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SELECT ESSAYS

IN

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SELECT ESSAYS
IN
ANGLO-AMERICAN LEGAL HISTORY

1. A PROLOGUE TO A HISTORY OF ENGLISH LAW [1]

By Frederic William Maitland [2]

SUCH is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web. The oldest utterance of English law that has come down to us has Greek words in it: words such as *bishop*, *priest*, and *deacon*.[3] If we would search out the origins of Roman law, we must study Babylon: this at least was the opinion of the great Romanist of our own day.[4] A statute of limitations must be set; but it must be arbitrary. The web must be rent; but, as we rend it, we may watch

[1] This essay was first published in the Law Quarterly Review, 1898, vol. XIV, pp. 13-33; and afterwards was prefixed to the second edition of the "History of English Law," 1899 (Cambridge, University Press; Boston, Little, Brown & Co.).

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Other Publications: Gloucester Pleas, 1884; Justice and Police, 1885; Bracton's Note-Book, 1887; History of English Law before the Time of Edward I (with Sir F. Pollock), 1895; Domesday Book and Beyond, 1897; Township and Borough, 1898; Canon Law in England, 1898; Introduction to Gierke's Political Theories of the Middle Ages, 1900; English Law and the Renaissance, 1901; prefaces to several volumes of the Selden Society's publications; editor of the Year-Books of Edward II (Selden Society, 1904-6). The miscellaneous essays and minor books of Professor Maitland are now being edited for publication in collected form by the University Press, Cambridge (Eng.).

[3] Æthelb. 1.

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

the whence and whither of a few of the severed and ravelling threads which have been making a pattern too large for any man's eye.

To speak more modestly, we may, before we settle to our task, look round for a moment at the world in which our English legal history has its beginnings. We may recall to memory a few main facts and dates which, though they are easily ascertained, are not often put together in one English book, and we may perchance arrange them in a useful order if we make mile-stones of the centuries.[1]

By the year 200 Roman jurisprudence had reached its zenith. Papinian was slain in 212,[2] Ulpian in 228.[3] Ulpian's pupil Modestinus may be accounted the last of the great lawyers.[4] All too soon they became classical; their successors were looking backwards, not forwards. Of the work that had been done it were folly here to speak; but the law of a little town had become ecumenical law, law alike for cultured Greece and for wild Britain. And yet, though it had assimilated new matter and new ideas, it had always preserved its tough identity. In the year 200 six centuries and a half of definite legal history, if we measure only from the Twelve Tables, were consciously summed up in the living and growing body of the law.

Dangers lay ahead. We notice one in a humble quarter. Certain religious societies, congregations (*ecclesiae*) of non-conformists, have been developing law, internal law, with ominous rapidity. We have called it law, and law it was going to be; but as yet it was, if the phrase be tolerable, unlawful law, for these societies had an illegal, if not a crim-

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

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

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

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

inal purpose. Spasmodically the imperial law was enforced against them; at other times the utmost that they could hope for from the state was that in the guise of "benefit and burial societies" they would obtain some protection for their communal property.[1] But internally they were developing what was to be a system of constitutional and governmental law, which would endow the overseer (*episcopus*) of every congregation with manifold powers. Also they were developing a system of punitive law, for the offender might be excluded from all participation in religious rites, if not from worldly intercourse with the faithful.[2] Moreover, these various communities were becoming united by bonds that were too close to be federal. In particular, that one of them which had its seat in the capital city of the empire was winning a pre-eminence for itself and its overseer.[3] Long indeed would it be before this overseer of a non-conformist congregation would, in the person of his successor, place his heel upon the neck of the prostrate Augustus by virtue of God-made law. This was not to be foreseen; but already a merely human jurisprudence was losing its interest. The intellectual force which some years earlier might have taken a side in the debate between Sabinians and Proculians now invented or refuted a christological heresy. Ulpian's priesthood[4] was not priestly enough.[5]

The decline was rapid. Long before the year 300 jurisprudence, the one science of the Romans, was stricken with sterility;[6] it was sharing the fate of art.[7] Its eyes were

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

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

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

[4] Dig. 1. 1. 1.

