neighbourhood—indeed, they are spoken of as being "the neighbourhood," "the country"—and the neighbourhood, the country, will know the facts. In the twelfth century population was sparse, and men really knew far more of the doings of their neighbours than we know nowadays. It was expected that all legal transactions would take place in public; the conveyance of land was made in open court, the wife was endowed at the church-door, the man who bought cattle in secret ran a great but just risk of being treated as a thief; every three weeks a court was held in the village, and all the affairs of every villager were discussed. The verdict, then, was the sworn testimony of the countryside; and if the twelve jurors perjured themselves, the verdict of another jury of twenty-four might send them to prison and render them infamous for ever. In course of time, and by slow degrees—degrees so slow that we can hardly detect them—the jury put off its old and acquired a new character. Sometimes, when the jurors knew nothing of the facts, witnesses who did know the facts would be called in to supply the requisite information. As human affairs grew more complex, the neighbours whom the sheriff summoned became less and less able to perform their original duty, more and more dependent upon the evidence given in their presence by those witnesses who were summoned by the parties. In the fifteenth century the change had taken place, though in yet later days a man who had been summoned as a juror,

and who sought to escape on the ground that he already knew something of the facts in question, would be told that he had given a very good reason for his being placed in the jury-box. We may well say, therefore, that trial by jury, though it has its roots in the Frankish inquest, grew up on English soil; and until recent times it was distinctive of England and Scotland, for on the continent of Europe all other forms of legal procedure had been gradually supplanted by that which canonists and civilians had constructed out of ancient Roman elements.

We have yet to speak of the employment of the inquest in criminal cases. The Frankish kings had employed it for the purpose of detecting crime. Do you suspect any of murder, robbery, larceny, or the like? This question was addressed by royal officers to selected representatives of every neighbourhood, and answered upon oath, and the suspected persons were sent to "the judgment of God." The Church borrowed this procedure; the bishop could detect ecclesiastical offences as the king detected crimes. It is not impossible that this particular form of the inquest had made its way into England some half-century before the Norman Conquest; but we hear very little about it until the days of Henry II. He ordained that it should be used upon a very large scale and as a matter of ordinary practice, both by the justices whom he sent to visit the counties and by the sheriffs. From his time onward a statement made upon oath by a set of jurors representing a hundred, to the effect that such an one is suspected of such a crime, is sufficient to put a man upon his trial. It is

known as an indictment. It takes its place beside the old accusation, or "appeal," urged by the person who has been wronged, by the man whose goods have been stolen or the nearest kinsman of the murdered man. It is but an accusation, however, and in Henry's days the indicted person takes his chance at the hot iron or the cold water; God may be for him, though man be against him. But already some suspicion is shown of the so-called judgment of God; for though he comes clean from the ordeal, he has to leave the country, swearing never to return. At last, in 1215, the Fourth Lateran Council forbade the clergy to take part in this superstitious rite. After this we hear no more in England of the ordeal as a legal process, though in much later days the popular belief that witches will swim died hard, and many an old woman was put in the pond. The judges of the thirteenth century had no substitute ready to take the place of that supernatural test of which an enlightened Pope had deprived them. Of course, if the indicted person will agree to accept the verdict of his neighbours, will "put himself upon his country"—that is, upon the neighbourhood—for good and ill, all is easy. Those who have indicted him as a suspicious character can now be asked whether he is guilty or no; and if they say that he is guilty, there will be no harm in hanging him, for he consented to the trial, and he must abide the consequences. To make the trial yet fairer, one may call in a second jury different from that which indicted him. Here is the origin of those two juries which we see employed in our own days—the grand jury that indicts, and the petty jury that tries. But suppose

that he will not give his consent; it is by no means obvious that the testimony of his neighbours ought to be treated as conclusive. Hitherto he has been able to invoke the judgment of God, and can we now deprive him of this ancient, this natural right? No, no one can be tried by jury who does not consent to be so tried. But what we can do is this—we can compel him to give his consent, we can starve him into giving his consent, and, again, we can quicken the slow action of starvation by laying him out naked on the floor of the dungeon and heaping weights upon his chest until he says that he will abide by the verdict of his fellows. And so we are brought to the pedantic cruelty of the "peine forte et dure." Even in the seventeenth century there were men who would endure the agony of being pressed to death rather than utter the few words which would have subjected them to a trial by jury. They had a reason for their fortitude. Had they been hanged as felons their property would have been confiscated, their children would have been penniless; while, as it was, they left the world obstinate, indeed, but unconvicted. All this—and until 1772 men might still be pressed to death—takes us back to a time when the ordeal seems the fair and natural mode of ascertaining guilt and innocence, when the jury is still a new-fangled institution.

The indictment, we have said, took its place beside the "appeal"—the old private accusation. The owner of the stolen goods, the kinsman of the murdered man, might still prosecute his suit in the old manner, and offer to prove his assertion by his body. The Church had not abolished, and could not abolish, the judicial

combat, for though in truth it was an ordeal, no priestly benediction of the instruments that were to be used was necessary. By slow degrees in the thirteenth century the accused acquired the right of refusing his accuser's challenge and of putting himself upon a jury. What is more, the judges began to favour the "indictment" and to discourage the "appeal" by all possible means. They required of the accuser a punctilious observance of ancient formalities, and would quash his accusation if he were guilty of the smallest blunder. Still, throughout the Middle Ages we occasionally hear of battles being fought over criminal cases. In particular a convicted felon would sometimes turn "approver"—that is to say, he would obtain a pardon conditional on his ridding the world, by means of his appeals, of some three or four other felons. If he failed in his endeavour, he was forthwith hanged. But those who were not antiquarians must have long ago ceased to believe that such a barbarism as trial by battle was possible, when in 1818 a case arose which showed them that they had inadequately gauged the dense conservatism of the laws of their country. One Mary Ashford was found drowned; one Abraham Thornton was indicted for murdering her; a jury acquitted him. But the verdict did not satisfy the public mind, and the brother of the dead girl had recourse to an "appeal": to this accusation the previous acquittal was no answer. Thornton declared himself ready to defend his innocence by his body, and threw down, in Westminster Hall, as his gage of battle, an antique gauntlet, "without either fingers or thumb, made of white tanned skin, orna-

mented with sewn tracery and silk fringes, crossed by a narrow band of red leather, with leathern tags and thongs for fastening." The judges did their best to discover some slip in his procedure; but he had been careful and well advised; even his glove was of the true mediaeval pattern. So there was nothing for it but to declare that he was within his rights, and could not be compelled to submit to a jury if he preferred to fight. His adversary had no mind to fight, and so let the glove alone. After this crowning scandal Parliament at last bestirred itself, and in the year of grace 1819 completed the work of Pope Innocent III by abolishing the last of the ordeals.

