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A SKETCH OF THE CIVIL AND CANON LAWS IN ENGLAND.

Before proceeding to give a short sketch of the Civil and Canon Laws in England, it may, perhaps, be well to state what is meant by these terms.

By the Civil Law is meant the law of the ancient Romans which had its foundation in the Grecian republics, and received continual improvements in the Roman state during the space of upwards of a thousand years and did not expire even with the Empire itself. The books to which Justinian, the Roman Emperor, reduced the whole of the Roman Civil Law are now four in number, viz., (1) *The Pandects*, sometimes termed *The Digests*, which contain fifty books, and wherein are recorded the opinions and sentences of several men learned in the Roman Law; (2) *The Justinian Code*, consisting of twelve books, wherein are comprised the several decrees and constitutions of the Roman Emperors; (3) *The Novels*, consisting of nine collections, which form a supplement to *The Justinian Code*; and (4) *The Imperial Institutions*, consisting of four books. In so pure and elegant a style are *The Pandects* written, that Civilians say that, if the Roman language were entirely lost in every other respect, it might be easily retrieved again by the writings of *The Pandects*.

The Civil Law of Rome is superior to all other existing laws in wisdom, justice, candour and equity, in the decision of disputes between man and man. This law has reached countries which were never subdued by the Roman eagles; and it now exists among those nations which have long since thrown off the power that first imposed it. And it is to this fountain of knowledge that the greatest statesmen in all ages have not thought it beneath their dignity and honour to acknowledge themselves indebted for the great assistance it has given them in all the affairs of their administration.

The Canon Law sprang up out of the ruins of the Roman Empire, and from the power of the Roman Pontiffs. Its origin is said to be coeval with the founding of Christianity under the Apostles and their immediate successors, who are supposed to have framed certain rules or canons for the government of the Church. These are called *The Apostolical Canons*; and, although it cannot be proved that they were drawn up by the Apostles, yet we have every reason to believe that they belong to a very early period of ecclesiastical history. These rules were subsequently enlarged and explained by the General Councils of Nice, Constantinople, Ephesus and Chalcedon, (which were held at different times in the fourth and fifth centuries), and received the sanction of the secular power by a law of the Emperor Justinian (Novel 131, cap. i). The chapter just mentioned, after confirming the decrees of the four Councils, adds: "We receive the doctrines of the aforesaid holy synods as the Divine Scriptures and their canons we observe as laws." Collections of these canons were made at an early period. The Canon Law may be said to be threefold, viz.: Firstly, that which is properly so-called, consisting only of the canons of General and Provincial Councils; secondly, that which is styled *Jus Pontificum*, or *The Papal Law* which was compiled and made up of the decrees and epistles of several Popes and entirely depends on papal usurpation and authority, and on the sayings of the ancient Fathers of the Church; and, thirdly, that which is termed *Jus Ecclesiasticum*, or *Law of the Church* and which contemplates and takes in the state and government of the

Church and the laws at this day received from and by the Church. The decision of ecclesiastical controversies which could not be drawn from the Councils and the Fathers was sought for from the Roman Pontiffs, who wrote answers to those that consulted them in the same manner as the Roman Emperors had been accustomed to do; and their determinations were called *rescripts* and *decretal epistles*, which obtained the force of laws. *The decrees* were ecclesiastical constitutions made by the Pope and Cardinals, at the suit of no man. *The decretals* were canonical epistles, written by the Pope alone, or by the Pope and Cardinals, at the suit of one or more, for the deciding of some disputed point, and had no authority of a law in themselves. Near the end of the fifth century, a great collection of conciliar resolutions and papal letters was made by Dionysius Exiguus, a monk of Rome. It circulated widely, and was from time to time enlarged and revised. Then out of the darkness of the ninth century, there looms a book which was to control the history of mankind for a long time to come—a new edition of this ecclesiastical literature, into which had been secretly inserted sixty decretals ascribed to the Popes of the first four centuries. The forger called himself *Isidorus Mercator*. Many guesses have been made as to his name and home, but no more seems for certain to be known than that he compiled his work in Gaul about the very middle of the ninth century. The false decretals are composed of phrases from the Bible, the Fathers, genuine canons and decretals, and the West-Goths Roman law-book; and all the materials are so arranged as to establish a few great principles—the grandeur and superhuman origin of ecclesiastical power, the sacredness of the persons and the property of bishops, and the supremacy of the Bishop of Rome. Brought into collision with the claims of temporal power, the learning of canons and decretals ceased to be a mere part of theology and began to wear the air of jurisprudence. Sentences out of the Roman law-books were placed side by side with texts from the Bible. Isidore's forgeries were received as genuine; and ampler collections were made from time to time. But the fame of earlier laborers

