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F. W. Maitland

Excerpt

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PERIOD I.

ENGLISH PUBLIC LAW AT THE DEATH OF EDWARD THE FIRST.

A. *General characteristics of English law and review of legislation.*

i. *Before 1066.*

The oldest English laws that have come down to us are those of Ethelbert, king of Kent, and we have good reason for believing that they were the first English laws that were ever put into writing. Ethelbert became king in 560 and died in 616. The laws that we have must have been published after he had received the Christian faith; we may attribute them to the year 600 or thereabouts. Thus the history of English law may be said to begin just about the time when the history of Roman law—we will not say comes to an end, for in a certain sense it has never come to an end—but comes to a well marked period:—the reign of Ethelbert overlaps the reign of Justinian. Not only are Ethelbert's the earliest English laws, but they seem to be the earliest laws ever written in any Teutonic tongue. It is true that on the continent the German nations which overwhelmed the Roman Empire had already felt the impulse to put their laws in writing; the *Lex Salica*, for example, the law of the Salian Franks, is considerably older than anything that we Englishmen have to show, but it is written in Latin, and for centuries Latin continued to be the legal language of the new kingdoms. But our earliest laws are written in English, or Anglo-Saxon, and until the Norman Conquest all laws were written in English, though

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Latin was commonly used for many legal documents, conveyances of land and the like. Seemingly it was the contact with Roman civilization in the form of Christianity which raised the desire for written laws. Beda, who died in 735, says that Ethelbert put his laws in writing ‘juxta exempla Romanorum.’ It is possible that some collection of ecclesiastical canons served as a model. We do well to remember that the oldest laws that we have, however barbarous they may seem, are none the less Christian laws. ‘God’s property and the church’s 12-fold. A bishop’s property 11-fold. A priest’s property 9-fold. A deacon’s property 6-fold. A clerk’s property 3-fold’:—this is the first utterance of English law. This it is well to remember, for it should prevent any glib talk about primitive institutions: Teutonic law (for what is true of England is true also of the continent) when it is first set in writing has already ceased to be primitive; it is already Christian, and so close is the connection between law and religion, that we may well believe that it has already undergone a great change.

We have two more sets of Kentish laws, a set from Hlothar and Eadric, who seem to have been joint kings of the Kentings, which we may date in 680 or thereabouts, and a set from Wihtræd, which comes from 700 or thereabouts. Wessex takes up the tale; in 690 or thereabouts king Ine, with the counsel and consent of the wise, published a set of laws. Then we have a gap of two centuries, the greatest gap in our legal history. The laws of Alfred, which come next in order, may be attributed to 890 or thereabouts. They show us that during the two last centuries there had been no great change in the character of law or the legal structure of society. Alfred disclaims all pretension of being an innovator, he will but set down the best principles that he has been able to find in the laws of Ethelbert, of Ine and of the Mercian king, Offa. The laws of Offa of Mercia, who died in 796, have not come down to us.

Beginning with Alfred’s we now have a continuous series of laws covering the whole of the tenth century and extending into the eleventh, laws from Edward the Elder, Æthelstan, Edmund, Edgar, and Ethelred; the series is brought to an end

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by a long and comprehensive set of laws coming from our great Danish king, Canute. We have no one law that can be ascribed to Edward the Confessor, who, however, in after days acquired the fame of having been a great legislator.

These Anglo-Saxon laws or dooms—as they call themselves—after having lain hid in MS. for several centuries, were dug up in the sixteenth century as antiquarian curiosities. Lambard published some of them in 1568 under the title *Archaionomia*. In 1840 they were published for the Record Commissioners with a modern English translation under the title *Ancient Laws and Institutes of England*; they were again published in 1865 with a German translation by Dr Reinhold Schmid¹. These editions contain, besides the dooms, a few brief statements of customary law, forms of oaths and the like. The whole material can be printed in about 160 octavo pages. We have nothing from this period that can be called a treatise on law, and we have but very few accounts of litigation. On the other hand we have a large number of private legal documents, conveyances of lands, or land books as they were called, leases, wills and so forth; these were collected and printed by J. M. Kemble in his *Codex Diplomaticus Ævi Saxonici*.