If we regard it as an engine for the discovery of truth and for the punishment of malefactors, the mediaeval jury was a clumsy thing. Too often its verdicts must have represented guess-work and the tittle-tattle of the countryside. Sometimes a man must have gone to the gallows, not because anyone had seen him commit a crime, not because guilt had been brought home to him by a carefully tested chain of proved facts, but because it was notorious that he was just the man from whom a murder or a robbery might be expected. Only by slow degrees did the judges insist that the jurors ought to listen to evidence given by witnesses in open court, and rely only upon the evidence that was there given. Even when this step had been taken, it was long before our modern law of evidence took shape, long before the judges laid down such rules as that "hearsay is not evidence," and that testimony which might show that the prisoner had committed other crimes was not relevant to the

question whether he had perpetrated the particular offence of which he stood indicted.

But whatever may have been the case in the days of the ordeal—and about this we know very little—we may be fairly certain that in the later Middle Ages the escape of the guilty was far commoner than the punishment of the guiltless. After some hesitation our law had adopted its well-known rule that a jury can give no verdict unless the twelve men are all of one mind. To obtain a condemnatory unanimity was not easy if the accused was a man of good family; one out of every twelve of his neighbours that might be taken at random would stand out loyally for his innocence. Bribery could do much; seignorial influence could do more; the sheriff, who was not incorruptible, and had his own likes and dislikes, could do all, since it was for him to find the jury. It is easy for us to denounce as unconstitutional the practice which prevailed under Tudors and Stuarts of making jurors answer for their verdicts before the King's Council; it is not so easy for us to make certain that the jury system would have lived through the sixteenth century had it not been for the action of this somewhat irregular check. For the rest, we may notice that the jury of the Middle Ages, if it is to be called a democratic institution, can be called so only in a mediaeval sense. The jurors were freeholders. The great mass of Englishmen were not freeholders. The peasant who was charged with a crime was acquitted or convicted by the word of his neighbours, but by the word of neighbours who considered themselves very much his superiors.

If, however, we look back to those old days, we shall find ourselves deploring not so much that some men of whose guilt we are by no means satisfied are sent to the gallows, as that many men whose guilt is but too obvious escape scot-free. We take up a roll upon which the presentments of the jurors are recorded. Everywhere the same tale meets our eye. "Malefactors came by night to the house of such an one at such a place; they slew him and his wife and his sons and his daughters, and robbed his house; we do not know who they were; we suspect no one." Such organisation as there was for the pursuit of these marauders was utterly inefficient. Every good and lawful man is bound to follow the hue and cry when it is raised, and the village reeve, or in later days the village constable, ought to put himself at the head of this improvised and unprofessional police force. But it was improvised and unprofessional. Outside the walls of the boroughs there was no regular plan of watch and ward, no one whose business it was to keep an eye on men of suspicious habits, or to weave the stray threads of evidence into a halter. The neighbours who had followed the trail of the stolen cattle to the county boundary were apt to turn back, every man to his plough. "Let Gloucestershire folk mind Gloucestershire rogues." They would be fined, when the justices came round, for neglect of their duties—for the sheriff, or the coroner, or someone else, would tell tales of them—but meanwhile their hay was about, and the weather was rainy. Even when the jurors know the criminal's name, the chances seem to be quite ten to one that he has not been captured.

Nothing could then be done but outlaw him. At four successive county courts—the county court was held month by month—a proclamation calling upon him to present himself, "to come in to the king's peace," would be made, and at the fifth court he would be declared an outlaw. If after this he were caught, then, unless he could obtain some favour from the king, he would be condemned to death without any investigation being made of his guilt or innocence; the mere fact of his outlawry being proved, sentence followed as a matter of course. But the old law had been severer than this: to slay the outlaw wherever he may be found was not only the right but the duty of every true man, and even in the middle of the thirteenth century this was still the customary law of the Welsh marches. The outlaw of real life was not the picturesque figure that we have seen upon the stage; if he and his men were really "merry" in the greenwood, they were merry in creditable circumstances. Still, it is not to be denied that he attracted at times a good deal of romantic sympathy, even in the ages which really knew him. This probably had its origin in the brutal stringency of the forest laws, which must be charged with the stupid blunder of punishing small offences with a rigour which should have been reserved for the worst crimes.

The worst crimes were common enough. Every now and then the king and the nation would be alarmed, nor needlessly alarmed, by the prevalence of murder and highway robbery. A new ordinance would be issued, new instructions would be given to the judges, sheriffs would be active, and jurors would

be eager to convict; a good deal of hanging would be done, perhaps too indiscriminately. But so soon as the panic was over, Justice would settle down into her old sluggish habits. Throughout the Middle Ages life was very insecure; there was a great deal of nocturnal marauding, and the knife that every Englishman wore was apt to stab upon slight provocation.

The Church had not mended matters by sanctifying places and persons. In very old days when the blood-feud raged, when punishment and vengeance were very much one, it was a good thing that there should be holy places to which a man might flee when the avenger of blood was behind—places where no drop of blood might be spilt without sacrilege. They afforded an opportunity for the peacemaker. The bishop or priest would not yield up the fugitive who lay panting at the foot of the altar until terms had been made between him and his pursuers. But at a later time when the State was endeavouring to punish criminals, and there would be no punishment until after trial, the sanctuary was a public nuisance. The law was this:—If a criminal entered a church he was safe from pursuit; the neighbours who were pursuing him were bound to beset the church, prevent his escape, and send for the coroner. Sometimes they would remain encamped round the church for many days. At last the coroner would come, and parley with the fugitive. If he confessed his crime, then he might "abjure the realm"—that is, swear to leave England within a certain number of days (he was allowed days enough to enable him to reach the nearest seaport), and never to return. If he strayed

from the straight road which led to the haven, or if he came back to the realm, then he could at once be sentenced to death. For a man to take sanctuary, confess his crime and abjure the realm, was an every-day event, and we must have thus shipped off many a malefactor to plunder our neighbours in France and Flanders. If the man who had taken sanctuary would neither confess to a crime, nor submit to a trial, the State could do no more against him. It tried to teach the clergy that their duty was to starve him into submission; but the clergy resented this interference with holy things. A bad element of caprice was introduced into the administration of justice. The strong, the swift, the premeditating murderer cheated the gallows. Especially in the towns he might fairly complain of bad luck if he could not slip into one of the numerous churches before he was caught. On the other hand, the man who had not plotted his crime would get hanged.