was eclipsed by that of Gratian, a monk of Bologna, that city which was the centre of the new Roman jurisprudence. His work was published between the years 1139 and 1142; and was called *Concordantia Discordantium Canonum*, but which soon became known as *Decretum Gratiani*, or yet more simply *Decretum*. It is a great law-book, and the spirit which animated its author was not that of a theologian, nor that of an ecclesiastical ruler, but that of a lawyer. The *Decretum* soon became an authoritative text-book and the Canonists seldom went behind it. It never became *enacted law*; but the Canonists had for it rather that reverence which English lawyers have paid to *Coke upon Littleton* than that utter submission which is due to every clause of a statute. Gratian was the head of a school of lawyers well grounded in Roman Law, many of them doctors *Utriusque Juris*, who brought to bear upon the *Decretum* and the subsequent decretals, the same methods that they employed upon *The Code* and *Digest*. From time to time, compilations of the decretals were made; but they were all set aside by a grand collection published by Gregory IX. about A. D. 1234. It comprised five books, and was an authoritative statute-book; all the decretals of a general import that had not been received into it were thereby repealed, and every sentence and every rubric that it contained was law. In 1298, Boniface VIII. added to these *Liber Sextus*, a collection of those decretals issued since the Gregorian codification, which were to be in force for the future. Another collection of decretals known as *The Clementines*, (having been collected by Clement V.), was added in A. D. 1317. To these ought to be added *The Extravagants* of John XXII. in A. D. 1300, and of some of the Bishops of Rome, whose authors or collectors are unknown. But by this time the Canon Law had seen its best days. We, thus, see that the Popes of Rome did the same in Church as Justinian did in the Empire.

Spelman says that the decrees and canons of the Church of Rome were adopted, as they then existed, by the clergy and people of England as early as the year A. D. 605, soon after the establishment of Christianity in the country. Besides the

foreign Canon Law, we have our *Legatine* and *Provincial Constitutions*, adapted to the exigencies of the English Church. Of these, the former were ecclesiastical laws promulgated by the Cardinals Otho and Othobon, legates from Pope Gregory IX., in the reign of Henry III. *The Provincial Constitutions* were decrees of provincial synods held under divers Archbishops of Canterbury, from Stephen Langton, in the reign of Henry III., to Henry Chichele, in the reign of Henry V., and adopted, also, by the province of York in the reign of Henry VI.

With respect to these canons, it was provided, at the time of the Reformation, by the Statute 25 Henry VIII., c. 19 (afterwards repealed by 1 Philip & Mary, c. 8, but revived by 1 Elizabeth, c. 1), that they should be reviewed by the King and certain commissioners to be appointed under the Act, but that until such review should be made, all canons, constitutions and synodals provincial, being then already made and not repugnant to the law of the land or the King's prerogative, should still be used and executed. The review did not take place in Henry's time, but the project for the reformation of the canons was revived in the reign of Edward VI., and a new code of Ecclesiastical Law was drawn up under a commission appointed by the Crown, under the Statute 3 & 4 Edward VI., c. 11, and received the name of *Reformatio Legum Ecclesiasticarum*. The confirmation of this was prevented by the premature death of the King, and although the project for a review of the old canons was again renewed in Elizabeth's reign, it was speedily dropped, and has not since been renewed. The consequence of this is, that so much of the English canons made previously to the Statute Henry VIII. as are not repugnant to the Common or Statute Law of this realm is still in force in this country. It was, however, decided by the Court of King's Bench that canons of the Convocation of Canterbury, in 1603 (which, though confirmed by the King, never received the sanction of Parliament), do not (except so far as they are declaratory of the ancient Canon Law) bind the laity of these realms: *Middleton v. Croft*, Strange, 1056. It was admitted by Lord Hardwicke, in delivering judgment in the above-

mentioned case, that the clergy are bound by all the canons which are confirmed by the King.

