

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Excerpt

[More information](#)

CHAPTER I.

THE DARK AGE IN LEGAL HISTORY.

SUCH is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web. The oldest utterance of English law that has come down to us has Greek words in it: words such as *bishop*, *priest* and *deacon*¹. If we would search out the origins of Roman law, we must study Babylon: this at least was the opinion of the great Romanist of our own day². A statute of limitations must be set; but it must be arbitrary. The web must be rent; but, as we rend it, we may watch the whence and whither of a few of the severed and ravelling threads which have been making a pattern too large for any man's eye.

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 centuries³.

¹ Æthelb. 1.

² Thering, Vorgeschichte der Indoeuropäer; see especially the editor's preface.

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

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Excerpt

[More information](#)

The classical age of Roman law.

By the year 200 Roman jurisprudence had reached its zenith. Papinian was slain in 212¹, Ulpian in 228². Ulpian's pupil Modestinus may be accounted the last of the great lawyers³. All too soon they became classical; their successors were looking backwards, not forwards. Of the work that had been done it were folly here to speak, but the law of a little town had become ecumenical law, law alike for cultured Greece and for wild Britain. And yet, though it had assimilated new matter and new ideas, it had always preserved its tough identity. In the year 200 six centuries and a half of definite legal history, if we measure only from the Twelve Tables, were consciously summed up in the living and growing body of the law.

The beginnings of ecclesiastical law.

Dangers lay ahead. We notice one in a humble quarter. Certain religious societies, congregations (*ecclesiae*) of non-conformists, have been developing law, internal law, with ominous rapidity. We have called it law, and law it was going to be, but as yet it was, if the phrase be tolerable, unlawful law, for these societies had an illegal, a criminal purpose. Spasmodically the imperial law was enforced against them; at other times the utmost that they could hope for from the state was that in the guise of 'benefit and burial societies' they would obtain some protection for their communal property⁴. 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 faithful⁵. Moreover, these various communities were becoming united by bonds that were too close to be federal. In particular, that one of them which had its seat in the capital city of the empire was winning a preeminence for itself and its overseer⁶. Long indeed would it be before

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

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

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

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

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

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

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Excerpt

[More information](#)

CH. I.] *The dark age in legal history.* 3

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 priesthood¹ was not priestly enough².

The decline was rapid. Long before the year 300 jurisprudence, the one science of the Romans, was stricken with sterility³; it was sharing the fate of art⁴. Its eyes were turned backwards to the departed great. The constitutions of the emperors now appeared as the only active source of law. They were a disordered mass, to be collected rather than digested. Collections of them were being unofficially made: the *Codex Gregorianus*, the *Codex Hermogenianus*. These have perished; they were made, some say, in the Orient⁵. The shifting eastward of the imperial centre and the tendency of the world to fall into two halves were not for the good of the West. Under one title and another, as *coloni*, *laeti*, *gentiles*, large bodies of untamed Germans were taking up their abode within the limit of the empire⁶. The Roman armies were becoming barbarous hosts. Constantine owed his crown to an Alamannian king⁷.

Cent. III.
Decline of
Roman
law.

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 crime⁸. Before the end of

Cent. IV.
Church and
State.

¹ Dig. 1. 1. 1.

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

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

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

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

⁶ Brunner, op. cit. i. 32-39.

⁷ Ibid. 33.

⁸ Löning, op. cit. i. 44.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Excerpt

[More information](#)4 *The dark age in legal history.* [BK. I.]

the century cruel statutes were being made against heretics of all sorts and kinds¹. 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 Africa². 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 empire³ go whatever juristic ability, and whatever power of organization are left among mankind. The new supernatural jurisprudence was finding another mode of utterance; the bishop of Rome was becoming a legislator, perhaps a more important legislator than the emperor⁴. 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 Romans⁵. For a disciplinary jurisdiction over clergy and laity the state now left a large room wherein the bishops ruled⁶. 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 tribunal⁷. It was necessary for the state to protest that criminal jurisdiction was still in its hands⁸. 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 obey⁹. If from one point of view we see this as a triumph of anarchy, from another it appears as a

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

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

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

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

⁵ Cod. Theod. 16. 1. 2.