And then the clergy stood outside the criminal law. If a clerk in holy orders committed a crime—this was the law of the thirteenth century—he could not be tried for it in a lay court. He could be accused there, and the judges might ask a jury whether he was guilty or no; but even though they found him guilty, this was no trial. At the request of his bishop—and the bishops made such requests as a matter of course—he was handed over for trial in an ecclesiastical court. Such a court had power to inflict very heavy punishments. It might draw no drop of blood, but it could imprison for life, besides being able to degrade the clerk from his orders. As a matter of fact, however, we hear

very little of any punishment save that of degradation. What is more, the criminal procedure of the ecclesiastical courts in England was of an absurdly old-fashioned and clumsy kind. They held by compurgation. If the accused clerk could but get some eleven or twelve friends of his own profession to swear that they believed him innocent, he was acquitted; he might resume his criminal career. Church and State are both to blame for this sad story. The Church would yield no jot of the claims that were sanctified by the blood of St Thomas; the lay courts would not suffer the bishops to do criminal justice in a really serious fashion. There can be no doubt that many of the worst criminals—men who had been found guilty by a jury of brutal murders and rapes—escaped scot-free, because they had about them some slight savour of professional holiness. It should be understood that this immunity was shared with the bishops, priests, and deacons by a vast multitude of men who were in "minor orders." They might have no ecclesiastical duties to perform; they might be married; they might be living the same life which laymen lived; but they stood outside the ordinary criminal law. One of the worst evils of the later Middle Ages was this "benefit of clergy." The king's justices, who never loved it, at length reduced it to an illogical absurdity. They would not be at pains to require any real proof of a prisoner's sacred character. If he could read a line in a book, this would do; indeed, it is even said that the same verse of the Psalms was set before the eyes of every prisoner, so that even the illiterate might escape if he could repeat by heart those saving words.

Criminal law had been rough and rude, and sometimes cruel; it had used the gallows too readily; it had punished with death thefts which, owing to a great fall in the value of money, were becoming petty thefts. Still, cruelty in such matters is better than caprice, and the "benefit of clergy" had made the law capricious without making it less cruel.

The Growth of Jurisprudence. 1154–1273.

During the period which divides the coronation of Henry II (1154) from the coronation of Edward I (1272) definite legislation was still an uncommon thing. Great as were the changes due to Henry's watchful and restless activity, they were changes that were effected without the pomp of solemn law-making. A few written or even spoken words communicated to his justices, those justices whom he was constantly sending to perambulate the country, might do great things, might institute new methods of procedure, might bring new classes of men and of things within the cognisance of the royal court. Some of his ordinances—or "assizes," as they were called—have come down to us; others we have lost. No one was at any great pains to preserve their text, because they were regarded, not as new laws, but as mere temporary instructions which might be easily altered. They soon sink into the mass of unenacted "common law." Even in the next, the thirteenth, century some of Henry's rules were regarded as traditional rules which had come down from a remote time, and which might

be ascribed to the Conqueror, the Confessor, or any other king around whom a mist of fable had gathered.

Thus it came about that the lawyers of Edward I's day—and that was the day in which a professional class of temporal lawyers first became prominent in England—thought of Magna Carta as the oldest statute of the realm, the first chapter in the written law of the land, the earliest of those texts the very words of which are law. And what they did their successors do at the present day. The Great Charter stands in the forefront of our statute book, though of late years a great deal of it has been repealed. And certainly it is worthy of its place. It is worthy of its place just because it is no philosophical or oratorical declaration of the rights of man, nor even of the rights of Englishmen, but an intensely practical document, the fit prologue for those intensely practical statutes which English Parliaments will publish in age after age. What is more, it is a grand compromise, and a fit prologue for all those thousands of compromises in which the practical wisdom of the English race will always be expressing itself. Its very form is a compromise—in part that of a free grant of liberties made by the king, in part that of a treaty between him and his subjects, which is to be enforced against him if he breaks it. And then in its detailed clauses it must do something for all those sorts and conditions of men who have united to resist John's tyranny—for the bishop, the clerk, the baron, the knight, the burgess, the merchant—and there must be some give and take between these classes, for not all their interests are harmonious.

But even in the Great Charter there is not much new law; indeed, its own theory of itself (if we may use such a phrase) is that the old law, which a lawless king has set at naught, is to be restored, defined, covenanted, and written.

The Magna Carta of our statute book is not exactly the charter that John sealed at Runnymede; it is a charter granted by his son and successor, Henry III, the text of the original document having been modified on more than one occasion. Only two other acts of Henry's long reign attained the rank of statute law. The Provisions of Merton, enacted by a great assembly of prelates and nobles, introduced several novelties, and contain those famous words, "We will not have the laws of England changed," which were the reply of the barons to a request made by the bishops, who were desirous that our insular rule, "Once a bastard always a bastard," might yield to the law of the universal Church, and that marriage might have a retroactive effect. Among Englishmen there was no wish to change the laws of England. If only the king and his foreign favourites would observe those laws, then—such was the common opinion—all would be well. A change came; vague discontent crystallised in the form of definite grievances. After the Barons' War the king, though he had triumphed over his foes, and was enjoying his own again, was compelled to redress many of those grievances by the Provisions of Marlborough, or, as they have been commonly called, the Statute of Marlbridge. When, a few years afterwards, Henry died, the written, the enacted law of England consisted in the main of but

four documents, which we can easily read through in half an hour—there was the Great Charter, there was the sister-charter which defined the forest law, there were the Statutes of Merton and of Marlbridge. To these we might add a few minor ordinances; but the old Anglo-Saxon dooms were by this time utterly forgotten, the law-books of the Norman age were already unintelligible, and even the assizes of Henry II, though but a century old, had become part and parcel of "the common law," not to be distinguished from the unenacted rules which had gathered round them. Englishmen might protest that they would not change the law of England, but as a matter of fact the law of England was being changed very rapidly by the incessant decisions of the powerful central court.

Legal Reform under Edward I.

On the death of Henry III there followed some eighteen years which even at this day may seem to us the most brilliant eighteen years in the whole history of English legislation. At all events, if we are to find a comparable period we must look forward, for five hundred years and more, to the age of the first Reform Bill. Year by year King Edward I in his Parliaments made laws on a grand scale. His statutes will not be in our eyes very lengthy documents; but they are drastic, and they are permanent. They deal with all sorts of matters, public and private, but in particular with those elementary parts of the law of property and the law of civil procedure which English legislators

have, as a general rule, been well content to leave alone. Just for this reason they are exceedingly permanent; they become fundamental; elaborate edifices of gloss and comment are reared upon them. To this day, despite all the reforms of the present century, we have to look to them, and the interpretation which has been set upon them, for some of the most elementary principles of our land law. When all has been said that can be said for the explanation of this unique outburst of legislation, it still remains a marvellous thing.