I have spoken of ‘sets of laws’ and have refrained from using the word code. Once or twice it would seem as if an attempt had been made to state the existing law; but in general these laws seem to be new laws, additions to the law that is already in force; we may compare them to our modern statutes and like our statutes they pre-suppose a body of existing law. I will not say that they pre-suppose ‘common law,’ because I think that the phrase implies law common to the whole kingdom, and how much law there was common to the whole kingdom in the days before the Norman Conquest is a very difficult question. In the twelfth century, some time after the Conquest, it was the established theory that England was or had been divided between three laws, the West-Saxon, the Mercian and the Danish. The old laws themselves notice this distinction in a casual way; but we have little means of telling how deep it went. It is highly

¹ The best edition is now that of F. Liebermann, *Die Gesetze der Angelsachsen*, 2 vols., Halle, 1903 and 1906.

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probable, however, that a great variety of local customs was growing up in England, when the Norman Conquest checked the growth. Originally there may have been considerable differences between the laws of the various tribes of Angles, Saxons and Jutes that invaded Britain, and the Danes must have brought with them a new supply of new customs. But this would not be all; the courts of justice, as we shall presently see, were local courts, courts of shires and of hundreds; resort to any central tribunal, to the king and his wise men seems to have been rare, and this localization of justice must have engendered a variety of local laws. Law was transmitted by oral tradition and the men of one shire would know nothing and care nothing for the tradition of another shire.

The written laws issued by the king and the wise cover but a small part of the whole field of law. They deal chiefly with matters of national importance, in particular with the preservation of the peace. To keep the peace is the legislator's first object, and is not easy. The family bond is strong; an act of violence will too often lead to a blood feud, a private war. To force the injured man or the slain man's kinsfolk to accept a money composition instead of resorting to reprisals is a main aim for the law giver. Hence these dooms often take the form of tariffs—so much is to be paid for slaying an eorl, so much for a ceorl, so much for a broken finger, so much for a broken leg. Another aim is to make men mindful of their police duties, to organize them for the pursuit of robbers and murderers, to fine them if they neglect such duties. But of what we may call private law we hear little or nothing—of property, contract or the like. It is easy to ask very simple questions about inheritance and so forth to which no certain answer can be given, and like enough there were many different local customs. There was as yet no body of professional lawyers, law was not yet a subject for speculation; it was the right and duty of the free man to attend the court of his hundred and his shire, and to give his judgment there. This must not, however, lead us to believe that law was a simple affair, that it consisted of just the great primary rules of what we think natural justice. In all probability it was

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I

Roman influence

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very complicated and very formal; exactly the right words must be used, the due solemnities must be punctually performed. An ancient popular court with a traditional law was no court of equity; forms and ceremonies and solemn poetical phrases are the things which stick in the popular memory and can be handed down from father to son.

A great deal has been done by modern scholars and a great deal more may yet be done towards reconstructing the Anglo-Saxon legal system. Besides the primary sources of information that I have mentioned, the evidence of Caesar and Tacitus, the kindred laws of other German tribes and books written in England after the Conquest may be cautiously employed for the purpose: but for reasons already given I do not think that this matter can be profitably studied by beginners; we must work backwards from the known to the unknown, from the certain to the uncertain, and when we see very confident assertions about the details of Anglo-Saxon law we shall do well to be sceptical. One point however of considerable importance seems pretty clear, namely, that the influence of Roman jurisprudence was hardly felt. There is no one passage in the dooms which betrays any knowledge of the Roman law books. German scholars are in the habit of appealing to these Anglo-Saxon dooms as to the purest monuments of pure Germanic law; they can find nothing so pure upon the continent. But we must not exaggerate this truth. Roman jurisprudence did not survive in Britain, but the traditions of Roman civilization were of great importance. The main force which made for the improvement of law was the church, and the church if it was Catholic was also Roman. Thus, for example, at a quite early time we find the Anglo-Saxons making wills. This practice we may safely say is due to the church:—the church is the great recipient of testamentary gifts. We may further say that the will is a Roman institution; that these Anglo-Saxons would not be making wills, if there had been no Rome, no world-wide Roman Empire; but of any knowledge of the Roman law of wills, even of so much of it as is contained in the Institutes we may safely acquit them. Suppose a party of English missionaries to go

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preaching to the heathen, they would inevitably carry with them a great deal of English law although they might be utterly unable to answer the simplest examination paper about it; for instance they would know that written wills can be made, and they would think that written wills should take effect, though they might well not know how many witnesses our law requires, or whether a will is revoked by marriage. In some such way the church, Catholic and Roman, carried with it wherever it went the tradition of the older civilization, carried with it Roman institutions, such as the will, but in a popularized and vulgarized form.

