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978-1-107-68211-5 - Ioannis Selden: Ad Fletam Dissertatio

David Ogg

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IOANNIS SELDENI

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DAVID OGG

Fellow and Tutor of
New College Oxford

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TO
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THE HISTORICAL BACKGROUND OF
SELDEN'S *DISSERTATIO*
AD FLETAM

TO many persons of our time John Selden is known only by their perusal of the *Table Talk*; and in that little classic of our literature, wherein fragments of Selden's learned and familiar discourse were preserved for posterity by his Boswell-like friend, Richard Milward, they gain the picture of a shrewd man of the world who struck with equal force, and not seldom in a spirit of satire and jest, at the frailties of all parties and all creeds. Other persons have knowledge of Selden as the great jurist who replied, in his *Mare Clausum*, to the *Mare Liberum* of his famous contemporary, Hugo Grotius; while there are those who think of him either as an orientalist of distinction or as a prominent public man speaking in Parliament on the great issues of his age or arguing cases of constitutional import in the Courts. With the increase of interest in institutional and legal development, the historians of our time are coming to look upon Selden in still a different light. To them he stands as the representative of a group of antiquaries and lawyers who, in the first half of the seventeenth century, turned their attention to a study of ancient records and to the writing of books on the history of the laws and constitutional institutions of the realm. Of all the members of that brilliant company of scholars, which included men like Cotton, Camden, Spelman, and Hale, it was Selden who possessed, in the judgment of the good critics of his and our day, the deepest learning and the broadest historical vision.

No one of Selden's contributions to legal history, not even the *Titles of Honour* or the *History of Tithes*, presents his learning and historical vision to better advantage than the *Dissertatio ad Fletam*. In this essay, which first appeared as an introduction to the edition of *Fleta* in 1647, Selden gives an historical account

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of the English medieval law-books and the influence of Roman and Canon laws on Continental and English legal development. Although regarded from Selden's day to our own as one of the valuable writings upon these subjects, the *Dissertatio ad Fletam* has never appeared in a satisfactory edition. The first printed text contains mistakes; and the later editions of 1685 and 1726 are also far from faultless. Students of law and history will consider it, therefore, as a fortunate circumstance that Mr Ogg has chosen to devote much painstaking and scholarly labour to the preparation of a new and critical edition and to the writing of an Introduction which carries us, in a pleasurable and profitable manner, into the atmosphere of the historical problems which Selden endeavoured to solve. Mr Ogg's studies, both in this country and abroad, had well fitted him for his task. Through the writing of his *Cardinal de Retz* he was brought, moreover, into close touch with Selden's age; and although the subject of this book is somewhat limited, due to the fact that the Cardinal had little to offer to the biographer and historian except his human frailties, his literary genius, and his sense of humour, yet the preparatory studies which Mr Ogg pursued awakened in him a live interest in the seventeenth century. That early interest has already borne fruit in the volume entitled *Europe in the Seventeenth Century*, a recent study of Continental history in which the author prepares us, in more than one direction, for the reading of his edition of the *Dissertatio ad Fletam*; for Selden's essay is one of the characteristic products of European scholarship in the seventeenth century and closely allied, both in subject-matter and in method of treatment, to many Continental legal writings of the time.

It is peculiarly fitting that a Fellow of New College, Oxford, should be the editor of the *Dissertatio ad Fletam*. Selden received his University education at Oxford, where he was a member of Hart Hall, now Hertford College; and, moreover, he was indebted for part of his early training, as Mr Ogg's recent researches have revealed, to three New College men. In Lincoln's Inn Library Mr Ogg has examined the original ms. of an autobiographical fragment written by Selden in Latin in

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his own hand¹; while he has also transcribed, in the Bodleian, a later version of the fragment written in a late seventeenth or early eighteenth-century hand². This fragment of Selden's autobiography, no further parts of which can be traced, appears to have been unknown to all of Selden's biographers and to all the editors of his writings, including Wilkins and Kelham; and, so far as can be ascertained, no previous reference has ever been made to it in print³. Mr Ogg decided not to make use of the fragment in the writing of his Introduction to the *Dissertatio ad Fletam*; and he has allowed me to use his transcript in the present place.

The important fact disclosed by the fragment is that Selden not only studied at Chichester Grammar School under Hugh Barker, the master, a distinguished New College man, but that while at Oxford he also came under the 'tutela' of two junior fellows of New College, Anthony Barker, who was Hugh Barker's brother, and John Yonge. One would like to have precise knowledge in regard to the influence wielded by these three New College men on the formation of the great jurist's character and tastes in scholarship; but the fragment, which is our only source of information, is provokingly silent on these points. It gives, however, one hint. Selden's reference to Hugh Barker, if that reference be interpreted liberally, could easily lead one to the conclusion that it may have been this Oxford civilian and canonist, Doctor of Civil Law and Dean of the Arches, who, in the last years of the sixteenth century, when Selden was under his instruction at Chichester, first interested the future jurist in the study of the two Romanic laws, the history of which, both on the Continent and in England, he traces at some length in the *Dissertatio ad Fletam*.

Selden's essay was written at a time when the sixteenth century, the age of transition from medieval to modern times, was already a matter of history. Renaissance, Reformation, and Nationalism, three of the main forces of that transforming century, had already stamped themselves indelibly upon the

¹ Hale MSS. XIII, No. 42.² Smith MS. 103, f. 33.³ The sole exception is in the article on Selden in the *D.N.B.*, where it is mentioned among the authorities.