A professional class of English temporal lawyers was just beginning to form itself. We say "of English temporal lawyers," because for more than a century past there had been "legists" and "decretists" in the land. These legists and decretists constituted a professional class; they held themselves out as willing to plead the causes of those who would pay their fees. They did a large business, for the clergy of the time were extremely litigious. The bishop who was not perennially engaged in interminable disputes with two or three wealthy religious houses was either a very fortunate or a very careless guardian of the rights of his see. And all the roads of ecclesiastical litigation led to Rome. Appeals to the Pope were made at every stage of every cause, and the most famous Italian lawyers were retained as advocates. The King of England, who was often involved in contests about the election of bishops—contests which would sooner or later come before the Roman Curia—kept Italian canonists in his pay. Young Englishmen were sent to Bologna in order that they might learn the law of

the Church. The University of Oxford was granting degrees in civil and canon law, the University of Cambridge followed her example. There was no lack of ecclesiastical lawyers; indeed, the wisest and most spiritual of the clergy thought that there were but too many of them, and deplored that theology was neglected in favour of a more lucrative science. And what we might call an ecclesiastical "Bar" had been formed. The canonist who wished to practise in a bishop's court had to satisfy the bishop of his competence, and to take an oath obliging him to practise honestly. The tribunals of the Church knew both the "advocate" (who pleads on behalf of a client), and the "procurator" or "proctor" (who represents his client's person and attends to his cause).

In course of time two groups similar to these grew up round the king's court. We see the "attorney" (who answers to the ecclesiastical proctor) and the "pleader," "narrator," or "countor" (who answers to the ecclesiastical advocate). But the formation of these classes of professional lawyers has not been easy. Ancient law does not readily admit that one man can represent another; in particular, it does not readily admit that one man can represent another in litigation. So long as procedure is extremely formal, so long as all depends on the due utterance of sacramental words, it does not seem fair that you should put an expert in your place to say those words for you. My adversary has, as it were, a legal interest in my ignorance or stupidity. If I cannot bring my charge against him in due form, that charge ought to fail; at all events, he cannot justly be called upon to answer another person,

some subtle and circumspect pleader, whom I have hired. Thus the right to appoint an attorney who will represent my person in court, and win or lose my cause for me, appears late in the day. It spreads outwards from the king. From of old the king must be represented by others in his numerous suits. This right of his he can confer upon his subjects—at first as an exceptional favour, and afterwards by a general rule. In Henry III's reign this process has gone thus far:—A litigant in the king's court may appoint an attorney to represent him in the particular action in which he is for the time being engaged: he requires no special licence for this; but if a man wishes to appoint prospectively a general attorney, who will represent him in all actions, the right to do this he must buy from the king, and he will not get it except for some good cause. The attorneys of this age are by no means always professional men of business. Probably every free and lawful man may act as the attorney of another; indeed, shocking as this may seem to us, we may, not very unfrequently, find a wife appearing in court as her husband's attorney.

The other "branch of the profession" grows from a different stock. In very old days a litigant is allowed to bring his friends into court, and to take "counsel" with them before he speaks. Early in the twelfth century it is already the peculiar mark of a capital accusation that the accused must answer without "counsel." Then sometimes one of my friends will be allowed, not merely to prompt me, but even to speak for me. It is already seen that the old requirement of extreme verbal accuracy is working injustice.

A man ought to have some opportunity of amending a mere slip of the tongue; and yet old legal principles will not suffer that he should amend the slips of his own tongue. Let another tongue slip for him. Such is the odd compromise between ancient law and modern equity. One great advantage that I gain by putting forward "one of my counsel" to speak for me is that if he blunders—if, for example, he speaks of Roger when he should have spoken of Richard—I shall be able to correct the mistake, for his words will not bind me until I have adopted them. Naturally, however, I choose for this purpose my acutest and most experienced friends. Naturally, also, acute and experienced men are to be found who will gladly be for this purpose my friends or anybody else's friends, if they be paid for their friendliness. As a class of expert pleaders forms itself, the relation between the litigant and those who are "of counsel for him" will be very much changed, but it will not lose all traces of its friendly character. Theoretically one cannot hire another person to plead for one; in other words, counsel cannot sue for his fees.

Seemingly it was in the reign of Henry III that pleaders seeking for employment began to cluster round the king's court. Some of them the king, the busiest of all litigants, kept in his pay; they were his "serjeants"—that is, servants—at law. Under Edward I a process, the details of which are still very obscure, was initiated by the king, which brought these professional pleaders and the professional attorneys under the control of the judges, and began to secure a monopoly of practice to those who had been formally

ordained to the ministry of the law. About the same time it is that we begin to read of men climbing from the Bar to the Bench, and about the same time it is that the judges are ceasing to be ecclesiastics. If we look back to Richard I's reign we may see, as the highest temporal court of the realm, a court chiefly composed of ecclesiastics, presided over by an archbishop, who is also Chief Justiciar; he will have at his side two or three bishops, two or three archdeacons, and but two or three laymen. The greatest judges even of Henry III's reign are ecclesiastics, though by this time it has become scandalous for a bishop to do much secular justice. These judges have deserved their appointments, not by pleading for litigants, but by serving as clerks in the Court, the Exchequer, the Chancery. They are professionally learned in the law of the land, but they have acquired their skill rather as the civil servants of the Crown than as the advocates or advisers of private persons; and if they serve the king well on the Bench, they may hope to retire upon bishoprics, or at all events deaneries. But the Church has been trying to withdraw the clergy from this work in the civil courts. Very curious had been the shifts to which ecclesiastics had been put in order to keep themselves technically free of blood-guiltiness. The accused criminal knew what was going to happen when the ecclesiastical president of the court rose but left his lay associates behind him. Hands that dared not write "and the jurors say that he is guilty, and therefore let him be hanged," would go so far as "and therefore, etc." Lips that dared not say any worse would venture a sufficiently intelligible "Take him away, and let him

have a priest." However, the Church has her way. The clerks of the court, the Exchequer, the Chancery, will for a very long time be clerks in holy orders; but before the end of Edward I's reign the appointment of an ecclesiastic to be one of the king's justices will be becoming rare. On the whole, we may say that from that time to the present, one remarkable characteristic of our legal system is fixed—all the most important work of the law is done by a very small number of royal justices who have been selected from the body of pleaders practising in the king's courts.