I have spoken of the Anglo-Saxon dooms as the dooms of this king and of that, but we ought to observe, even in passing, and though this matter must come before us again, that no English king takes on himself to legislate without the counsel and consent of his wise men. Legislative formulae are of great importance to us, for we have to trace the growth of that form of words in which our Queen and Parliament legislate for us to-day. Here is the preface of the laws of Wihtræd: 'In the reign of the most clement king of the Kentish men, Wihtræd, there was assembled a deliberative convention of the great men: there was Birhtwald, Archbishop of Britain, and the fore-named king, and the Bishop of Rochester, Gybmund by name; and every degree of the church of that province spoke in unison with the obedient people. There the great men decreed these dooms with the suffrages of all, and added them to the customary laws of the Kentish men';—and so on until the end of the period, until the laws of Canute: "This is the ordinance that king Canute, king of all England, and king of the Danes and Norwegians, decreed, with the counsel of his 'witan' to the honour and behoof of himself."

ii. 1066–1154.

The Norman Conquest is an event of the utmost importance in the history of English law; still we must not suppose that English law was swept away or superseded by Norman law. We must not suppose that the Normans had any compact body of laws to bring with them. They can have had but

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very little if any written law of their own ; in this respect they were far behind the English.

Since 912 these Norsemen had held a corner of what had once formed a part of the great Frank kingdom ; but their dukes had been practically independent, owing little more than a nominal allegiance to the kings of the French. They had adopted the religion and language of the conquered, and we must believe that what settled law there was in Normandy was rather Frankish than Norse. They were an aristocracy of Scandinavian conquerors ruling over a body of Romance-speaking Kelts. No one of their dukes had been a great legislator. Such written law as there was must have already been of great antiquity, the *Lex Salica* and the capitularies of the Frankish kings, and how far these were really in force, we cannot say. The hold of the dukes upon their vassals had been precarious ; but probably some traditions of strong and settled government survived from the times of the Carolings. For instance, that practice of summoning a body of neighbours to swear to royal and other rights which is the germ of trial by jury, appears in England so soon as the Normans have conquered the country, and it can be clearly traced to the courts of the Frankish kings.

There is no Norman law book that can be traced beyond the very last years of the twelfth century ; there is none so old as our own *Glanvill*. Really we know very little of Norman law as it was in the middle of the tenth century. It cannot have been very unlike the contemporary English law—the Frankish capitularies are very like our English dooms, and the East of England was full of men of Norse descent. We must not therefore think of William as bringing with him a novel system of jurisprudence.

The proofs of the survival of English law can be briefly summarised. In the first place one of the very few legislative acts of William the Conqueror of which we can be certain, is that he confirmed the English laws. ‘This I will and order that all shall have and hold the law of king Edward as to lands and all other things with these additions which I have established for the good of the English people.’ Then again, after the misrule of Rufus, Henry I on his accession (1100)

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confirmed the English law: 'I give you back king Edward's law with those improvements whereby my father improved it by the counsel of his barons.' Secondly, these confirmations of Edward's law seem to have set several different persons on an attempt to restate what Edward's law had been. We have three collections of laws known respectively as the *Leges Edwardi Confessoris*, *Leges Willelmi Primi*, *Leges Henrici Primi*. These are apparently the work of private persons; we cannot fix the date of any of them with any great certainty. The most valuable is the *Leges Henrici Primi*, which has been ascribed to as late a date as the reign of Henry II, but which the most recent investigations assign to that of Henry I. It is a book of some size, very obscure and disorderly. The author has borrowed freely from foreign sources, from the *Lex Salica*, the capitularies of the Frankish kings, and from collections of ecclesiastical canons—one little passage has been traced to the Theodosian Code; but the main part of the book consists of passages from the Anglo-Saxon dooms translated into Latin, and the author evidently thinks that these are, or ought to be, still regarded as the law of the land. The picture given us by this book is that of an ancient system which has undergone a very severe shock. So the compiler of the *Leges Edwardi Confessoris* has borrowed largely from the old dooms. His book did much to popularize the notion that the Confessor was a great legislator. In after times he became the hero of many legal myths; but as already said there is no one law that can be attributed to him. The demand for Edward's law which was conceded by William and by Henry I was not a demand for laws made by Edward; it was merely a demand for the good old law, the law which prevailed here before England fell under the domination of the Conqueror¹. Thirdly, Domesday book, the record of the great survey made in the years 1085–6—the greatest legal monument of the Conqueror's reign—shows us that the Norman landowners were conceived as stepping into the exact place of the English owners whose forfeited lands had come to their hands; the Norman repre-

¹ For a fuller account of the law-books of the Norman period see Pollock and Maitland, *History of English Law*, 2nd edn. vol. I, pp. 97–110. Stubbs, *Lectures on Early English History*, 37–133.