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laws and jurisprudential thought as well as upon the social, religious, and political ideas and institutions of Europe. Moreover, before Selden wrote his *Dissertatio ad Fletam* the Reception of the foreign laws by Germany had already overwhelmed, in a revolutionary manner, the native laws and customs of that country; and in many of the other regions of Europe the political and legal ideas of the Bartolist jurists had been adopted, in greater or lesser degree, as a means of strengthening the machinery of national territorial states and of furthering the tendency towards absolutism. When, therefore, we study Selden's essay, we should hold these historical facts in mind. They help us to understand Selden's views as to the course of legal development on the Continent and in England; and they also present to us the environment in which the jurist's treatise was written.

To students of the *Dissertatio ad Fletam* the history of the Renaissance, and more particularly the history of the legal humanism of that epoch, is of special importance. In their protest against the medievalism of the Bartolist jurists, who dominated the theory and practice of the law, and in their endeavour to reconstruct the pure Roman Law of the classical jurists, undefiled by Byzantine and Bolognese jurisprudence, the humanists had brought to their aid the auxiliary sciences of philology, literature, and history. In developing their own method of legal study, the *mos Gallicus*, as opposed to the *mos Italicus* of the Bartolists, the humanists laid special emphasis upon the importance of historical investigation; and such studies were, indeed, an essential part of their effort to go 'back to the sources.' The Italian legal humanists of the fifteenth century had already drawn attention to the need of viewing the law from an historical standpoint; and it was, in fact, Valla's pupil, Pomponius Leto, who first attempted to reconstruct Roman legal history. In the sixteenth century, however, the French school of legal humanism, represented by Alciati, Cujas, Douaren, Doneau, Baudouin, and Hotman, brought the historical study of the Roman Law into the forefront of their programme of juristic reform; and in some respects the main

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purpose of the school was summarised by Baudouin's famous remark, *sine historia caecam esse jurisprudentiam*. Nor were the historical investigations of the Renaissance jurists confined to the Roman Law; for, while Cujas and other scholars in France and elsewhere were reconstructing Roman legal history, Antonio Agostino, the great Spanish civilian and canonist of the sixteenth century, a humanist of the highest distinction, was founding also the historical study of the Canon Law.

The humanist civilians and canonists of the Renaissance were, in truth, the creators of legal history as a branch of juristic study; and as early as the sixteenth century itself their example was followed by the 'national jurists.' In all, or nearly all, the countries of Europe jurists, many of them trained in the Civil and Canon Law, turned their attention to the study of the native legal materials. They re-edited the medieval law-books and sources; and they wrote historical and systematic treatises upon the native and customary law. By their pioneer work they founded indeed the historical study of the several national legal systems of Europe; and, for this reason, they are to be revered as the predecessors of those great legal historians of our own day who have set themselves to the task of writing the history of the laws of Europe.

The influence of legal humanism upon the establishment of studies in English legal history is one of the cardinal facts which every reader of Selden's essay should bear in mind. In England, no less than in other countries, investigations in the history of the national law had their beginning in the sixteenth century, under the inspiration of the ideas and methods of the humanists; and, in the early seventeenth century, in Selden's time, a scientific school of English legal history was definitely founded. The work of that school, of which Selden was one of the leaders, was largely shaped by humanism. Humanism, indeed, helped to mould Selden, as it helped to mould his predecessors and his contemporaries; and this influence is illustrated in a striking manner by the *Dissertatio ad Fletam*. Particularly in those portions of the essay which deal with the history of the Roman and Canon laws on the Continent Selden's reliance

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upon Alciati, Cujas, and other legal writers of the Renaissance, is marked. Not only do the humanists furnish Selden with historical facts; they shape many of his own views, as, for example, his view of the value of ancient legal writings and of the loss to scholarship caused by Tribonian in preserving in the Digest only fragments of the classical jurists. Selden's own attitude towards the schools of humanism and natural law is reflected in the *Table Talk*, where, in speaking of 'Learning,' he remarks: 'The Jesuites and the lawyers of France, and the low-country men, have engrossed all learning. The rest of the world make nothing but homilies.'

The reader of Selden's essay has need, therefore, to acquaint himself with the juristic and legal history of the age of the Renaissance; for only by this means can he properly understand the jurist's historical materials and methods, and form a true estimate of the place which his essay holds in the literature of legal history. If, however, our knowledge of the juristic and legal history of Europe be even more extensive, if it include not only the transitional epoch of the Renaissance, but also the centuries which preceded and followed it, we are the better prepared to appreciate the broader aspects of that long evolution which Selden partly presents to us. What we need, in fact, is a vision of the vast historical background of twenty centuries in the East and in the West. Grasping the whole of the Christian era with our mind's eye, we can see the action and reaction of the forces of history, we can behold both the rise and the decline of great movements in the past and also the present state of other great movements that are still in the ascendancy. The struggle of two of these dominant movements in European history, the conflict caused by the spread and development of Romanic and of non-Romanic laws, is of vital interest to the reader of Selden's essay. Only certain aspects of that ceaseless strife come to the surface in Selden's pages: but, looking back on a longer range of history than the one which Selden surveyed, we of the twentieth century can see clearly that the Romanism which dominated the legal life of the later middle age has suffered a decline and that the significant note of the

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modern history of the civil laws of Europe has been the rise and progress of those elements that are Germanic, native, national, non-Romanic.