Slowly the "curia" of the Norman reigns had been giving birth to various distinct offices and tribunals. In Edward's day there was a "King's Bench" (a court for criminal causes and other "pleas of the Crown"); a "Common Bench" (a court for actions brought by one subject against another); an Exchequer, which both in a judicial and an administrative way collected the king's revenue and enforced his fiscal rights; a Chancery, which was a universal secretarial bureau, doing all the writing that was done in the king's name. These various departments had many adventures to live through before the day would come when they would once more be absorbed into a High Court of Justice. Of some few of those adventures we shall speak in another place, but must here say two or three words about a matter which gave a distinctive shape to the whole body of our law—a shape that it is even now but slowly losing. Our common law during the later Middle Ages and far on into modern times is in the main a commentary on writs issued out of the king's Chancery. To understand this, we must go

back to the twelfth century, to a time when it would have seemed by no means natural that ordinary litigation between ordinary men should come into the king's court. It does not come there without an order from the king. Your adversary could not summon you to meet him in that court; the summons must come from the king. Thus much of the old procedure we still retain in our own time; it will be the king, not your creditor, who will bid you appear in his High Court. But whereas at the present day the formal part of the writ will merely bid you appear in court, and all the information that you will get about the nature of the claim against you will be conveyed to you in the plaintiff's own words or those of his legal advisers, this was not so until very lately. In old times the writ that was drawn up in the king's Chancery and sealed with his great seal told the defendant a good many particulars about the plaintiff's demand. Gradually, as the king began to open the doors of his court to litigants of all kinds, blank forms of the various writs that could be issued were accumulated in the Chancery. We may think of the king as keeping a shop in which writs were sold. Some of them were to be had at fixed prices, or, as we should say nowadays, they could be had as matters of course on the payment of fixed court-fees; for others special bargains had to be made. Then, in course of time, as our Parliamentary constitution took shape, the invention of new writs became rarer and rarer. Men began to see that if the king in his Chancery could devise new remedies by granting new writs, he had in effect a power of creating new rights and making new laws without the concur-

rence of the estates of the realm. And so it came to be a settled doctrine that though the old formulas might be modified in immaterial particulars to suit new cases as they arose, no new formula could be introduced except by statute. This change had already taken place in Edward I's day. Thenceforward the cycle of writs must be regarded as a closed cycle; no one can bring his cause before the king's courts unless he can bring it within the scope of one of those formulas which the Chancery has in stock and ready for sale. We may argue that if there is no writ there is no remedy, and if there is no remedy there is no wrong; and thus the register of writs in the Chancery becomes the test of rights and the measure of law. Then round each writ a great mass of learning collects itself. He who knows what cases can be brought within each formula knows the law of England. The body of law has a skeleton, and that skeleton is the system of writs. Thus our jurisprudence took an exceedingly rigid and permanent shape; it became a commentary on formulas. It could still grow and assimilate new matter, but it could only do this by a process of interpretation which gradually found new, and not very natural, meanings for old phrases. As we shall see hereafter, this process of interpretation was too slow to keep up with the course of social and economic change, and the Chancery had to come to the relief of the courts of law by making itself a court of equity.

English Law, 1307–1600.

The desire for continuous legislation is modern. We have come to think that, year by year, Parliament must meet and pour out statutes; that every statesman must have in his mind some programme of new laws; that if his programme once become exhausted he would cease to be a statesman. It was otherwise in the Middle Ages. As a matter of fact a Parliament might always find that some new statute was necessary. The need for legislation, however, was occasioned (so men thought) not by any fated progress of the human race, but by the perversity of mankind. Ideally there exists a perfect body of law, immutable, eternal, the work of God, not of man. Just a few more improvements in our legal procedure will have made it for ever harmonious with this ideal; and, indeed, if men would but obey the law of the land as it stands, there would be little for a legislator to do.

During the fourteenth century a good deal is written upon the statute roll, and a good deal can still be said in very few words. "Also it is agreed that a Parliament shall be holden once a year or more often if need be." This is a characteristic specimen of the brief sentences in which great principles are formulated and which by their ambiguity will provide the lawyers and politicians of later ages with plenty of matter for debate. Many of these short clauses are directed against what are regarded as abuses, as evasions of the law, and the king's officers are looked upon as the

principal offenders. They must be repeated with but little variation from time to time, for it is difficult to bind the king by law. Happily the kings were needy; in return for "supply" they sold the words on the statute roll, and those words, of some importance when first conceded, became of far greater importance in after times. When we read them nowadays they turn our thoughts to James and Charles, rather than to Edward and Richard. The New Monarchy was not new. This, from its own point of view, was its great misfortune. It had inherited ancient parchment rolls which had uncomfortable words upon them.

But Parliament by its statutes was beginning to interfere with many affairs, small as well as great. Indeed, what we may consider small affairs seem to have troubled and interested it more even than those large constitutional questions which it was always hoping to settle but never settling. If we see a long statute, one guarded with careful provisos, one that tells us of debate and compromise, this will probably be a statute which deals with one particular trade; for instance, a statute concerning the sale of herring at Yarmouth fair. The thorniest of themes for discussion is the treatment of foreign merchants. Naturally enough our lords, knights, and burgesses cannot easily agree about it. One opinion prevails in the seaports, another in the upland towns, and the tortuous course of legislation, swaying now towards Free Trade and now towards Protection, is the resultant of many forces. The "omnicompetence," as Bentham called it, of statute law was recognised by all, the impotence of statute law was seen by none. It can determine the rate of wages,

the price of goods, the value of money; it can decide that no man shall dress himself above his station.

On the other hand, the great outlines of criminal law and private law seem to have been regarded as fixed for all time. In the twentieth century students of law will still for practical purposes be compelled to know a good deal about some of the statutes of Edward I. They will seldom have occasion to know anything of any laws that were enacted during the fourteenth or the first three-quarters of the fifteenth century. Parliament seems to have abandoned the idea of controlling the development of the common law. Occasionally and spasmodically it would interfere, devise some new remedy, fill a gap in the register of writs, or circumvent the circumventors of a statute. But in general it left the ordinary law of the land to the judges and the lawyers. In its eyes the common law was complete, or very nearly complete.

And then as we read the statute-roll of the fifteenth century we seem for a while to be watching the decline and fall of a mighty institution. Parliament seems to have nothing better to do than to regulate the manufacture of cloth. Now and then it strives to cope with the growing evils of the time, the renascent feudalism, the private wars of great and small; but without looking outside our roll we can see that these efforts are half-hearted and ineffectual. We are expected to show a profound interest in "the making of worsteds," while we gather from a few casual hints that the Wars of the Roses are flagrant. If for a moment the Parliament of Edward IV can raise its soul above defective barrels of fish and fraudulent gutter tiles, this will

be in order to prohibit "cloish, kayles, half-bowl, hand-in-hand and hand-out, quekeboard," and such other games as interfere with the practice of archery.