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

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

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

⁹ Löning, op. cit. i. 64–94.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Excerpt

[More information](#)

CH. I.] *The dark age in legal history.* 5

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 us¹. This by itself would tell a sad tale; but we remember how rapidly the empire was being torn in shreds. Already Britain was abandoned (407). We may doubt whether the statute-book of Theodosius ever reached our shores until it had been edited by Jacques Godefroi². Indeed we may say that the fall of a loose stone in Britain brought the crumbling edifice to the ground³. Already before this code was published the hordes of Alans, Vandals and Sueves had swept across Gaul and Spain; already the Vandals were in Africa. Already Rome had been sacked by the West Goths; they were founding a kingdom in southern Gaul and were soon to have a statute-book of their own. Gaiseric was not far off, nor Attila. Also let us remember that this Theodosian Code was by no means well designed if it was to perpetuate the memory of Roman civil science in that stormy age. It was no 'code' in our modern sense of that term. It was only a more or less methodic collection of modern statutes. Also it contained many things that the barbarians had better not have read; bloody laws against heretics, for example.

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 475⁴. Euric was a conquering king; he ruled Spain and a large part of southern Gaul; he had cast off, so it is said, even the pretence of ruling

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

² The Breviary of Alaric is a different matter.

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

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

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Excerpt

[More information](#)

in the emperor's name. Nevertheless, his laws are not nearly so barbarous as our curiosity might wish them to be. These West Goths who had wandered across Europe were veneered by Roman civilization. It did them little good. Their later law-books, that of Reckessuinth (652–672), that of Erwig (682), that of Egica (687–701) are said to be verbose and futile imitations of Roman codes. But Euric's laws are sufficient to remind us that the order of date among these *Leges Barbarorum* is very different from the order of barbarity. Scandinavian laws that are not written until the thirteenth century will often give us what is more archaic than anything that comes from the Gaul of the fifth or the Britain of the seventh. And, on the other hand, the mention of Goths in Spain should remind us of those wondrous folk-wanderings and of their strange influence upon the legal map of Europe. The Saxon of England has a close cousin in the Lombard of Italy, and modern critics profess that they can see a specially near kinship between Spanish and Icelandic law¹.

Cent. VI.
The cen-
tury of
Justinian.

In legal history the sixth century is the century of Justinian. But, in the west of Europe this age appears as his, only if we take into account what was then a remote future. How powerless he was to legislate for many of the lands and races whence he drew his grandiose titles—*Alamannicus, Gothicus, Francicus* and the rest—we shall see if we inquire who else had been publishing laws. The barbarians had been writing down their customs. The barbarian kings had been issuing law-books for their Roman subjects. Books of ecclesiastical law, of conciliar and papal law, were being compiled².

The *Lex*
Salica.

The discovery of fragments of the laws of Euric the West Goth has deprived the *Lex Salica* of its claim to be the oldest extant statement of Germanic custom. But if not the oldest, it is still very old; also it is rude and primitive³. It comes to us from the march between the fifth and the sixth centuries;

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

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

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

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Excerpt

[More information](#)

CH. I.] *The dark age in legal history.* 7

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 unique¹) there is nothing distinctively Christian. If the Sicambrian has already bowed his neck to the catholic yoke, he is not yet actively destroying by his laws what he had formerly adored². 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 596³. 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 century⁴.

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

The Lex Ribuaria and Lex Burgundionum.

The Lex Romana Burgundionum.