Students of English law and history will be particularly interested in Selden's account of the influence of Roman and Canon laws on the Common Law: nor will they have less interest in Mr Ogg's paragraphs upon this subject. His conclusion on one important point should be noticed. 'On the whole,' he remarks, 'Selden's contention is right: at no other period of our legal history are the commonplaces of Roman Law doctrine so frequently cited in court as in the reign of Edward II.' Mr Ogg adds, however, that the citing of maxims is, in itself, 'no evidence of any real Roman Law influence'; and yet, 'it must be admitted that the legal maxims have played some part in the development of our law.' To our learned editor's account of this matter one further instructive instance of the use of maxims may be appended. In *Anon. v. Page*¹, a case already mentioned by Mr Plucknett in dealing with Romanic influence on the early Year Books², Spigurnel, counsel for the plaintiff, remarked that 'he that pledges his oath to his adversary makes his adversary his judge.' Mr Bolland, commenting on this passage, says that 'it looks as if Spigurnel misquoted a Romanist maxim originally applied to the quite different case of tendering a decisory oath to the adversary, which does not occur in the Common Law.'

To Mr Ogg's learned Introduction another point may be added. In support of his view that Roman Law had become unknown in the common law courts in the reign of Edward III, Selden cites the Year Book case of the Abbot of Torre³. Sir Frederick Pollock, in his valued notes to Maine's *Ancient Law*⁴, has pointed out, however, that Selden, with all his learning, misunderstood the case, and thereby misled Blackstone at a later time. There is nothing in the case, Sir Frederick Pollock

¹ Y.B.B., Eyre of Kent, 6 & 7 Edward II, 1313-4, vol. II (edited by Mr Bolland for the Selden Society), p. 54.

² See *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge Studies in English Legal History), pp. 36-38.

³ Mich. 22 Ed. III, f. 14, ed. 1561; see pp. 157-161, *infra*.

⁴ Pp. 117, 118.

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concludes, which ‘shows very gross ignorance, although the language might not satisfy a learned civilian; the Court, so far from treating Roman words of art as nonsense, professed to understand them quite enough for the purpose in hand.... [Selden’s] general thesis that knowledge of Roman Law in England, except among professed canonists, declined rapidly after the reign of Edward II, is doubtless correct. But there was no question of hostility. Not the fourteenth or thirteenth, but the sixteenth century was the time of recrimination between common lawyers and civilians, and perhaps of some real danger to the Common Law.’

Although interest in Romanic influence on English Law was awakened in the sixteenth century, and although some of the legal writings of that main century of the Renaissance deal with aspects of Romanism in England, the earliest of the works that have survived as classics come to us from the middle of the seventeenth century. Selden’s *Dissertatio ad Fletam* appeared in 1647; six years later Duck’s *De Usu et Autoritate Juris Civilis* was first published. While recognizing the great value of Duck’s long eighth chapter on the history of Roman Law in England, scholars will always assign to Selden’s essay a special place in our literature as the first important investigation of this subject. Many writings on Roman legal influence in England have appeared since the days of Selden and Duck; and among them the essays of Güterbock, Stubbs, Maitland, Lord Justice Scrutton, and Sir Paul Vinogradoff, as well as the historical treatises of Pollock and Maitland and of Dr Holdsworth, have brought to light many facts unknown to the pioneers of the seventeenth century. The present edition of the *Dissertatio ad Fletam* places Selden’s text in the setting of this wealth of later scholarship. The results of Mr Ogg’s research prove to us that in the main Selden’s essay has stood the test of time, and that even in the critical atmosphere of our age it is still worthy of careful study as one of the leading contributions to English legal history.

H. D. H.

PREFACE

THERE exist three distinct editions of the *Ad Fletam Dissertatio*—that of 1647, that of 1685, and the text published by Wilkins in his complete *Opera* of Selden (1726). The texts of 1647 and 1685 appeared as appendices to the reprints of *Fleta*: in Wilkins' edition, the *Dissertatio* was printed with the other works of Selden. Of these three texts, the first has numerous mistakes, some of which were corrected in a short list of *corrigenda* printed at the end of the volume; the 1685 edition incorporated these corrections, but repeated the uncorrected mistakes (with additional misprints): for the third edition, that of 1726, Selden's editor simply repeated the text of 1647, copying even the most obvious printers' errors, omitting to make any use of the 1647 *corrigenda* and perpetuating a fresh crop of misprints. Accordingly the text reprinted here, together with Selden's notes, is that of 1647, with the misprints corrected. The ms. of the *Dissertatio* does not appear to have survived Selden's lifetime: no trace of it nor reference to it has been found by the present writer.