In the end it was better that Parliament should for a while register the acts of a despot than that it should sink into the contempt that seemed to be prepared for it. The part which the assembled Estates of the Realm have to play in the great acts of Henry VIII may in truth be a subservient and ignoble part; but the acts are great and they are all done "by the authority of Parliament." By the authority of Parliament the Bishop of Rome could be deprived of all jurisdiction, the monasteries could be dissolved, the king could be made (so far as the law of God would permit) supreme head of the English Church, the succession to the Crown could be settled first in this way, then in that, the force of statute might be given to the king's proclamations. There was nothing that could not be done by the authority of Parliament. And apart from the constitutional and ecclesiastical changes which everyone has heard about, very many things of importance were done by statute. We owe to Henry VIII—much rather to him than to his Parliament—not a few innovations in the law of property and the law of crime, and the Parliaments of Elizabeth performed some considerable legal exploits. The statutes of the Tudor period are lengthy documents. In many a grandiose preamble we seem to hear the voice of Henry himself; but their length is not solely due to the pomp of imperial phrases. They condescend to details; they teem with exceptions and saving clauses. One cannot establish a new ecclesiastical

polity by half-a-dozen lines. We see that the judges are by this time expected to attend very closely to the words that Parliament utters, to weigh and obey every letter of the written law.

Just now and then in the last of the Middle Ages and thence onwards into the eighteenth century, we hear the judges claiming some vague right of disregarding statutes which are directly at variance with the common law, or the law of God, or the royal prerogative. Had much come of this claim, our constitution must have taken a very different shape from that which we see at the present day. Little came of it. In the troublous days of Richard II a chief justice got himself hanged as a traitor for advising the king that a statute curtailing the royal power was void. For the rest, the theory is but a speculative dogma. We can (its upholders seem to say) conceive that a statute might be so irrational, so wicked, that we would not enforce it; but, as a matter of fact, we have never known such a statute made. From the Norman Conquest onwards, England seems marked out as the country in which men, so soon as they begin to philosophise, will endeavour to prove that all law is the command of a "sovereign one," or a "sovereign many." They may be somewhat shocked when in the seventeenth century Hobbes states this theory in trenchant terms and combines it with many unpopular doctrines. But the way for Hobbes had been prepared of old. In the days of Edward I the text-writer whom we call Britton had put the common law into the king's mouth: all legal rules might be stated as royal commands.

Still, even in the age of the Tudors, only a small

part of the law was in the statute-book. Detached pieces of superstructure were there; for the foundation men had to look elsewhere. After the brilliant thirteenth century a long, dull period had set in. The custody of the common law was now committed to a small group of judges and lawyers. They knew their own business very thoroughly, and they knew nothing else. Law was now divorced from literature; no one attempted to write a book about it. The decisions of the courts at Westminster were diligently reported and diligently studied, but no one thought of comparing English law with anything else. Roman law was by this time an unintelligible, outlandish thing, perhaps a good enough law for half-starved Frenchmen. Legal education was no longer academic—the universities had nothing to do with it, they could only make canonists and civilians—it was scholastic. By stages that are exceedingly obscure, the inns of court and inns of chancery were growing. They were associations of lawyers which had about them a good deal of the club, something of the college, something of the trade-union. They acquired the "inns" or "hospices" —that is, the town houses—which had belonged to great noblemen: for example, the Earl of Lincoln's inn. The house and church of the Knights of the Temple came to their hands. The smaller societies, "inns of chancery," became dependent on the larger societies, "inns of court." The serjeants and apprentices who composed them enjoyed an exclusive right of pleading in court; some things might be done by an apprentice or barrister, others required a serjeant; in the Court of Common Pleas only a serjeant could be

heard. It would take time to investigate the origin of that power of granting degrees which these societies wielded. To all seeming the historian must regard it as emanating from the king, though in this case, as in many other cases, the control of a royal prerogative slowly passed out of the king's hand. But here our point must be, that the inns developed a laborious system of legal education. Many years a student had to spend in hearing and giving lectures and in pleading fictitious causes before he could be admitted to practice.

It is no wonder that under the fostering care of these societies English jurisprudence became an occult science and its professors "the most unlearned kind of most learned men." They were rigorous logicians, afraid of no conclusion that was implicit in their premises. The sky might fall, the Wars of the Roses might rage, but they would pursue the even course of their argumentation. They were not altogether unmindful of the social changes that were going on around them. In the fifteenth century there were great judges who performed what may seem to us some daring feats in the accommodation of old law to new times. Out of unpromising elements they developed a comprehensive law of contract; they loosened the bonds of those family settlements by which land had been tied up; they converted the precarious villein tenure of the Middle Ages into the secure copyhold tenure of modern times. But all this had to be done evasively and by means of circumventive fictions. Novel principles could not be admitted until they were disguised in some antique garb.

A new and a more literary period seems to be beginning in the latter half of the fifteenth century, when Sir John Fortescue, the Lancastrian Chief Justice, writing for the world at large, contrasts the constitutional kingship of England with the absolute monarchy of France, and Sir Thomas Littleton, a Justice in the Court of Common Pleas, writing for students of English law, publishes his lucid and classical book on the tenure of land. But the hopes of a renascence are hardly fulfilled. In the sixteenth century many famous lawyers added to their fame by publishing reports of decided cases and by making "abridgments" of the old reports, and a few little treatises were compiled; but in general the lawyer seems to think that he has done all for jurisprudence that can be done when he has collected his materials under a number of rubrics alphabetically arranged. The alphabet is the one clue to the maze. Even in the days of Elizabeth and James I Sir Edward Coke, the incarnate common law, shovels out his enormous learning in vast disorderly heaps. Carlyle's felicity has for ever stamped upon Coke the adjective "tough"—"tough old Coke upon Littleton, one of the toughest men ever made." We may well transfer the word from the man to the law that was personified in him. The English common law was tough, one of the toughest things ever made. And well for England was it in the days of Tudors and Stuarts that this was so. A simpler, a more rational, a more elegant system would have been an apt instrument of despotic rule. At times the judges were subservient enough: the king could dismiss them from their offices at a moment's notice; but the clumsy, cumbrous system, though it might

bend, would never break. It was ever awkwardly rebounding and confounding the statecraft which had tried to control it. The strongest king, the ablest minister, the rudest Lord-Protector could make little of this "ungodly jumble."