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

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

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

turned backwards to the departed great. The constitutions of the emperors now appeared as the only active source of law. They were a disordered mass, to be collected rather than digested. Collections of them were being unofficially made: the *Codex Gregorianus*, the *Codex Hermogenianus*. These have perished; they were made, some say, in the Orient.[1] The shifting eastward of the imperial centre and the tendency of the world to fall in two halves were not for the good of the West. Under one title and another, as *coloni*, *laeti*, *gentiles*, large bodies of untamed Germans were taking up their abode within the limit of the empire.[2] The Roman armies were becoming barbarous hosts. Constantine owed his crown to an Alamannian king.[3]

It is on a changed world that we look in the year 400. After one last flare of persecution (303), Christianity became a lawful religion (313). In a few years it, or rather one species of it, had become the only lawful religion. The "confessor" of yesterday was the persecutor of to-day. Heathenry, it is true, died hard in the West; but already about 350 a pagan sacrifice was by the letter of the law a capital crime.[4] Before the end of the century cruel statutes were being made against heretics of all sorts and kinds.[5] No sooner was the new faith lawful, than the state was compelled to take part in the multifarious quarrels of the Christians. Hardly had Constantine issued the edict of tolerance, than he was summoning the bishops to Arles (314), even from remote Britain, that they might, if this were possible, make peace in the church of Africa.[6] In the history of law, as well as in the history of dogma, the fourth century is the century of ecclesiastical councils. Into the debates of the spiritual parliaments of the empire[7] go what-

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

[2] Brunner, op. cit. i. 32-39. [3] Ibid. 38. [4] Löning, op. cit. i. 44.

[5] Löning, op. cit. i. 97-98, reckons 68 statutes from fifty-seven years (380-438).

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

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

ever juristic ability and whatever power of organization are left among mankind. The new supernatural jurisprudence was finding another mode of utterance; the bishop of Rome was becoming a legislator, perhaps a more important legislator than the emperor.[1] In 380 Theodosius himself commanded that all the peoples which owned his sway should follow, not merely the religion that Christ had delivered to the world, but the religion that St. Peter had delivered to the Romans.[2] For a disciplinary jurisdiction over clergy and laity the state now left a large room wherein the bishops ruled.[3] As arbitrators in purely secular disputes they were active; it is even probable that for a short while under Constantine one litigant might force his adversary unwillingly to seek the episcopal tribunal.[4] It was necessary for the state to protest that criminal jurisdiction was still in its hands.[5] Soon the church was demanding, and in the West it might successfully demand, independence of the state and even a dominance over the state: the church may command and the state must obey.[6] If from one point of view we see this as a triumph of anarchy, from another it appears as a triumph of law, of jurisprudence. Theology itself must become jurisprudence, albeit jurisprudence of a supernatural sort, in order that it may rule the world.

Among the gigantic events of the fifth century the issue of a statute-book seems small. Nevertheless, through the turmoil we see two statute-books, that of Theodosius II and that of Euric the West Goth. The Theodosian code was an official collection of imperial statutes beginning with those of Constantine I. It was issued in 438 with the consent of Valentinian III who was reigning in the West. No perfect copy of it has reached us.[7] This by itself would tell a sad

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

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

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

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

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

[6] Löning, op. cit. i. 64-94.

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

tale; but we remember how rapidly the empire was being torn in shreds. Already Britain was abandoned (407). We may doubt whether the statute-book of Theodosius ever reached our shores until it had been edited by Jacques Godefroi.[1] Indeed we may say that the fall of a loose stone in Britain brought the crumbling edifice to the ground.[2] Already before this code was published the hordes of Alans, Vandals, and Sueves had swept across Gaul and Spain; already the Vandals were in Africa. Already Rome had been sacked by the West Goths; they were founding a kingdom in southern Gaul and were soon to have a statute-book of their own. Gaiseric was not far off, nor Attila. Also let us remember that this Theodosian Code was by no means well designed if it was to perpetuate the memory of Roman civil science in a stormy age. It was no "code" in our modern sense of that term. It was only a more or less methodic collection of modern statutes. Also it contained many things that the barbarians had better not have read; bloody laws against heretics, for example.