A verbose and inaccurate translation of the *Dissertatio* by the eighteenth-century lawyer and antiquarian, Robert Kelham, was published in 1771, an edition which made no attempt to deal with the questions raised by the text. For whatever reason, this is now a very rare book. Since its appearance, no work of Selden's has been reprinted, except the *Table Talk* collected by his amanuensis the Rev. Richard Milward and first published in 1689. Its convenient size and the general interest of its subject are the main reasons why the *Ad Fletam Dissertatio* has been chosen to represent Selden in this series. The circumlocutions of seventeenth-century Latin generally warrant a freer translation than would be permissible with a classical text, but actual abridgments in my translation are specially indicated. Selden's style is so diffuse and involved that, from a literary point of view, he has little to lose by translation; on the other hand I have aimed always at interpreting his meaning accurately. The notes

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added to the translation have been restricted to as small number as possible and are intended to facilitate reference to Selden's authorities as well as to indicate the results of modern research on the chief topics discussed. The references in these notes and in the introduction to MSS. are to the MSS. in the British Museum, except where otherwise stated.

In taking leave of this task, I wish that its performance were more worthy of the subject and of the very generous assistance afforded me. Its inception is due mainly to the inspiring teaching of Sir Paul Vinogradoff, whose services to the allied studies of law and history are second only to those of Selden himself. The general editor of the series, Professor Hazeltine, aided me with the introduction by making several helpful suggestions and criticisms: Dr de Zulueta, Regius Professor of Civil Law in the University of Oxford, assisted me with practical counsel and saved me from several blunders. To the Rev. H. E. Salter, Fellow of Magdalen College, Oxford, to Dr W. C. Bolland, of the Inner Temple, and to Mr G. R. Y. Radcliffe, Fellow and Bursar of New College, Oxford, I am indebted for guidance on specific points submitted to them. Mr H. L. Henderson, Fellow and Tutor of New College, corrected many misprints in the 1647 edition and gave both skilful and unstinted help with the translation: had this generous help not been available, it would not have been possible for me to complete this work. For mistakes, however, whether in the introduction, the notes or the translation, the present writer is solely responsible.

In conclusion, I wish to thank the Syndics of the Cambridge University Press for undertaking to publish a book which may, it is hoped, do a little to encourage a revived study of Selden in English-speaking lands.

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INTRODUCTION

THE *Ad Fletam Dissertatio* was written when Selden was in his sixty-third year, after he had attained to full maturity of his great intellectual powers, and its subject—the reception of Roman Law in mediaeval Europe—was eminently fitted for a display of the unique store of erudition accumulated by the most learned person who ever left Oxford without taking a degree. At the time when the debt of modern civilisation to the mediaeval and ancient past is being more eagerly investigated and more accurately gauged, Selden's *Dissertatio* still has its value both as a pioneer contribution to a great subject and the starting-point for all estimates of Roman Law influence on the ideas and institutions of later times.

It is with this short work of Selden's, originally printed as an explanatory essay to the first printed edition of the anonymous *Fleta*, that the present introduction is concerned.

This edition¹ of *Fleta* was based on the unique MS. (in Selden's custody), but in the *Dissertatio* appended thereto, Selden disclaimed all responsibility for the numerous mistakes in the printed text of *Fleta*, explaining that he wrote his essay only at the earnest request of the publishers, who desired their edition to be accompanied by some kind of explanatory treatise dealing with the questions raised by the publication of this anonymous fourteenth-century MS. The first chapter of Selden's *Dissertatio* is devoted to a brief exposition of the historical value of legal writings which, from the practitioner's point of view, have been rendered obsolete by subsequent legal changes. In his second chapter Selden considers the relationship of Bracton's *De Legibus* to its epitomes, such as *Fleta*, *Britton* and the *Summa* of Thornton: he suggests that the compilation known as *Britton* was not, as was commonly supposed, the work of a bishop of Hereford named Britton, but was a working summary of Bracton, or rather Bratton², and received its title from a corruption of that

¹ 1647.

² For the name and some new biographical details, see Komar, 'De Origine Vitae Brattonis Varia' in *Illinois Law Review*, vol. XVI (1922), pp. 516-522, 586-608.

name. This chapter contains an account of Selden's ms. of Thornton's *Summa*. A disquisition on the Lex Regia and Bracton's interpretation of it provides material for the third¹ chapter: the fourth² deals with the use of imperial law in England during the Roman occupation and contains a conjecture that not only Papinian but also Ulpian and Paul may have practised in this country. In the fifth³ chapter Selden studies the Theodosian Code, correcting a widespread error in regard to the date of its promulgation: the use made by the Church of the so-called Donation of Constantine he condemns in scathing terms. In the sixth⁴ chapter he attributes to the monks Ivo and Gratian the enterprise of combining elements from the Codes with the Canons in order that they might cheat secular rulers and subjects: the same chapter gives an account of the legal revival at Bologna associated with the name of Irnerius. In chapter VII⁵ the subject of Roman Law influence in England is resumed: here Selden describes William of Malmesbury's well-known ms. containing the Alarician Breviary, and gives an account of Vacarius and the teaching of Roman Law in the England of Stephen's reign. Chapter VIII⁶ illustrates the use of imperial jurisprudence during the period from Henry III to Edward III, after which, according to our authority, it ceased to be of force in English courts other than in certain exceptional or local jurisdictions. The reasons for English aversion from the use of civil law principles in our government are considered in the ninth chapter⁷, where tribute is paid to English reverence for the common law. In the tenth⁸ and last chapter Selden returns to *Fleta*, conjecturing that it was compiled in the Fleet prison, in the reign of Edward I, by a prisoner, possibly one of the legal functionaries deposed for malpractices by the judicial inquisition of 1288. A remarkable passage in *Fleta* concerning royal alienations gives him a final occasion for displaying his erudition, as well as an opportunity for a parting thrust at the clergy. Selden had never forgotten the clerical attacks on his *History of Tithes*.