By the framers of the Canon Law, Europe was regarded as one vast moral territory, of which the Pope was the supreme magistrate, on whom the eyes of all were fixed, and to whom everyone could appeal as the incorruptible guardian of truth and justice. The chief object of the Canon Law was to establish, by means of the legislative authority of the Pope, the supremacy of ecclesiastical authority over the temporal power. The most prominent doctrines put forth in the *Decretals* are, that the laws of laymen cannot bind the Church to her prejudice, that the constitutions of provinces in relation to ecclesiastical matters are of no authority, and that subjects owe no allegiance to an excommunicated lord. The general Canon Law, so far as its principles are concerned, appeals much more to the religious and moral feelings than do most of the original doctrines of the Roman Civil Law; but it wants that purity of style and scientific method which constitute the great value of the juridical works of ancient Rome. The spread of the Canon Law was not an unmixed evil, inasmuch as an invocation of reason, however adulterated, and of law, however captious, was better than the perpetual appeal to brutal violence, which was the characteristic of the feudal system, and it must be acknowledged that the framers and imposers of the Canon Law were actuated by some desire to promote the welfare of mankind, and to mitigate the frightful evils which on all sides beset them.

The Common Law of England has borrowed less than any other state in Christendom from the jurisprudence of ancient and modern Rome, and yet, for more than three centuries, England was governed by the Civil Law, from the time of Claudius to that of Honorius, during which time some of the most eminent Roman lawyers, as Papinian, Paul and Ulpian, whose opinions and decisions are collected in the body of the Civil Law, sat in the seat of judgment in this nation. But all germs of such jurisprudence would have perished under the rude incursions of the Saxons and Danes had not the tribunals of the clergy afforded them shelter from the storm; occasion-

ally, too, some maxims of the imperial *Code*, admitted either from their intrinsic merit, or through the influence of the clergy, enriched the meagre system of English Law. Nevertheless, in after times, the Civil Law again came to be of great repute within this kingdom, particularly all the time from the reign of King Stephen to the reign of Edward III., both inclusive. During that period, and at other times, according as the study of the Civil Law prevailed, the judges and professors of the Common Law had frequent recourse to it in cases where the Common Law was either totally silent or defective. And thus we see in the most ancient books of the Common Law, as *Bracton* and *Fleta*, that the authors thereof have transcribed, one after another, in very many places, the exact words of *Justinian's Institutes*. Before the Norman Conquest, the bishop and sheriff had sat together in the court of justice, administering with equal jurisdiction the law upon temporal and spiritual offences. But by the charter of William the Conqueror the Ecclesiastical was separated from the Civil Court. This division has continued up to the present time, with the exception of a temporary reunion in the reign of Henry I., the Ecclesiastical Court deciding according to the rules and practice of the Civil and Canon Laws generally on all matters having reference to the Church, to the spiritual discipline of the laity, to the contract of marriage, and to the disposition of personal property after death. Besides the Ecclesiastical Court, there was the High Court of Admiralty (established about the time of Edward I.), in which all causes, civil and maritime, were decided according to the Civil Law and maritime customs.

The Courts of Equity, also, borrowed largely, and for a long time exclusively, from the same jurisprudence. Almost every Lord Chancellor, from the Conquest to the Reformation, was an ecclesiastic, and it was a matter of course that, like every eminent ecclesiastic of those days, he should be well versed in the Civil and Canon Laws. This, coupled with the fact that the dignitaries of the Church were more highly educated than the lay nobility, was the reason why the ecclesiastics were generally employed in the foreign negotiations of this period.