We turn from it to the first monument of Germanic law that has come down to us. It consists of some fragments of what must have been a large law-book published by Euric for his West Goths, perhaps between 470 and 475.[3] Euric was a conquering king; he ruled Spain and a large part of southern Gaul; he had cast off, so it is said, even the pretence of ruling in the emperor's name. Nevertheless, his laws are not nearly so barbarous as our curiosity might wish them to be. These West Goths who had wandered across Europe were veneered by Roman civilization. It did them little good. Their later law-books, that of Reckessuinth (652-672), that of Erwig (682), that of Egica (687-701), are said to be verbose and futile imitations of Roman codes. But Euric's laws are sufficient to remind us that the order of date among these *Leges Barbarorum* is very different from the order of

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

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

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

barbarity. Scandinavian laws that are not written until the thirteenth century will often give us what is more archaic than anything that comes from the Gaul of the fifth or the Britain of the seventh. And, on the other hand, the mention of Goths in Spain should remind us of those wondrous folk-wanderings and of their strange influence upon the legal map of Europe. The Saxon of England has a close cousin in the Lombard of Italy, and modern critics profess that they can see a specially near kinship between Spanish and Icelandic law.[1]

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

The discovery of fragments of the laws of Euric the West Goth has deprived the *Lex Salica* of its claim to be the oldest extant statement of Germanic custom. But if not the oldest, it is still very old; also it is rude and primitive.[3] It comes to us from the march between the fifth and the sixth centuries; almost certainly from the victorious reign of Chlodwig (486-511). An attempt to fix its date more closely brings out one of its interesting traits. There is nothing distinctively heathen in it; but (and this makes it unique[4]) there is

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

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

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

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

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

Whether in the days when Justinian was legislating, the Western or Ripuarian Franks had written law may not be certain; but it is thought that the main part of the *Lex Ribuaria* is older than 596.[2] Though there are notable variations, it is in part a modernized edition of the *Salica*, showing the influence of the clergy and of Roman law. On the other hand, there seems little doubt that the core of the *Lex Burgundionum* was issued by King Gundobad (474-516) in the last years of the fifth century.[3]

Burgundians and West Goths were scattered among Roman provincials. They were East Germans; they had long been Christians, though addicted to the heresy of Arius. They could say that they had Roman authority for their occupation of Roman soil. Aquitania Secunda had been made over to the West Goths; the Burgundians vanquished by

[1] Greg. Turon. ii. 22 (ed. Omont, p. 60): "Mitis depone colla, Sicamber; adora quod incendisti, incende quod adorasti."
[2] Brunner, op. cit. i. 303 ff.; Schröder, op. cit. 229; Esmein, op. cit. 107. Edited by Sohm in Monumenta Germanica.
[3] Brunner, op. cit. i. 332 ff.; Schröder, op. cit. 234; Esmein, op. cit. 108. Edited by v. Salis in M. G.

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

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

[1] Brunner, op. cit. i. 50-1. [2] Ibid. 64-7.
[3] Krüger, op. cit. 317; Brunner, op. cit. i. 354; Schröder, op. cit. 234. Edited by v. Salis in M. G.
[4] Krüger, op. cit. 309; Brunner, op. cit. i. 358. Edited by Hänel, 1849.
[5] Karlowa, op. cit. i. 976.
[6] See above, p. 17.

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

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

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

In 528 Justinian began the work which gives him his fame in legal history; in 534, though there were novel constitu-

[1] The epitomes will be found in Hänel's edition, Lex Romana Visigothorum, 1849.
[2] Brunner, op. cit. i. 365; Karlowa, op. cit. i. 947 ff. Edited by Bluhme in M. G.
[3] Maassen, op. cit. i. 422 ff.; Tardif, op. cit. 110. Printed in Migne, Patrologia, vol. 67.
[4] Haddan and Stubbs, Councils, iii. 119. See, however, the remarks of Mr. C. H. Turner, Eng. Hist. Rev. ix. 727.
[5] Maassen, op. cit. i. 441.