¹ *Infra*, pp. 21–41.³ *Infra*, pp. 55–83.⁵ *Infra*, pp. 103–133.⁷ *Infra*, pp. 161–177.² *Infra*, pp. 43–55.⁴ *Infra*, pp. 83–103.⁶ *Infra*, pp. 133–161.⁸ *Infra*, pp. 177–197.

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Such, in brief outline, are the most noteworthy contents of the *Dissertatio*. Its author wrote at a time when serious historical research was becoming possible, when the parliamentary lawyers were ransacking the national records for precedents and arguments, when the great wealth of mediaeval literature—despised throughout the Renaissance—was beginning to be appreciated, and when, owing to the intelligent munificence of collectors like Sir Robert Cotton and Sir Symonds d'Ewes, important manuscripts were, for the first time, becoming accessible to scholars. It was the age of Coke, Spelman, Lambarde and Prynne, a period of attempts to define the system labelled Feudalism and to illustrate its principles by the reprinting of old texts. In this burst of antiquarian enthusiasm it is not surprising that many mistakes were made: the *Dissertatio* provides ample evidence of the merits and demerits of a scholarship which, while robust, was not always discriminating, for the material at its disposal had not yet been fully sifted and examined. Selden made good use of his resources. He cited from his own manuscripts, many of them unique. He had access to the collection of Sir Robert Cotton, afterwards the nucleus of the great store of manuscripts in the British Museum. He was an assiduous researcher in the Exchequer archives. The mediaeval chronicles familiar to modern readers in the *Rolls Series*, the *Patrologia Latina* and the *Monumenta Germaniae Historica*, were, in many cases, known to him in MS. or in the sixteenth-century printed versions. A classical scholar and Orientalist, he was also a pioneer in those studies which the publications of the modern Selden Society have done so much to encourage. In none of his contemporaries was the historical sense¹ so highly developed, and probably none of his successors can claim to rival him in sheer weight of learning.

The first obvious characteristic of the *Dissertatio* is the great wealth of its sources. Of the MSS. referred to, the most important are the *Thornton*², the *Fleta*³, the Collections of William⁴ of

¹ See the two articles by Prof. Hazeltine in *Harvard Law Review*, xxiv, 105, 205, and in *Festschrift H. Brunner*, p. 579, on the subject of Selden as a historian.

² *Infra*, pp. 15–19.

³ *Infra*, p. 3 and n. 1.

⁴ *Infra*, p. 107 and n. 1.

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Malmesbury containing the Alarician Breviary, and, lastly, the Inner Temple MS. of the Year Books¹. Of these the second and third still survive, the one in the British Museum, the other in the Bodleian: the first and fourth are not now known to exist. The *Thornton* and the MS. of William of Malmesbury were the private property of Selden. Each MS. calls for special reference here.

(a) The *Thornton* was one of the MSS. which, on the dispersal² of Selden's library, went neither to the Bodleian nor to Lincoln's Inn, but was probably in one of the eight chests of his literary property destroyed by fire at the Inner Temple in January, 1679³. On that occasion, in order to prevent the flames spreading further, a small library was exploded with such violence as to cause injury to several spectators. Two years earlier the Inner Temple had suffered some damage from fire: in 1666 it had shared in the disaster of the Great Fire of London: it is not unlikely therefore that the MS. of Thornton was lost in one of these conflagrations. It is possible also that the Inner Temple MS. of the Year Books shared the same fate. Selden's descriptions are the only authentic evidence we possess regarding these two MSS. These however are only two of the sources used by Selden for his *Dissertatio* and no longer traceable: reference to the following pages⁴ will show how extensive is the loss incurred by posterity in this respect.

Recently a distinguished American scholar⁵ has adduced a considerable weight of evidence to show that one of the Selden MSS. in Lincoln's Inn Library, catalogued as a *Bracton*, is really a *Thornton*. This he proves mainly from internal evidence: it corresponds, in several important respects, to the description given in the *Dissertatio*, and it contains special reference to a law-suit in which Thornton was known to be interested. It does not have the frontispiece illumination described by Selden and the arrangement of chapters is different. The inscription of Selden's motto in his handwriting shows that it was one of

¹ *Infra*, pp. 149–53 and 151, n. 2.

² For the distribution of Selden's library after his death, see Macrae, *Annals of the Bodleian*, 2nd ed., 110–120.

³ *Calendar of Inner Temple Records* (1901), vol. III. xxx–xxx1.

⁴ *E.g.* p. 11, n. 1; p. 13, n. 7; p. 31, n. 2; p. 35, n. 5; p. 147, n. 3; p. 149, n. 5.

⁵ Dr Woodbine in *Law Quarterly Review*, xxv, 44.

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his MSS., and for this reason it must be considered to have come into Selden's possession after 1647, the date of the *Dissertatio*: alternatively, it may have been mistaken by Selden himself for a *Bracton*, though this hypothesis is unlikely. On the whole, it seems reasonable to conclude that Lincoln's Inn Hale MS. cxxxv is the only surviving MS. of Thornton's *Summa* and that it was not described by Selden either because he mistook it for *Bracton* or because he acquired it after 1647.