The ecclesiastics had not that horror of a foreign jurisprudence which distinguished some of our Common lawyers—which made Lord Coke exult in the fancied autochthonous character of English legislation, and praise his countrymen as legally deserving to be styled "*Penitus toto divisos orbe Britannos.*"

The Ecclesiastical Law of England is composed of four main ingredients—the Civil Law, the Canon Law, the Common Law and the Statute Law. When these laws interfere and cross each other, the Civil Law submits to the Canon Law; both these to the Common Law, and all three to the Statute Law.

The encroachments of the Church upon temporal rights and authorities were never encouraged in England. The English people, jealous of their national freedom, had a rooted dislike to the public law of the Romans, which set no limits to the royal prerogative and placed the prince beyond the control of his subjects; and, therefore, when at various times attempts were made in Parliament to introduce changes founded on the Roman Law, these innovations were strenuously resisted by the English barons, from a natural apprehension that they might prove injurious to the liberties of the subjects. The rude and fierce barons, who composed the Parliaments of Henry III. and Edward I., were not the sort of men to relish the doctrines of passive obedience and non-resistance so slavishly inculcated by the decretals. Englishmen have, in all ages, shown a firm determination that neither the national Church nor the national law should be subject to the papal legislation or jurisdiction.

As early as A. D. 1138 Archbishop Theobald of Canterbury, at the instance, perhaps, of his clerk Thomas—Thomas, who was himself to be Chancellor, archbishop and martyr; and who had studied law at Bologna, and had sat, it may be, at the feet of Gratian—brought over Vacarius and other learned ecclesiastics from Italy to introduce the study of the Civil and Canon Laws into England. It would seem that Theobald wished to have the help of a trained lawyer in the struggle in which he was engaged with Stephen's brother, Henry, Bishop of Winchester, who, to the prejudice of the

rights of Canterbury, had obtained the office of papal legate. That Vacarius taught the Civil Law there can be no doubt. That Stephen endeavored to silence him and to extirpate the books of the Civil and Canon Laws we are told upon good authority. From Stephen's reign onwards, the proofs that the Civil and Canon Laws are being studied in England become more frequent. The letters of Archbishop Theobald's secretary, John of Salisbury—one of the foremost scholars of the age—are full of allusions to both laws; many of these occur in relation to English ecclesiastical law-suits of which John is forwarding reports to the Pope. Maxims out of the *The Institutes* or *The Digest* became part of the stock-in-trade of the polite letter-writer, the moralist and the historian.

Of all the centuries the twelfth was the most legal. In no age since the classical days of Roman Law had so large a part of the sum total of intellectual endeavor been devoted to jurisprudence. In the first years of the twelfth century Irnerius began to read and teach *The Digest* at Bologna. Very soon a powerful school had formed itself around his successors. The fame of "the four doctors," Bulgarus, Martinus, Jacobus and Hugo, had gone into all lands; from every corner of western Europe, students flocked to Bologna. It was as if a new gospel had been revealed. Before the end of the century complaints were loud that theology was neglected, that the liberal arts were despised, that the Roman Law had driven Aristotle and Plato from the schools and that men would learn law and nothing but law. This enthusiasm for the new learning was not soon spent; it was not spent until the middle of the thirteenth century. The keenest minds of the age had set to work on the classical Roman texts and they were inspired by a general love of knowledge. Another law was coming into existence. From humble beginnings, the Canon Law had grown into a mighty system. Already it asserted its right to stand beside the Civil Law as a second great body of jurisprudence; and yet it was more than jurisprudence. The Civil Law might be the law of earth, *jus soli*; here was the law of heaven, *jus poli*. It is plain that a flourishing school of Roman and Canon Law had grown up at Oxford. But the