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

Laws have need of arms: Justinian knew it well. Much depended upon the fortunes of a war. We recall from the Institutes the boast that Africa has been reclaimed. Little was at stake there, for Africa was doomed to the Saracens; nor could transient success in Spain secure a western home for the law-books of Byzantium.[2] All was at stake in Italy. The struggle with the East Goths was raging; Rome was captured and recaptured. At length the emperor was victorious (552), the Goths were exterminated or expelled; we hear of them no more. Justinian could now enforce his laws in Italy, and this he did by the pragmatic sanction *pro petitione Vigilii* (554).[3] Fourteen years were to elapse and then the Lombard hordes under Alboin would be pouring

[1] Krüger, op. cit. 319.
[2] Conrat, op. cit. i. 32.
[3] Krüger, op. cit. 354; Karlowa, op. cit. i. 938; Hodgkin, Italy and her Invaders, vi. 519.

down upon an exhausted and depopulated land. Those fourteen years are critical in legal history; they suffer Justinian's books to obtain a lodgment in the West. The occidental world has paid heavily for Code and Digest in the destruction of the Gothic kingdom, in the temporal power of the papacy, and in an Italy never united until our own day; but perhaps the price was not too high. Be that as it may, the coincidence is memorable. The Roman empire centred in New Rome has just strength enough to hand back to Old Rome the guardianship of her heathen jurisprudence, now "enucleated" (as Justinian says) in a small compass, and then loses for ever the power of legislating for the West. True that there is the dwindling exarchate in Italy; true that the year 800 is still far off; true that one of Justinian's successors, Constantine IV, will pay Rome a twelve days' visit (663) and rob it of ornaments that Vandals have spared;[1] but with what we must call Græco-Roman jurisprudence, with the Ecloga of Leo the Isaurian and the Basilica of Leo the Wise, the West, if we except some districts of southern Italy,[2] has no concern. Two halves of the world were drifting apart, were becoming ignorant of each other's language, intolerant of each other's theology. He who was to be the true lord of Rome, if he loathed the Lombard, loved not the emperor. Justinian had taught Pope Vigilius, the Vigilius of the pragmatic sanction, that in the Byzantine system the church must be a department of the state.[3] The bishop of Rome did not mean to be the head of a department.

During some centuries Pope Gregory the Great (590-604) is one of the very few westerns whose use of the Digest can be proved.[4] He sent Augustin to England. Then "in Augustin's day," about the year 600, Æthelbert of Kent set in writing the dooms of his folk "in Roman fashion."[5] Not

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

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

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

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

[5] Liebermann, Gesetze der Angelsachsen, p. 3. The first instalment of Dr. Liebermann's great work comes to our hands as these pages go through the press. Bede, Hist. Eccl. lib. 2, c. 5 (ed. Plummer, i. 90): "iuxta exempla Romanorum." Bede himself (Opera, ed. Giles, vol. vi. p. 321) had read of Justinian's Codex; but what he says of it seems to prove that he had never seen it: Conrat, op. cit. i. 99.

improbably he had heard of Justinian's exploits; but the dooms, though already they are protecting with heavy *bót* the property of God, priests and bishops, are barbarous enough. They are also, unless discoveries have yet to be made, the first Germanic laws that were written in a Germanic tongue. In many instances the desire to have written laws appears so soon as a barbarous race is brought into contact with Rome.[1] The acceptance of the new religion must have revolutionary consequences in the world of law, for it is likely that heretofore the traditional customs, even if they have not been conceived as instituted by gods who are now becoming devils, have been conceived as essentially unalterable. Law has been the old; new law has been a contradiction in terms. And now about certain matters there must be new law. What is more, "the example of the Romans" shows that new law can be made by the issue of commands. Statute appears as the civilized form of law. Thus a fermentation begins and the result is bewildering. New resolves are mixed up with statements of old custom in these *Leges Barbarorum*.