(b) The problems which puzzled Selden in *Fleta* still perplex his successors. 'Tractatus iste...merito Fleta poterit appellari, quia in Fleta de jure Anglicano conscriptus est'¹: this is the sum of our knowledge regarding the authorship of the treatise. The records of the Fleet do not go beyond the seventeenth century, so we do not know the names of those who were consigned to this prison in the reign of Edward I. It is possible that the author was one of the lawyers deposed and imprisoned by the great judicial investigation of 1288: his book shows that he had used Bracton, that he had read Walter of Henley's treatise on Husbandry and that he was familiar with the internal administration of the royal household². Beyond that we can only conjecture. Investigation at the British Museum and Record Office has failed to produce any clue regarding the authorship of this treatise. It would be tempting to make out a case for Hengham, but this could be supported only by the facts that Hengham was one of the imprisoned judges and that he was given to the composition of legal compendiums. The prisoner of the Fleet has been successful in maintaining his anonymity.

(c) The MS. of William of Malmesbury's historical and legal collections has been the subject of considerable investigation³. In 1885 Stubbs suggested⁴ that it was written about the year 1130 by William of Malmesbury himself, who, however, is not likely to have been the original compiler. What Selden thought to be the Theodosian Code has proved, in reality, to be the Alarician Breviary: nevertheless this part of the MS. has been

¹ *Infra*, p. 186.

² See F. M. Nicholl's edition of *Britton* (2 vols., 1865), I, xxv.

³ *Infra*, p. 107, n. 1.

⁴ In a letter bound up with MS. Bodley Seld. Arch. B. 16.

found of considerable value to nineteenth-century editors like Haenel¹ and Mommsen². Its special interest for Selden was that, compared with the older MSS., it revealed a more advanced degree of daring in the process by which the Donation of Constantine came to be regarded as an integral part of the Theodosian Code, for the sanction addressed to Ablavius, hitherto added cautiously as an appendix, now figures unashamed in the second title of Book xvi³. Considering the later use made of it, the MS. may be regarded as the most valuable of all in Selden's possession.

(d) Maitland did not regard the Inner Temple MS. of the Year Books as definitely lost, but his own failure to find it suggests that, like the illuminated Thornton, it may have disappeared in one of the seventeenth-century conflagrations at the Inner Temple. On the other hand, however, there is no proof that it perished in this way and it is a notorious fact that in the past libraries were careless in lending MSS. Not a few valuable literary treasures have been inherited by their present 'owners' from ancestors who purposely or negligently failed to return such borrowed property. The Inner Temple MS. of the Year Books may have passed, in this way, into private ownership; the same process is known to have happened to other MSS. of the Year Books. Selden supposed that the Inner Temple MS. was a transcription from an original by Richard of Winchedon, and he cites what appear to be different comments by compiler and copyist: but it has been conjectured by Maitland that this hypothesis is wrong and that compiler and copyist were one and the same person—namely, Richard⁴ of Winchedon. The interest of the MS. is that it contains not merely conventional citations from civil law *Regulae Juris*, but attempts to illustrate an English case from what was thought to be civil law doctrine.

The secondary authorities used in the *Dissertatio* will be seen to consist mainly of the French and to a less extent the German,

¹ *Novellae Constitutiones* (part VI of *Corpus Juris Antejustiniani*, 1844), XII–XIV. Haenel believed that the MS. is a late twelfth-century copy and that its original compiler used a mutilated Breviary and a canon law source. The original compiler was almost certainly not William of Malmesbury.

² See Mommsen and Meyer's edition of the Theodosian Code (Berlin, 1905), LXV–LXVII.

³ *Infra*, p. 77, n. 3.

⁴ *Infra*, p. 151, n. 2.

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Italian and Spanish juristic writings of the sixteenth century. Without the great revival of Roman Law studies during the Renaissance, the *Dissertatio* would have been impossible. The leader of that revival was Alciati (1492–1550), who taught Roman Law at Avignon, Bourges, Pavia, Bologna and Ferrara: by his critical and to some extent philological treatment of the texts, Alciati trained up a great school of jurists, including Muretus and Panzirol, a tradition carried on by Cujas, Baudouin, Rebuffy, Hotman and the brothers Peter and Francis Pithou. The papal interdict on Roman Law studies in Paris, promulgated in 1219, was not removed until 1679: hence it was at universities such as those of Bourges, Orléans and Toulouse that these studies flourished. The work of the new schools was mainly editorial. Throughout the greater part of the sixteenth century, the old glossed editions were still being printed, but they gradually gave way to texts unencumbered by mediaeval comment; until in 1575 Haloander published at Antwerp the first unglossed edition of the Digests. Peter Pithou published texts of the Theodosian Novels and the post-Theodosian Novels¹, as well as the *Codex Canonum Vetus Ecclesiae Romanae*; his brother Francis edited texts of the *Leges Barbarorum* and the *Epitome* of Julian. In 1549 Jean du Tillet produced a part of the *Liber Singularis Regularum* of Ulpian and in 1550 the sixteen books of the Theodosian Code. Of these editorial restorers, the greatest was Cujas (1522–1590), whose textual labours served to give to the Corpus Juris something like its definitive form. Nor were the scholars of Germany, Italy and the Low Countries far behind in this work of producing unglossed and critical texts. The Ingoldstadt John Sichard (1499–1552) published a complete text of the Theodosian Code and the Alarician Breviary at Basle in 1528: in 1553 an edition of the *Basilica* came from Viglius of Zuichem; in 1558, Scrimgeour, at Geneva, edited the first edition of the Greek Novels of Justinian. The Florentine edition of the Digests appeared in 1553 by the enterprise of the Torelli brothers: the legislation of Lombard and Carolingian kings was made accessible in Lindenbrog's *Codex Legum Antiquarum*, published in 1613:

¹ 1571.