Italians had been the first in the field and easily maintained their pre-eminence. During the rest of the Middle Ages, hardly a man acquired the highest fame as legist or decretist, who was not an Italian, if not by birth, at least by education. Some manuals of procedure have been preserved which good critics have ascribed to England or Normandy of the twelfth century. Of these the most interesting to us is one which has been attributed to William Longchamp, a clerk of Norman race, who was for some years King Richard's Viceroy and the true ruler of England. Probably that Englishman who gains most fame in the cosmopolitan study is Ricardus Anglicus, who has been identified with Richard le Poore, who became Dean of Salisbury, Bishop of Chichester, of Salisbury, and of Durham; but his celebrity seems to have been gained in Italy before his preferment to these high places. In the next century, the most prominent name is that of William of Drogheda, who taught at Oxford and wrote a *Summa Aurea*.

When Archbishop Theobald brought over Vacarius and other learned ecclesiastics from Italy to introduce the study of the Civil and Canon Laws into England, the bishops and clergy of the day rigorously supported the new system so favorable to their order, but the nobility and laity generally adhered to the old Common Law with great pertinacity. Accordingly, we find that this system of jurisprudence never obtained as extensive a footing in this country as it did in other countries of Europe; and our most eminent lawyers, in all periods of our history, have shown great unwillingness to defer to its authority. It is well observed by Blackstone, Comm. 80, that all the strength "that either the papal or imperial laws have obtained in this realm . . . is only because they have been admitted and received by immemorial usage and custom in some particular cases and some particular courts, and then they form a part of the customary laws; or else, because they are in some other cases introduced by consent of Parliament, and then they owe their validity to the *leges scriptæ*, or statute law."

England assimilated less of the Canon Law than other countries of Europe, or than she might have adopted with

advantage. It was not that the English people considered the Canon Law inferior to their own, but their struggles against appeals to Rome and other claims of ecclesiastical jurisdiction roused the spirit of the nation, and they stoutly stood up for their Common Law, cumbrous and even barbarous in some respects as it was, not because they thought their own perfect, but because they were resolved to manage their own affairs after their own fashion.

At the Parliament of Merton, in the year 1236, when the bishops proposed the legalising of legitimation by subsequent marriage, alleging that the Canon Law sanctioned such legitimation, we are told that, all the barons replied with one voice "*nolumus leges Anglię mutare.*" This incident shows us that, even at that early period, the Canon Law was of no authority, unless it was sanctioned by the law of the land. In this decision, it is probable that the jealousy of ecclesiastical ascendancy had much weight. The Canon and Civil Laws were associated in idea, and the barons dreaded the introduction of a system of jurisprudence which might have impaired the vigour of the feudal tenures with all their lucrative incidents. But still higher motives of patriotism may have mingled with prejudice and dislike. During the growth of the Canon Law, the Church extended her influence into all departments of life. Churchmen filled high places of State and performed the duties of practical lawyers, while prelates often exercised civil jurisdiction over a considerable tract of country. Hence the legislation of the Church embraced many subjects which properly belonged to municipal law. All matters connected in the most distant way with the Church or religious duties were deemed proper subjects for disposal by her tribunals. Hence the *Curie Christianitatis* took cognizance of questions relating to legitimacy, marriage and succession. They assumed jurisdiction not only over the clergy, but all who were under the obligation of religious vows, as well as widows and orphans (*personę miserabiles*) and minors. In the department of criminal law, they were particularly active, punishing both ecclesiastical and religious offences, such as heresy, simony, blasphemy, sacrilege and violation of personal and social