The century which ends in 700 sees some additions made to the Kentish laws by Hlothær and Eadric, and some others made by Wihtræd; there the Kentish series ends. It also sees in the dooms of Ine the beginning of written law in Wessex.[2] It also sees the beginning of written law among the Lombards; in 643 Rothari published his edict;[3] it is accounted to be one of the best statements of ancient German usages. A little later the Swabians have their *Lex Alamannorum*,[4] and the Bavarians their *Lex Baiuwariorum*.[5]

[1] Brunner, op. cit. i. 283. So native princes in India have imitated the Indian Penal Code within their states.

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

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

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

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

It is only in the Karolingian age that written law appears among the northern and eastern folks of Germany, the Frisians, the Saxons, the Angli and Warni of Thuringia, the Franks of Hamaland.[1] To a much later time must we regretfully look for the oldest monuments of Scandinavian law.[2] Only two of our "heptarchic" kingdoms leave us law, Kent and Wessex, though we have reason to believe that Offa the Mercian (ob. 796) legislated.[3] Even Northumbria, Bede's Northumbria, which was a bright spot in a dark world, bequeaths no dooms. The impulse of Roman example soon wore out. When once a race has its *Lex*, its aspirations seem to be satisfied. About the year 900 Alfred speaks as though Offa (circ. 800), Ine (circ. 700), Æthelbert (circ. 600) had left him little to do. Rarely upon the mainland was there any authoritative revision of the ancient *Leges*, though transcribers sometimes modified them to suit changed times, and by so doing have perplexed the task of modern historians. Only among the Lombards, who from the first, despite their savagery, seem to show something that is like a genius for law,[4] was there steadily progressive legislation. Grimwald (668), Liutprand (713-35), Ratchis (746), and Aistulf (755) added to the edict of Rothari. Not by abandoning, but by developing their own ancient rules, the Lombards were training themselves to be the interpreters and in some sort the heirs of the Roman *prudentes*.

As the Frankish realm expanded, there expanded with it a wonderful "system of personal laws."[5] It was a system of racial laws. The *Lex Salica*, for example, was not the law of a district, it was the law of a race. The Swabian, wherever he might be, lived under his Alamannic law, or, as an expressive phrase tells us, he lived Alamannic law (*legem vivere*). So Roman law was the law of the Romani. In a famous, if exaggerated sentence, Bishop Agobard of Lyons

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

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

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

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

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

has said that often five men would be walking or sitting together and each of them would own a different law.[1] We are now taught that this principle is not primitively Germanic. Indeed in England, where there were no Romani, it never came to the front, and, for example, "the Danelaw" very rapidly became the name for a tract of land.[2] But in the kingdoms founded by Goths and Burgundians the intruding Germans were only a small part of the population, the bulk of which was Gallo-Roman, and the barbarians, at least in show, had made their entry as subjects or allies of the emperor. It was natural then that the Romani should live their old law, and, as we have seen, their rulers were at pains to supply them with books of Roman law suitable to an age which would bear none but the shortest of law-books. It is doubtful whether the Salian Franks made from the first any similar concession to the provincials whom they subdued; but, as they spread over Gaul, always retaining their own *Lex Salica*, they allowed to the conquered races the right that they claimed for themselves. Their victorious career gave the principle an always wider scope. At length they carried it with them into Italy and into the very city of Rome. It would seem that among the Lombards, the Romani were suffered to settle their own disputes by their own rules, but Lombard law prevailed between Roman and Lombard. However, when Charles the Great vanquished Desiderius and made himself king of the Lombards, the Frankish system of personal law found a new field. A few years afterwards (800) a novel Roman empire was established. One of the immediate results of this many-sided event was that Roman law ceased to be the territorial law of any part of the lands that had become subject to the so-called Roman Emperor. Even in Rome it was reduced to the level of a personal or racial law, while in northern Italy there were many Swabians who lived Alamannic, of Franks who lived

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

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

Salic or Ripuarian law, besides the Lombards.[1] In the future the *renovatio imperii* was to have a very different effect. If the Ottos and Henries were the successors of Augustus, Constantine, and Justinian, then Code and Digest were *Kaiserrecht*, statute law for the renewed empire. But some centuries were to pass before this theory would be evolved, and yet other centuries before it would practically mould the law of Germany. Meanwhile Roman law was in Rome itself only the personal law of the Romani.

