Library of Congress Catalogue Card Number 91-77977
ISBN 0-9630106-1-1 (Set)

Printed in the United States of America
on Acid-Free Paper

The Lawbook Exchange, Ltd.
135 West 29th Strret
New York, NY 10001
1992

SELECT ESSAYS

IN

ANGLO-AMERICAN LEGAL HISTORY

By VARIOUS AUTHORS

COMPILED AND EDITED BY A COMMITTEE OF THE
ASSOCIATION OF AMERICAN LAW SCHOOLS

IN THREE VOLUMES
VOLUME II

BOSTON
LITTLE, BROWN, AND COMPANY
1908

of law for each country being almost equally comprehensive, it must suffice here to refer to the data given in Stephen-Blackstone, New Commentaries, i. Neither can the development of the English law in the British Colonies or in the United States be here considered.

Bibliography. Of Reeves, History of the English Law, part of vol. ii and vols. iii-v treat of the period here considered to the reign of Elizabeth inclusive. Crabb becomes very summary subsequent to the period covered by Reeves. The most recent development of the law is treated of by Wilson, History of Modern English Law, 1875, a zealous advocate of radical modernization of the English law through legislation (Benthamism), contrasting the common law with the recent changes. Full notes regarding the legal writers who were also judges are found in Edw. Foss, The Judges of England, with sketches of their lives, 9 vols., to 1864, and in his Biographia Juridica, a biographical Dictionary of the Judges of England, 1066-1870, 1870. Holmes, The Common Law, Boston, 1881, gives a very noteworthy account of civil and criminal institutions of the common law and their historic foundations. An excellent view of the English private law on a historical basis is afforded by Ernst Heymann, in Holtzendorff-Kohler: Encyclopaedie der Rechtswissenschaft, 6th ed., i (1904), p. 795. For a first introduction see Sir Fred. Pollock, A First Book of Jurisprudence for Students of the Common Law, 1896.

23. MATERIALS FOR THE HISTORY OF ENGLISH LAW [1]

By Frederic William Maitland [2]

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." [3] 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 favorable for yet greater achievements.

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 con-

[1] This essay was first published in the Political Science Quarterly, vol. iv, pp. 496-518, 628-647 (1889).

[2] A biographical notice of this author is prefixed to Essay No. 1, in volume i of this Collection.

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

siderable 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 endeavor, 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 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 mediæval 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 mediæval 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 labor 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

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

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 certainly 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

[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.

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 mediæval 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 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

[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.

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 development of civil procedure has not been neglected.[3] 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.[4]

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

[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).

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

[4] 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.

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 tenfold, 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 "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 mediæval 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.[2] The commencement in 1858 of the Rolls

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

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

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 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 favors 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

[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.

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 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 presumption 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]

[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 standing 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.

The dooms are far from giving us a complete 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, 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, canons and penitentials[2] 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 docu-

[1] The standing 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 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.

[2] 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 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.

ments 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, 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 jurisitic 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 substance; 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 labors 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* (Copehagen, 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 favor 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 coæval *Très ancien Coutumier* constantly in his hand.

In three very accessible places Heinrich Brunner has sketched the history of law in Normandy: (1) *Das an-*

glonormannische Erbfolgesystem (Leipzig, 1869); (2) *Die Entstehung der Schwurgerichte* (Berlin, 1871); (3) *Ueberblick über die Geschichte der französischen, normannischen und englischen Rechtsquellen,* in Holtzendorff's *Encyklopädie 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 versions exist, known as *Statuta et Consuetudines Normanniae,* or *Établissements et Coutumes de Normandie;* [4] 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,

[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 XIIIe siècle (Paris, 1864). A collection of judgments delivered in the "Assises" between 1234 and 1237 (Assisiae Normanniae will be found in Warnkönig's Französische Staats- und Rechtsgeschichte, vol. ii, pp. 48-64).

[4] 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).

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.[1]

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) *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.*[2]

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

[1] 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 presumés du Grand Coutumier de Normandie (Paris, 1885).

[2] 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.

another ordinance touching trial by battle. Henry I's coronation charter (1100) is of great value, 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

[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.

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.[1] The writer has made a large use of the Anglo-Saxon 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,*[2] usually, though on no very conclusive evidence, attributed to Ranulf Glanvill, who became chief justiciar in 1180, and died a crusader at

[1] 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 *Archæological Journal* (1862), vol. xix.

[2] 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.

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 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 mediæval 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 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 Eng-

[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; 2d 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).

land. 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 mediæval 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 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

[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 Mediæval and Modern History, p. 303.

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]

(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.[2]

(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.[3] The form of this

[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 Mediæval 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).

[2] 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.

[3] 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 Winchester in the time of Henry I, and (*d*) the Boldon 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.

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 labor 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' 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.[2] 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

[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's Conquest; Domesday Studies (1888), a volume of essays by various writers edited by P. Edward Dove (a second volume of this work is promised).

[2] 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.

of Henry II's reign contained in the Black Book of the Exchequer.[1]

(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.[2]

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 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.

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

[2] Melville Madison Bigelow, in his Placita Anglo-Normannica (London, 1879), has collected most of what has been discovered 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. 1 (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.

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' 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

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

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 lawyer's 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.

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 to give us the sheriff's 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.

(*a*) Bracton's *Tractatus* (or *Summa*) *de Legibus et Consuetudinibus Angliae* is by far the greatest of our mediæval 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.[2]

[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 stopgap; 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 1200-1225. 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.

[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.

[2] 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

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

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 afterthoughts 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).

[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.

(*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 abridgment 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.[1]

(*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.[2] 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

[1] "Fet assavoir" appears at the end of the editions of Fleta. The two Henghams appear in Selden's edition of Fortescue's De Laudibus (1616). Some of the minor tracts seem never to have been printed.

[2] 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.

writs whereby actions were begun; such writs were the very skeleton of our mediæval *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 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 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

[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.

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 mano-

[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

rial 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.[1]

(*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.[2]

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

other Seignorial Courts, gives extracts from some typical rolls of the thirteenth century and may serve to stimulate a desire for further information.

[1] 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 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.

[2] 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 Industry and Commerce, who proposes, I believe, to reprint in the second edition of his book the rare tract ascribed to Bishop Grostete of Lincoln. Some other of these tracts are, I hear, to be edited for the Royal Historical society.

[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

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 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

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).

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

[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 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 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 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 rigors of the system of writs.[1]

With a few, and these late exceptions, the text-books of

[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 (2d 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.

the time are of little value; with the thirteenth 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 endeavor 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 mediæval law in his *Abridgement* and his *New Natura Brevium*. 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.[2]

Here I must stop, without of course intending to suggest that history stops here. The historian of modern law — the

[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 mediæval 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.

[2] 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).

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 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 mediæval 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.