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Goldast's compilation of imperial rescripts from Charlemagne to Charles V appeared at Frankfort in 1607. As a result of this scholarly activity, jurisprudence parted company with dialectic to join forces with history and philology: 'sine historia, caecam esse jurisprudentiam' was the aphorism in which Baudouin defined the new ideals. By the end of the sixteenth century material for jurists like Selden had been classified and printed; the clear waters of judicial editorship had swept away the cloudy 'absinth of Accursius.'

The magnitude of this material can be inferred even from a glance at the vast library of printed books owned and read by Selden¹. It would have been superhuman to have avoided errors in utilising this profuse literary wealth: consequently there are certain mistakes in the *Dissertatio*, inevitable perhaps in a work of its period. The most obvious of these can be easily pointed out. Thus *Fleta*, Thornton, Hengham, *Britton* and even Andrew Horn are all grouped together with Bracton as if they formed a homogeneous class, and in this way an injustice is done to the characteristic and original work of Bracton. It seems strange that a man of Selden's learning should not have detected the gross fabrications in Horn's *Mirror of Magistrates*, and it is a remarkable fact that all his contemporaries took quite seriously the strange medley of 'horn and ivory'² which the London fishmonger passed off on an unsuspecting public. It was Reeves³ who first cast suspicion on a book which Selden actually placed in the same category as the *De Legibus*. Nor does Selden appear to have suspected the debt of Bracton to Azo, though he was deeply versed in both; not till the nineteenth century was the debt revealed⁴: it remained for Maitland⁵ and Vinogradoff⁶ to show that Bracton's borrowings are not, as Sir Henry Maine assumed⁷, mere plagiarisms, but discriminating and generally

¹ About 8000 volumes; now in the 'Selden end' of the Bodleian Library.

² See Maitland's preface to the Selden Society edition of *The Mirror of Magistrates*.

³ *History of English Law* (1787), II, 359, quoted by Maitland, *op. cit.*

⁴ By Güterbock, in his *Henricus de Bracton und Sein Verhältnis zum Römischen Rechte* (1862).

⁵ In *Bracton and Azo* (Selden Society).

⁶ See, for instance, *The Roman elements in Bracton's treatise* (*Yale Law Journal*, June 1923).

⁷ *Ancient Law*, ch. IV.

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intelligent selections of material which might be utilised for the illustration of native legal rules.

But the most serious mistake made by Selden is his confusion regarding Vacarius, the first teacher of Roman Law in Britain. It was common in the sixteenth and seventeenth centuries to confuse the jurists Roger and Roffred: Selden went a step further when, relying on an imperfect text of the chronicle of Robert of Torigny, he identified Vacarius with Roger, abbot of Bec, whom, in turn, he confused with the jurist Roger. From these initial assumptions, Selden was led into a series of startling consequences. His first deduction was that as Roger of Bec had won fame by devoting himself (*vacare*) to law teaching, he came to be called Vacarius. On his return to Bec, Roger (*i.e.* Vacarius) resumed his ecclesiastical duties and was afterwards elected to the archbishopric of Canterbury, vacant by the murder of Thomas à Becket. From the assumption that abbot and jurist were identical, it followed that Vacarius was the author of a number of treatises in addition to the *Summa Pauperum*, which Selden knew of but had never seen¹. Not even serious chronological difficulties could convince Selden that he was working not on one false hypothesis but on several, and so, in his hands, Vacarius assumes a variety of aliases that would have done justice to the most hardened criminal. From Vacarius he is transformed into Roger, then Froger, then Freger, then Frederick: we are not altogether unprepared when he makes his final appearance as Robert². There is a glimpse of the real Vacarius in pope Alexander III's rescript to the abbot of Fountains, but Selden has already so transformed his hero that he does not recognise him in his natural garb, and thinks that he must be a double—another Vacarius, 'who succeeded Roger as expounder of imperial law in this country³.' When Selden conjectures⁴ that the jurist, placed by the Monk of Eynsham in the third circle of Purgatory, was 'native-born or here only for teaching purposes,' one breathes a sigh of relief that this deceased lawyer is not identified with Roger and that so the career of the chameleon-like abbot is not pursued into the realms beyond.

¹ *Infra*, pp. 111 and 121.

³ *Infra*, p. 121.

² *Infra*, p. 125.

⁴ *Infra*, p. 139.