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

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

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

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

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Excerpt

[More information](#)

say that they had Roman authority for their occupation of Roman soil. Aquitania Secunda had been made over to the West Goths; the Burgundians vanquished by Aetius had been deported to Savoy¹. In their seizure of lands from the Roman *possessores* they had followed, though with modifications that were profitable to themselves, the Roman system of billeting barbarian soldiers². 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 former³ seems to be the law-book that Gundobad promised to his Roman subjects; he died in 516. Rules have been taken from the three Roman *codices*, from the current abridgements of imperial constitutions and from the works of Gaius and Paulus. Little that is good has been said of this book. Far more comprehensive and far more important was the Breviary of Alaric or *Lex Romana Visigothorum*⁴. Euric's son, Alaric II., published it in 506 as a statute-book; among the *Romani* of his realm it was to supplant all older books. It contained large excerpts from the Theodosian Codex, a few from the *Gregorianus* and *Hermogenianus*, some post-Theodosian constitutions, some of the *Sententiae* of Paulus, one little scrap of Papinian and an abridged version of the Institutes of Gaius. The greater part of these texts was equipped with a running commentary (*interpretatio*) which attempted to give their upshot in a more intelligible form. It is thought now-a-days that this 'interpretation' and the sorry version of Gaius represent, not Gothic barbarism, but degenerate Roman science. A time had come when lawyers could no longer understand their own old texts and were content with debased abridgements⁵.

The *Lex Romana Visigothorum*.

Importance of the Breviary.

The West Goths' power was declining. Hardly had Alaric issued his statute-book when he was slain in battle by the Franks. Soon the Visigothic became a Spanish kingdom. But it was not in Spain that the *Breviarium* made its permanent mark. There it was abrogated by Reckessuinth when he issued a code for all his subjects of every race⁶. On the other hand, it struck deep root in Gaul. It became the principal, if

¹ Brunner, op. cit. i. 50-1.

² Ibid. 64-7.

³ Krüger, op. cit. 317; Brunner, op. cit. i. 354; Schröder, op. cit. 234.

Edited by v. Salis in M. G.

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

⁵ Karlowa, op. cit. i. 976.

⁶ See above, p. 6.

CH. I.] *The dark age in legal history.* 9

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 epitomes¹.

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 kind².

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 673⁴. A version of it (*Dionysio-Hadriana*) was sent by Pope Hadrian to Charles the Great in 774⁵. 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 constitutions to come from him, it was finished. Valuable as the Code of imperial statutes might be, valuable as might be the modernized and imperial edition of an excellent but ancient school-book,

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

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Excerpt

[More information](#)

the main work that he did for the coming centuries lies in the Digest. We are told now-a-days that in the Orient the classical jurisprudence had taken a new lease of life, especially in the school at Berytus¹. We are told that there is something of a renaissance, something even of an antiquarian revival visible in the pages of the Digest, a desire to go back from vulgar practice to classical text, also a desire to display an erudition that is not always very deep. Great conqueror, great builder, great theologian, great law-giver, Justinian would also be a great master of legal science and legal history. The narrow escape of his Digest from oblivion seems to tell us that, but for his exertions, very little of the ancient treasure of wisdom would have reached modern times: and a world without the Digest would not have been the world that we know. Let us, however, remember the retrospective character of the book. The *ius*, the unenacted law, ceased to grow three hundred years ago. In time Justinian stands as far from the jurists whose opinions he collects as we stand from Coke or even from Fitzherbert.

Justinian
and Italy.

Laws have need of arms: Justinian knew it well. Much depended upon the fortunes of a war. We recall from the Institutes the boast that Africa has been reclaimed. Little was at stake there, for Africa was doomed to the Saracens; nor could transient success in Spain secure a western home for the law books of Byzantium². 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 Vigili* (554)³. Fourteen years were to elapse and then the Lombard hordes under Alboin would be pouring down upon an exhausted and depopulated land. Those fourteen years are critical in legal history; they suffer Justinian's books to obtain a lodgement in the West. The occidental world has paid heavily for Code and Digest in the destruction of the Gothic kingdom, in the temporal power of the papacy, and in an Italy never united until our own day; but perhaps the price was not too high. Be that as it may, the coincidence is memorable. The Roman

¹ Krüger, *op. cit.* 319.

² Conrat, *op. cit.* i. 32.

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