A system of personal laws implies rules by which a "conflict of laws" may be appeased, and of late years many of the international or intertribal rules of the Frankish realm have been recovered.[2] We may see, for example, that the law of the slain, not that of the slayer, fixes the amount of the wergild, and that the law of the grantor prescribes the ceremonies with which land must be conveyed. We see that legitimate children take their father's, bastards their mother's law. We see also that the churches, except some which are of royal foundation, are deemed to live Roman law, and in Italy, though not in Frankland, the rule that the individual cleric lives Roman law seems to have been gradually adopted.[3] This gave the clergy some interest in the old system. But German and Roman law were making advances towards each other. If the one was becoming civilized, the other had been sadly barbarized, or rather vulgarized. North of the Alps the current Roman law regarded Alaric's *Lex* as its chief authority. In Italy Justinian's Institutes and Code and Julian's epitome of the Novels were known, and someone may sometimes have opened a copy of the Digest. But everywhere the law administered among the Romani seems to have been in the main a traditional, customary law which paid little heed to written texts. It was, we are told, *ein römisches Vulgarrecht*, which stood to pure Roman law in the same relation as that in which the vulgar Latin or Romance that people talked stood to the literary language.[4] Not a few of the rules and ideas which

[1] Brunner, op. cit. i. 260. [2] Ibid. 261 ff.
[3] Brunner, op. cit. i. 269; Löning, op. cit. ii. 284.
[4] Brunner, op. cit. i. 255.

were generally prevalent in the West had their source in this low Roman law. In it starts the history of modern conveyancing. The Anglo-Saxon "land-book" is of Italian origin.[1] That England produces no formulary books, no books of "precedents in conveyancing," such as those which in considerable numbers were compiled in Frankland,[2] is one of the many signs that even this low Roman law had no home here; but neither did our forefathers talk low Latin.

In the British India of to-day we may see, and on a grand scale, what might well be called a system of personal laws, of racial laws[3] If we compared it with the Frankish, one picturesque element would be wanting. Suppose that among the native races there was one possessed of an old law-book, too good for it, too good for us, which gradually, as men studied it afresh, would begin to tell of a very ancient but eternally modern civilization and of a skilful jurisprudence which the lawyers of the ruling race would some day make their model. This romance of history will not repeat itself.

During the golden age of the Frankish supremacy, the age which closely centres round the year 800, there was a good deal of definite legislation: much more than there was to be in the bad time that was coming. The king or emperor issued capitularies (*capitula*).[4] Within a sphere which can not be readily defined he exercised a power of laying commands upon all his subjects, and so of making new territorial law for his whole realm or any part thereof; but in principle any change in the law of one of the folks would require that folk's consent. A superstructure of capitularies might be reared, but the *Lex* of a folk was not easily alterable. In 1827 Ansegis, Abbot of St. Wandrille, collected some of the capitularies into four books.[5] His work seems to have found general acceptance, though it shows that many capitularies were speedily forgotten and

[1] Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde, i. 187.
[2] Brunner, D. R. G. i. 401; Schröder, op. cit. 254. Edited in M. G. by Zeumer; also by E. de Rozière, Recueil général des formules.
[3] The comparison has occurred to M. Esmein, op. cit. 56.
[4] Brunner, op cit. i. 374; Schröder, op. cit. 247; Esmein, op. cit. 116. Edited in M. G. by Boretius and Krause; previously by Pertz.
[5] Brunner, op. cit. i. 382; Schröder, op. cit. 251; Esmein, op. cit. 117.

that much of the Karolingian legislation had failed to produce a permanent effect. Those fratricidal wars were beginning. The legal products which are to be characteristic of this unhappy age are not genuine laws; they are the forged capitularies of Benedict the Levite and the false decretals of the Pseudo-Isidore.