morality (as adultery, bigamy, fraud, etc.). The cognizance of heresy has always been held in every country where the Canon Law has prevailed, to belong to the ecclesiastical judge; and the Canonists have ever treated heresy with great severity, the Roman ecclesiastics determining without appeal whatever they pleased to be heresy and shifting off to the secular arm, the odium and drudgery of executions. For the proper administration of this extended judicial system, the Church had to enact her own rules of procedure, which were generally far superior to those prevailing in the Civil Courts. As a matter of fact, it was by no means an evil at that period of European history that the administration of the law should fall into the hands of the clergy, who were certainly the most highly-educated men of their time, and many of whom had been trained as lawyers in the schools of Bologna and Paris. The influence of the Church in the domain of public law was most marked. She may be said to have been the originator of modern International Law. The ancient Romans looked upon all foreigners as *hostes*. Christianity inculcated the brotherhood of nations. The Popes acted as arbitrators between prince and prince, and between prince and people; they protected the weak against the strong, and right against might. The principle grew up that disputes between nations should be decided according to law and Christian morality, and that war, when inevitable, should be conducted according to recognized rules laid down in the interests of humanity. The system of Church administration served as a model for that of the State, which in mediæval times was frequently controlled by ecclesiastics. The Canon Law was suited to the civilization of the Middle Ages. It was natural that a system claiming to regulate the most important concerns of practical life, administered by courts which, though belonging to different nations, were under the control of one central authority, and developed under the direction of a succession of able legislators, such as Hildebrand and Innocent III., should take the lead in forming the character and reconciling the conflicting interests of the rising nationalities. Much of the Roman element in the Common Law

of Europe at the present day has descended indirectly through the Canon Law.

We can find conclusive testimony to the influence which the Canon Law has exercised over the law of this country in the text of Bracton, although, as has been before stated, the influence was not so great as in other countries of Europe. Bracton, who wrote in the time of Henry III., and who is, in consequence of his application to the study of the Roman Law, the most systematic and methodical writer on English Law, in his fourth book, fol. 187, *De Exceptionibus*, uses the very phrase of *The Decretal*: "*Sunt enim exceptiones quæ competunt contra breve et assisam differunt scd non perimunt;*" again, in the fifth tractate of the fifth book, fol. 399, he enters more generally upon the same subject, and enumerates all the different kinds and divisions of exceptions in the Canonists: *e. g.*, he remarks that a litigant, after taking a further step, cannot go back to an objection which might have been taken at an earlier period. "*Item,*" he says, "*exceptiones illæ quæ competunt contra breve, quæ quidem exceptiones si in initio litis omitantur et ad petendum visum procedatur, si tenens [i. e., the defendant] illas post visum petitum velit opponere, non audiatur, quia per petitionem visus videtur hujusmodi exceptionibus tacite renunciasse.*" These words show how great a change there had been in the ideas of the age from those which prevailed before the dissemination of the papal codes. Again, the custom of allowing the defendant to produce a certain number of compurgators (persons who swore that they believed what he said was true) was transmitted from the Canon to the Feudal Law. Among the other causes which fell under ecclesiastical cognizance, the right of deciding upon wills was that which they retained for the longest time, as their appropriate and peculiar attribute. It was a common thing for the Christian Emperors to assign specially to bishops the care of wills and the task of executing the injunctions of the deceased. The custom, thus established, obtained more and more throughout Europe, and from the chapter *De Testamentis*, in *The Decretals*, it is clear, especially from the decisions and answers of Alexander III., Innocent III. and Gregory IX., that questions

of all kinds on this subject were indiscriminately referred to the decision of the Holy See. Once incorporated with *The Decretals*, their decisions became part of the Common Law of Europe, and in the twelfth century, Alexander III., by a law addressed to the Bishop of Ostia, cap. 10, rejecting and cancelling the rule of the Civil Law, which required seven witnesses for the validity of a will, enacted, under pain of excommunication, that wills made in the presence of the parish priest and two or three competent witnesses should be valid. This was, no doubt, the origin of our law, by which, down to the end of the reign of William IV., three witnesses were required to establish a will of landed property. Nothing can more plainly show the authority of the Holy See, in such matters, than the fact that the law of Europe was changed in conformity with this decree. Testaments were the channel through which the ideas of Roman jurisprudence penetrated into the German customs.