Selden was led into these errors by an important omission in the Paris ms. of the Chronicle of Robert of Torigny. Unfortunately this ms. was published in 1619 by Duchesne, in his *Gesta Normannorum in Francia* where Selden, under the year 1148, read as follows: ‘Obiit Bechardus VI abbas Becci cui successit Rogerius magister Vacarius.’ Here there is an accidental omission of a paragraph between Rogerius and magister, a paragraph which makes it clear not only that Roger and Vacarius were quite distinct persons, but also that the information concerning Vacarius was added, not as concerning the abbey of Bec, but because it was of a general character such as might commend it to the readers of the chronicle. The average monastic scribe was quite capable of omissions as deceptive and as difficult to detect as this one. Had Selden been dependent solely on this defective text, his mistake would be pardonable, but he read Robert of Torigny in ms.¹ also, for his friend Sir Symonds d’Ewes possessed one of the mss. of the chronicle. This ms. omits the reference to Vacarius altogether and so does not confuse the abbot with the lecturer; hence Selden ought to have suspected that there was something seriously wrong with the text on which he was relying for the sole link connecting Roger with Vacarius. Even thus, however, there was ample evidence in his books that Roger the abbot, Vacarius the Lombard and Roger the jurist were three quite distinct persons—evidence rejected by Selden because it did not conform with his hypothesis that they were all three one and the same. In maintaining the indivisibility of this extraordinary trinity, Selden becomes both embarrassed and obstinate: nor does he take the reader into his confidence, for in referring to Robert of Torigny’s obituary notice of abbot Roger, he is careful to omit the details provided in that notice, leaving his reader to infer that Roger as abbot was of that eminence and distinction which one would expect in a man who had already made his reputation as a jurist. In his eulogy of the late abbot, Robert of Torigny refers to his provision of better accommodation for the monks, his improvement of the water-supply, his building of guest chambers and his installation of improved heating

¹ *Infra*, p. 112, n. 1, and p. 113, n. 1.

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arrangements¹, activities which one would associate with an enterprising domestic bursar, but not with a pioneer exponent of abstract jurisprudence. Selden's treatment of this subject shows a perversity possible only in a man of absolutely assured reputation.

There are also several faults of method in the *Dissertatio*. Thus in the first section of chapter VIII Selden adduces a number of scattered and inconclusive references without any attempt at correlation or generalisation: what may have been literary embellishments or conventions he cites as direct evidence of Roman Law influence. He takes up much time with a discussion of Bracton's real name, and points out several mistakes in the printed editions of the *De Legibus*, but says nothing of the 'universitas regni et baronagium' or the 'reipublicae communis sponsio' as illustrating Bracton's conception of the Lex Regia. He does not even refer to Bracton's peculiar adaptation of Roman Law terminology to the discussion of the villein status. Important questions like the influence on English Law of the canon law he leaves untouched. Moreover his style is crabbed and difficult: he never spares the reader, incorporating into his text many discussions more fitted for foot-notes or appendices; he tends to diffuseness and redundancy; often an important principle is lost sight of in an elaborate discussion of some subsidiary theme. The only relief is provided by occasional touches of sarcasm—generally at the expense of the clergy. Incompetent editors, including the editor of the text to which his essay was an appendix, are castigated without regard for their feelings. These faults of pedantry were shared by many of the great scholars of the time: they help to account for the fact that, by his contemporaries, Selden was more respected than loved and that by posterity he is more frequently quoted than read.

But it would be worse than folly to reprint one of Selden's works merely in order to show its faults. His mistakes are often of some historical interest, for they reveal the prepossessions, the disabilities and the equipment of the seventeenth-century scholar. In addition, the *Dissertatio* abounds in proofs

¹ *Chronicle of Robert of Torigny* (Rolls Series, ed. Howlett), p. 286.

not only of profound learning but of cogent analogy and logical reasoning; examples are his discussion of the relationship between Bracton and *Britton*: his account of the forged Donation of Constantine: his balanced and judicious estimate of the precise influence of civil law principles on common law practice, and his determination, from internal evidence, of the precise period when *Fleta* was compiled. The austere standards and rigorous earnestness of Selden's scholarship found ample scope in the subject to which he devoted the *Dissertatio*, and if he sometimes errs through a plethora of material, he yet provides a sharp corrective to all that is superficial or pretentious. In an age of specialisation like the present, Selden may profitably be studied as an illustration of the fact that it is possible to combine minute research with wide intellectual interests. To-day, these are too often divorced.

The three topics of most general interest touched upon in the *Dissertatio* are: first, the real nature of the twelfth-century legal revival at Bologna; second, the use made by Bracton of his Roman Law sources; and, third, the general influence of Roman Law on English legal and constitutional principles. It is proposed here to supplement Selden's Essay by brief references to the results of some modern investigations on each of these three subjects.

I. With regard to the first topic, Selden clearly did not believe that Roman Law studies were in complete abeyance in the period between the fifth and twelfth centuries, for he cites such diverse writers as Isidore of Seville¹, Boniface of Mainz² and Hincmar of Rheims³ to show that imperial jurisprudence was never entirely neglected in what have been termed the Dark Ages. But he took the view nevertheless that the work of Irnerius was in itself a revival and even a renaissance, for it was linked (in his opinion) with the discovery of the Pisan MS. of the Pandects after the destruction of Amalfi in 1137; and it had a semi-official aspect because it received the direct encouragement of the emperor Lothair⁴. It will be seen that Selden,

¹ *Infra*, p. 71.³ *Infra*, p. 81.² *Infra*, p. 75.⁴ *Infra*, p. 91.