To this we must add that professional jealousies had been aroused by the evolution of new courts, which did not proceed according to the course of the common law. Once more we must carry our thoughts back to the days of Edward I. The three courts—King's Bench, Common Bench, and Exchequer—had been established. There were two groups of "Justices," and one group of "Barons" engaged in administering the law. But behind these courts there was a tribunal of a less determinate nature. Looking at it in the last years of the thirteenth century we may doubt as to what it is going to be. Will it be a house of magnates, an assembly of the Lords Spiritual and Temporal, or will it be a council composed of the king's ministers and judges and those others whom he pleases for one reason or another to call to the council board? As a matter of fact, in Edward I's day, this highest tribunal seems to be rather the council than the assembly of prelates and barons. This council is a large body; it comprises the great officers of state—Chancellor, Treasurer, and so forth; it comprises the judges of the three courts; it comprises also the Masters or chief clerks of the Chancery, whom we may liken to the "permanent under-secretaries" of our own time; it comprises also those prelates and barons whom the king thinks fit to have about him. But the definition of this body seems somewhat vague. The sessions or

"parliaments" in which it does justice often coincide in time with those assemblies of the Estates of the Realm by which, in later days, the term "parliaments" is specifically appropriated, and at any moment it may take the form of a meeting to which not only the ordinary councillors, but all the prelates and barons, have been summoned. In the light which later days throw back upon the thirteenth century we seem to see in the justiciary "parliaments" of Edward I two principles, one of which we may call aristocratic, while the other is official; and we think that, sooner or later, there must be a conflict between them—that one must grow at the expense of the other. And then again we cannot see very plainly how the power of this tribunal will be defined, for it is doing work of a miscellaneous kind. Not only is it a court of last resort in which the errors of all lower courts can be corrected, but as a court of first instance it can entertain whatever causes, civil or criminal, the king may evoke before it. Then lastly, acting in a manner which to us seems half judicial and half administrative, it hears the numerous petitions of those who will urge any claim against the king, or complain of any wrong which cannot be redressed in the formal course of ordinary justice.

In the course of the fourteenth century some of these questions were settled. It became clear that the Lords' House of Parliament, the assembly of prelates and barons, was to be the tribunal which could correct the mistakes in law committed by the lower courts. The right of a peer of the realm to be tried for capital crimes by a court composed of his peers was established.

Precedents were set for those processes which we know as impeachments, in which the House of Lords hears accusations brought by the House of Commons. In all these matters, therefore, a tribunal technically styled "the King in Parliament," but which was in reality the House of Lords, appeared as the highest tribunal of the realm. But, beside it, we see another tribunal with indefinitely wide claims to jurisdiction—we see "the King in Council." And the two are not so distinct as an historian, for his own sake and his readers', might wish them to be. On the one hand, those of the King's Council who are not peers of the realm, in particular the judges and the Masters of the Chancery, are summoned to the Lords' House of Parliament, and only by slow degrees is it made plain to them that, when they are in that House, they are mere "assistants" of the peers, and are only to speak when they are spoken to. On the other hand, there is a widespread, if not very practical, belief that all the peers are by rights the king's councillors, and that any one of them may sit at the council board if he pleases. Questions enough are left open for subsequent centuries.

Meanwhile the Council, its actual constitution varying much from reign to reign, does a great deal of justice, for the more part criminal justice, and this it does in a summary, administrative way. Plainly there is great need for such justice, for though the representative commoners and the lawyers dislike it, they always stop short of demanding its utter abolition. The commoners protest against this or that abuse. Sometimes they seem to be upon the point of denouncing

the whole institution as illegal; but then there comes some rebellion or some scandalous acquittal of a notorious criminal by bribed or partial jurors, which convinces them that, after all, there is a place for a masterful court which does not stand upon ceremony, which can strike rapidly and have no need to strike twice. They cannot be brought to admit openly that one main cause of the evils that they deplore is the capricious clumsiness of that trial by jury which has already become the theme of many a national boast. They will not legislate about the matter, rather they will look the other way while the Council is punishing rich and powerful offenders, against whom no verdict could have been obtained. A hard line is drawn between the felonies, for which death is the punishment, and the minor offences. No one is to suffer loss of life or limb unless twelve of his neighbours have sworn to his guilt after a solemn trial; but the Council must be suffered to deal out fines and imprisonments against rioters, conspirators, bribers, perjured jurors; otherwise there will be anarchy. The Council evolves a procedure for such cases, or rather it uses the procedure of the canon law. It sends for the accused; it compels him to answer upon oath written interrogatories. Affidavits, as we should call them, are sworn upon both sides. With written depositions before them, the Lords of the Council, without any jury, acquit or convict. The extraction of confessions by torture is no unheard-of thing.

It was in a room known as the Star Chamber that the Council sat when there was justice to be done, and there, as "the Court of Star Chamber," it earned its

infamy. That infamy it fairly earned under the first two Stuart kings, and no one will dispute that the Long Parliament did well in abolishing it. It had become a political court and a cruel court, a court in which divines sought to impose their dogmas and their ritual upon a recalcitrant nation by heavy sentences; in which a king, endeavouring to rule without a Parliament, tried to give the force of statutes to his proclamations, to exact compulsory loans, to gather taxes that the Commons had denied him; a whipping, nose-slitting, ear-cropping court; a court with a grim, unseemly humour of its own, which would condemn to an exclusive diet of pork the miserable Puritan who took too seriously the Mosaic prohibition of swine's flesh. And then, happily, there were doubts about its legality. The theory got about that it derived all its lawful powers from a statute passed in 1487, at the beginning of Henry VII's reign, while manifestly it was exceeding those powers in all directions. We cannot now accept that theory, unless we are prepared to say that for a century and a half all the great judges, including Coke himself, had taken an active part in what they knew to be the unlawful doings of the Council—the two Chief Justices had habitually sat in the Star Chamber. Still we may be glad that this theory was accepted. The court was abolished in the name of the common law.

It had not added much to our national jurisprudence. It had held itself aloof from jurisprudence; it had been a law unto itself, with hands free to invent new remedies for every new disease of the body politic. It had little regard for precedents, and, therefore, men

were not at pains to collect its decisions. It had, however, a settled course of procedure which, in its last days, was described by William Hudson in a very readable book. Its procedure, the main feature of which was the examination of the accused, perished with it. After the Civil War and the Restoration no attempt was made to revive it, but that it had been doing useful things then became evident. The old criminal law had been exceedingly defective, especially in relation to those offences which did not attain the rank of felonies. The King's Bench had, for the future, to do what the Star Chamber had done, but to do it in a more regular fashion, and not without the interposition of a jury.

Far other were the fortunes of the Star Chamber's twin sister, the Court of Chancery. Twin sisters they were; indeed, in the fourteenth century it is hard to tell one from the other, and even in the Stuart time we sometimes find the Star Chamber doing things which we should have expected to be done by the Chancery. But, to go back to the fourteenth century, the Chancellor was the king's first minister, the head of the one great secretarial department that there was, the President of the Council, and the most learned member of the Council. Usually he was a bishop; often he had earned his see by diligent labours as a clerk in the Chancery. It was natural that the Lords of the Council should put off upon him, or that he should take to himself, a great deal of the judicial work that in one way or another the Council had to do. Criminal cases might come before the whole body, or some committee of it. Throughout the Middle Ages

criminal cases were treated as simple affairs; for example, justices of the peace who were not trained lawyers could be trusted to do a great deal of penal justice, and inflict the punishment of death. But cases involving civil rights, involving the complex land law, might come before the Council. Generally, in such cases, there was some violence or some fraud to be complained of, some violence or fraud for which, so the complainant alleged, he could get no redress elsewhere. Such cases came specially under the eye of the Chancellor. He was a learned man with learned subordinates, the Masters of the Chancery. Very gradually it became the practice for complainants who were seeking the reparation of wrongs rather than the punishment of offences, to address their petitions, not to the King and Council, but to the Chancellor. Slowly men began to think of the Chancellor, or the Chancery of which he was president, as having a jurisdiction distinct from, though it might overlap, that of the Council.