Slowly and by obscure processes a great mass of ecclesiastical law had been forming itself. It rolled, if we may so speak, from country to country and took up new matter into itself as it went, for bishop borrowed from bishop and transcriber from transcriber. Oriental, African, Spanish, Gallican canons were collected into the same book, and the decretal letters of later were added to those of earlier popes. Of the *Dionysiana* we have already spoken. Another celebrated collection seems to have taken shape in the Spain of the seventh century; it has been known as the *Hispana* or *Isidoriana*,[1] for without sufficient warrant it has been attributed to that St. Isidore of Seville (ob. 636), whose *Origines*[2] served as an encyclopædia of jurisprudence and all other sciences. The *Hispana* made it sway into France, and it seems to have already comprised some spurious documents before it came to the hands of the most illustrious of all forgers.

Then out of the depth of the ninth century emerged a book which was to give law to mankind for a long time to come. Its core was the *Hispana;* but into it there had been foisted, besides other forgeries, some sixty decretals professing to come from the very earliest successors of St. Peter. The compiler called himself Isidorus Mercator; he seems to have tried to personate Isidore of Seville. Many guesses have been made as to his name and time and home. It seems certain that he did his work in Frankland and near the middle of the ninth century. He has been sought as far west as le Mans, but suspicion hangs thickest over the church

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

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

of Reims. The false decretals are elaborate mosaics made up out of phrases from the bible, the fathers, genuine canons, genuine decretals, the West Goth's Roman law-book; but all these materials, wherever collected, are so arranged as to establish a few great principles: the grandeur and superhuman origin of ecclesiastical power, the sacrosanctity of the persons and the property of bishops, and, though this is not so prominent, the supremacy of the bishop of Rome. Episcopal rights are to be maintained against the *chorepiscopi*, against the metropolitans, and against the secular power. Above all (and this is the burden of the song), no accusation can be brought against a bishop so long as he is despoiled of his see: *Spoliatus episcopus ante omnia debet restitui.*

Closely connected with this fraud was another. Someone who called himself a deacon of the church of Mainz and gave his name as Benedict, added to the four books of capitularies, which Ansegis had published, three other books containing would-be, but false, capitularies, which had the same bent as the decretals concocted by the Pseudo-Isidore. These are not the only, but they are the most famous manifestations of the lying spirit which had seized the Frankish clergy. The Isidorian forgeries were soon accepted at Rome.

The popes profited by documents which taught that ever since the apostolic age the bishops of Rome had been declaring, or even making, law for the universal church. On this rock or on this sand a lofty edifice was reared.[1]

And now for the greater part of the Continent comes the time when ecclesiastical law is the only sort of law that is visibly growing. The stream of capitularies ceased to flow; there was none to legislate; the Frankish monarchy was going to wreck and ruin; feudalism was triumphant. Sacerdotalism also was triumphant, and its victories were closely connected with those of feudalism. The clergy had long been striving to place themselves beyond the reach of the state's tribunals. The dramatic struggle between Henry II

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

and Becket has a long Frankish prologue.[1] Some concessions had been won from the Merovingians; but still Charles the Great had been supreme over all persons and in all causes. Though his realm fell asunder, the churches were united, and united by a principle that claimed a divine origin. They were rapidly evolving law which was in course of time to be the written law of an universal and theocratic monarchy. The mass, now swollen by the Isidorian forgeries, still rolled from diocese to diocese, taking up new matter into itelf. It became always more lawyerly in form and texture as it appropriated sentences from the Roman law-books and made itself the law of the only courts to which the clergy would yield obedience. Nor was it above borrowing from Germanic law, for thence it took its probative processes, the oath with oath-helpers and the ordeal or judgment of God. Among the many compilers of manuals of church law three are especially famous: Regino, abbot of Prüm (906-915);[2] Burchard, bishop of Worms (1012-1023);[3] and Ivo, bishop of Chartres (ob. 1117).[4] They and many others prepared the way for Gratian, the maker of the church's Digest, and events were deciding that the church should also have a Code and abundant Novels. In an evil day for themselves the German kings took the papacy from the mire into which it had fallen, and soon the work of issuing decretals was resumed with new vigour. At the date of the Norman Conquest the flow of these edicts was becoming rapid.