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I

Norman Legislation

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sents an English antecessor whose rights and duties have fallen upon him. The same conclusion is put before us by the charters of the Norman kings, the documents whereby they grant lands to their followers. It is in English words that they convey jurisdictions and privileges: the Norman lord is to have *sac* and *soc*, *thol* and *theam*, *infangthief* and *outfangthief*,—rights which have been enjoyed by Englishmen, rights which can only be described in the English language.

At the same time it must be admitted that there has been a large infusion of Norman ideas. Occasionally, though but rarely, we can place our finger on a rule or an institution and say 'This is not English.' Such is the case with trial by battle, such is the case with the sworn inquest of neighbours which comes to be trial by jury. More often we can say that a new idea, a new theory, has been introduced from abroad, this as we shall hereafter see is the case with what we call feudalism. But still more often we can only say that a new meaning, a new importance, has been given to an old institution. The valuable thing that the Norman Conquest gives us is a strong kingship which makes for national unity.

No one of the Norman kings, among whom we will include Stephen, was a great legislator. The genuine laws of William the Conqueror are few; of most of them we shall speak by and by. The two most important are that by which he severs the ecclesiastical jurisdiction from the temporal, and that by which he insists that every man, no matter of whom he holds his land, is the king's man and owes allegiance to the king. From the lawless Rufus we have no law. Henry the First on his accession (1100) purchases the support of the people by an important charter—important in itself, for it is a landmark in constitutional history, important also as the model for Magna Carta. Stephen also has to issue a charter, but it is of less value, for it is more general in its terms. It is as administrators rather than as legislators that William the First and Henry the First are active. The making of Domesday, the great rate book of the kingdom, is a magnificent exploit, an exploit which has no parallel in the history of Europe, an exploit only possible in a conquered country. Under Henry the First national finance becomes an orderly system, a system of

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which an orderly written record is kept. The sheriff's accounts for 1132 are still extant on what is called the Pipe Roll of 31 Hen. I; this is one of our most valuable sources of information. It has been casually preserved; it is not until the beginning of Henry II's reign that we get a regular series of such records. To illustrate the Norman reigns we have also a few unofficial records of litigation. These have been printed by Mr Bigelow in his *Placita Anglo-Normannica*. The genuine laws of William I and the Charter of Henry I will be found in Stubbs' *Select Charters*. The so-called *Leges Edwardi Confessoris*, *Willelmi Conquestoris*, and *Henrici Primi* are among the Ancient Laws published by the Record Commissioners¹.

iii. *Henry II* (1154–89), *Richard* (1189–99), *John* (1199–1216).

The reign of Henry II is of great importance in legal history; he was a great legislator and a great administrator. Some of his laws and ordinances we have, they have been casually preserved by chroniclers; others we have lost. The time had not yet come when all laws would be carefully and officially recorded. At his coronation or soon afterwards he issued a charter, confirming in general terms the liberties granted by his grandfather, Henry I. The next monument that we have of his legislation consists of the Constitutions of Clarendon issued in 1164. Henry's quarrel with Becket was the occasion of them. They deal with the border land between the temporal and the ecclesiastical jurisdictions, defining the province of the spiritual courts. During the anarchy of Stephen's reign the civil, as contrasted with the ecclesiastical, organization of society had been well-nigh dissolved—the church had gained in power as the state became feeble. Henry endeavoured to restore what he held to be the ancient boundary, to maintain the old barriers against the pretensions of the clergy. These Constitutions are the result. To some

¹ The *Leges Edwardi Confessoris* and the *Leges Henrici Primi* may now be read in Liebermann's *Gesetze der Angelsachsen*. For a full and valuable commentary on the latter document see Stubbs, *Lectures on Early English History*, 143–65. For the *Leges Willelmi* see Stubbs, *Select Charters*, p. 84.