What was to be the sphere of this jurisdiction? For a long time this question remained doubtful. The wrongs of which men usually complained to the Chancellor were wrongs well enough known to the common law—deeds of violence, assaults, land-grabbing, and so forth. As an excuse for going to him, they urged that they were poor while their adversaries were mighty, too mighty for the common law, with its long delays and its purchasable jurors. Odd though this may seem to us, that court which was to become a byword for costly delay started business as an expeditious and a poor man's court. It met with much opposition: the

House of Commons did not like it, and the common lawyers did not like it; but still there was a certain half-heartedness in the opposition. No one was prepared to say that there was no place for such a tribunal; no one was prepared to define by legislation what its place should be.

From the field of the common law the Chancellor was slowly compelled to retreat. It could not be suffered that, merely because there was helplessness on the one side and corruptive wealth on the other, he should be suffered to deal with cases which belonged to the old courts. It seems possible that this nascent civil jurisdiction of the Chancellor would have come to naught but for a curious episode in the history of our land law. In the second half of the fourteenth century many causes were conspiring to induce the landholders of England to convey their lands to friends, who, while becoming the legal owners of those lands, would, nevertheless, be bound by an honourable understanding as to the uses to which their ownership should be put. There were feudal burdens that could thus be evaded, ancient restrictions which could thus be loosened. The Chancellor began to hold himself out as willing to enforce these honourable understandings, these "uses, trusts or confidences" as they were called, to send to prison the trustee who would not keep faith. It is an exceedingly curious episode. The whole nation seems to enter into one large conspiracy to evade its own laws, to evade laws which it has not the courage to reform. The Chancellor, the judges, and the Parliament seem all to be in the conspiracy. And yet there is really no conspiracy: men are but living from hand

to mouth, arguing from one case to the next case, and they do not see what is going to happen. Too late the king, the one person who had steadily been losing by the process, saw what had happened. Henry VIII put into the mouth of a reluctant Parliament a statute which did its best—a clumsy best it was—to undo the work. But past history was too strong even for that high and mighty prince. The statute was a miserable failure. A little trickery with words would circumvent it. The Chancellor, with the active connivance of the judges, was enabled to do what he had been doing in the past, to enforce the obligations known as trusts. This elaborate story we can only mention by the way; the main thing that we have to notice is that, long before the Tudor days—indeed, before the fourteenth century was out—the Chancellor had acquired for himself a province of jurisdiction which was, in the opinion of all men, including the common lawyers, legitimately his own. From time to time he would extend its boundaries, and from time to time there would be a brisk quarrel between the Chancery and the law courts over the annexation of some field fertile of fees. In particular, when the Chancellor forbade a man to sue in a court of law, or to take advantage of a judgment that he had obtained in a court of law, the judges resented this, and a bitter dispute about this matter between Coke and Ellesmere gave King James I a wished-for opportunity of posing as the supreme lord of all the justice that was done in his name and awarding a decisive victory to his Chancellor. But such disputes were rare. The Chancellors had found useful work to do, and they had been suffered to do it without

much opposition. In the name of equity and good conscience they had, as it were, been adding an appendix to the common law. Every jot and tittle of the law was to be fulfilled, and yet, when a man had done this, more might be required of him in the name of equity and good conscience.

Where were the rules of equity and good conscience to be found? Some have supposed that the clerical Chancellors of the last Middle Ages found them in the Roman or the Canon Law, and certain it is that they borrowed the main principles of their procedure from the canonists. Indeed, until some reforms that are still very recent, the procedure of the Court of Chancery was the procedure of an Ecclesiastical Court. In flagrant contrast to the common law, it forced the defendant to answer on oath the charges that were brought against him; it made no use of the jury; the evidence consisted of written affidavits. On the other hand, it is by no means certain that more than this was borrowed. So far as we can now see, the Chancellors seem to get most of their dominant ideas from the common law. They imitate the common law whenever they can, and depart from it reluctantly at the call of natural justice and common honesty. Common honesty requires that a man shall observe the trust that has been committed to him. If the common law will not enforce this obligation it is failing to do its duty. The Chancellor intervenes, but in enforcing trusts he seizes hold of and adopts every analogy that the common law presents. For a long time English equity seems to live from hand to mouth. Sufficient for the day are the cases in that day's cause-list. Even in the seven-

teenth century men said that the real measure of equity was the length of the Chancellor's foot. Under the Tudors the volume of litigation that flowed into the Chancery was already enormous; the Chancellor was often sadly in arrear of his work, and yet very rarely were his decisions reported, though the decisions of the judges had been reported ever since the days of Edward I. This shows us that he did not conceive himself to be straitly bound by precedents: he could still listen to the voice of conscience. The rapid increase in the number of causes that he had to decide began to make his conscience a technical conscience. More and more of his time was spent upon the judgment-seat. Slowly he ceased to be, save in ceremonial rank, the king's first minister. Wolsey was the last Chancellor who ruled England. Secretaries of State were now intervening between the king and his Great Seal. Its holder was destined to become year by year more of a judge, less of a statesman. Still we must look forward to the Restoration for the age in which the rules of equity begin to take a very definite shape, comparable in rigour to the rules of the common law.

Somehow or another, England, after a fashion all her own, had stumbled into a scheme for the reconciliation of permanence with progress. The old mediaeval criminal law could be preserved because a Court of Star Chamber would supply its deficiencies; the old private law could be preserved because the Court of Chancery was composing an appendix to it; trial by jury could be preserved, developed, transfigured because other modes of trial were limiting it to an appropriate sphere. And so our old law maintained its continuity.

As we have said above, it passed scathless through the critical sixteenth century, and was ready to stand up against tyranny in the seventeenth. The Star Chamber and the Chancery were dangerous to our political liberties. Bacon could tell King James that the Chancery was the court of his absolute power. But if we look abroad we shall find good reason for thinking that but for these institutions our old-fashioned national law, unable out of its own resources to meet the requirements of a new age, would have utterly broken down, and the "ungodly jumble" would have made way for Roman jurisprudence and for despotism. Were we to say that that equity saved the common law, and that the Court of Star Chamber saved the constitution, even in this paradox there would be some truth.

CAMBRIDGE: PRINTED BY JOHN CLAY, M.A. AT THE UNIVERSITY PRESS.