Historians of French and German law find that a well-marked period is thrust upon them. The age of the folk-laws and the capitularies, "the Frankish time," they can restore. Much indeed is dark and disputable; but much has been made plain during the last thirty years by their unwearying labour. There is no lack of materials, and the materials are of a strictly legal kind: laws and statements of law. This done, they are compelled rapidly to pass through several centuries to a new point of view. They

[1] Hinschius, op. cit. iv. 849 ff.
[2] Tardif, op. cit. 162. Printed in Migne, Patrol. vol. 132; also edited by Wasserschleben, 1840.
[3] Ibid. 164. Printed in Migne, Patrol. vol. 140.
[4] Ibid. 170. Printed in Migne, Patrol. vol. 161.

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

Strangely different, at least upon its surface, is our English story. The age of the capitularies (for such we well might call it) begins with us just when it has come to its end upon the Continent. We have had some written laws from the newly converted Kent and Wessex of the seventh century. We have heard that in the day of Mercia's greatness Offa (ob. 796), influenced perhaps by the example of Charles the Great, had published laws. These we have lost; but we have no reason to fear that we have lost much else. Even Egbert did not legislate. The silence was broken by

[1] We borrow *féodalité classique* from M. Flach: Les origines de l'ancienne France, ii. 551.
[2] Esmein, op. cit. 487-8; Viollet, op. cit. 152. Schröder, op. cit. 624: "Vom 10. bis 12. Jahrhundert ruhte die Gesetzgebung fast ganz . . . Es war die Zeit der Alleinherrschaft des Gewohnheitsrechts."
[3] Oman, The Dark Ages, 511.

Alfred, and then we have laws from almost every king: from Edward, Æthelstan, Edmund, Edgar, Æthelred, and Cnut. The age of the capitularies begins with Alfred, and in some sort it never ends, for William the Conqueror and Henry I take up the tale.[1] Whether in the days of the Confessor, whom a perverse, though explicable, tradition honoured as a pre-eminent lawgiver, we were not on the verge of an age without legislation, an age which would but too faithfully reproduce some bad features of the Frankish decadence, is a question that is not easily answered. Howbeit, Cnut had published in England a body of laws which, if regard be had to its date, must be called a handsome code. If he is not the greatest legislator of the eleventh century, we must go as far as Barcelona to find his peer.[2] He had been to Rome; he had seen an emperor crowned by a pope; but it was not outside England that he learnt to legislate. He followed a fashion set by Alfred. We might easily exaggerate both the amount of new matter that was contained in these English capitularies and the amount of information that they give us; but the mere fact that Alfred sets, and that his successors, and among them the conquering Dane, maintain, a fashion of legislating, is of great importance. The Norman subdues, or, as he says, inherits a kingdom in which a king is expected to publish laws.

Were we to discuss the causes of this early divergence of English from continental history we might wander far. In the first place, we should have to remember the small size, the plain surface, the definite boundary of our country. This thought indeed must often recur to us in the course of our work: England is small: it can be governed by uniform law: it seems to invite general legislation. Also we

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

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

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

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

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

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

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

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

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

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

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

Here, again, there is room for controversy. It is said that he was not self-taught; it is said that neither his theme nor his method was quite new; it is said that he had a predecessor at Bologna, one Pepo by name. All this may be true and is probable enough: and yet undoubtedly he was soon regarded as the founder of the school which was

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

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

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

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

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

teaching Roman law to an intently listening world. We with our many sciences can hardly comprehend the size of this event. The monarchy of theology over the intellectual world was disputed. A lay science claimed its rights, its share of men's attention. It was a science of civil life to be found in the human heathen Digest.[1]

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

[1] Esmein, op. cit. 347: "Une science nouvelle naquit, indépendante et laïque, la science de la société civile, telle que l'avaient dégagée les Romains, et qui pouvait passer pour le chef-d'œuvre de la sagesse humaine . . . Il en résulta qu'à côté du théologien se plaça le légiste qui avait, comme lui, ses principes et ses textes, et qui lui disputa la direction des esprits avides de savoir."

a small, well conquered, much governed kingdom, a strong, a legislating kingship. It came to us soon; it taught us much; and then there was healthy resistance to foreign dogma. But all this we shall see in the sequel.