During a great part of the Middle Ages, the clergy were the only advocates; what could be more natural than that they should employ before lay tribunals the forms and method of proceeding which were the basis of all transactions in their own? And when the study of the Canon Law became a passion, how powerfully must this have aided the progress of their own influence! Among the works which prove the influence of the Canon Law and the manner in which it was interwoven with Roman jurisprudence in the thirteenth century, the most celebrated is the work called *Speculum Juris*, composed by William Durantis. "Thrice every week," says the writer of the Acts of Innocent III., "he presided in the consistory, in which, leaving inferior causes to others, he investigated the greater ones himself." Innocent III. was trained in the school of Bologna, which was the most celebrated school for the study of the Civil and Canon Laws in Europe. He was deeply versed in both these studies and, therefore, was able to apply the principles of Roman jurisprudence to the cases brought before him, and thus to engraft them on the stock of the Canon Law. Most of the decisions of this Pontiff, which are contained in the second book of *The Decretals*, and

describe the method of legal process, or, as it is called, "*ordo judiciorum*," as well as those in the third book which relate to contracts and wills and successions *ab intestato*, are deduced from the Civil Law.

In England at the time when the forms and method of proceeding were framed, clergymen were judges, sworn indeed to administer the law *secundum legem et consuetudinem Angliæ*, but, nevertheless, trained in a system more artificial and elaborate. It is evident from the oaths taken by our kings that the barons watched their proceedings and upheld the *lex terræ*, as opposed to the Canon and Roman Laws, with immovable resolution. *The Constitutions of Clarendon*, and the constant complaints of chicane in Matthew Paris prove the restless anxiety of the King, feudal nobles, and of the laity on this point. And about the time of Henry III. the custom of appointing the clergy to administer the law in secular tribunals (the Court of Chancery excepted) was, by degrees, abandoned; but still they continued to practice as advocates, clerks and scribes, and to discharge the ministerial functions which required more learning, knowledge of forms and habits of business than it was usual for the laity to possess. The devices by which the land was slipped out of the feudal fetters were their contrivance. Sir Henry Spelman tells us that "seven times priests were appointed Viceroy's during the absence of the monarch beyond sea." Twelve Chief Justiciaries were chosen from them, one hundred and sixty Chancellors and Keepers of the Great Seal, all the Masters of the Rolls from the time of Edward III. down to the twenty-sixth year of the reign of Henry VIII., and the examples of their being made judges of Assize, of the Common Pleas, and of the Justices in Eyre, are numerous.

The times of transacting business in courts of law and of vacation were borrowed from the Canon Law. And a stronger proof of the influence of the Canonists on our law cannot be found than that the *Dies Novem Lectionum*, the Purification, Ascension, St. John the Baptist, All Saints, etc., were long observed as holidays in English courts of justice. They are mentioned in an ordinance (8 Edward III.). Nearly all the

great writers on this subject have asserted that the Canonists were the framers of modern practice.

During this period the whole of western Europe was subject to the jurisdiction of one tribunal of ultimate appeal—the Roman *curia*. Appeals to it were encouraged by all manner of means. A very large part, and by far the most important part, of the ecclesiastical litigation that went on in this country, came before English prelates who were sitting, not as English prelates, not as ordinary judges, but as mere delegates of the Pope, commissioned to hear and determine this or that particular case. Bracton, indeed, treats the Pope as the ordinary judge of every Englishman, and the only ordinary judge whose powers are unlimited.

If we pass on to the period of the Reformation, we shall see that on the Continent, where the Civil Law formed the basis of all municipal codes, the study of this science was scarcely, if at all, affected by this memorable event. But in England, it was otherwise.

The professors of the Civil and Canon Laws belonged chiefly to the Ecclesiastical Courts, and were connected in the minds of the people, partly with the exactions of Empson and Dudley in the preceding reign, and partly with the authority of the Pope. Severe blows were dealt at the former, which were aimed at the latter system. Ayliffe, in his history of the University of Oxford during the Visitation of 1547 (*1 Ayliffe's Oxford*, 188), says: "The books of the Civil and Canon Laws were set aside to be devoured with worms as savouring to much of popery." And Wood, after stating "that as for other parts of learning at Oxford a fair progress was made in them," observes: "The Civil and Canon Laws were almost extinct, and few or none there were that took degrees in them, occasioned merely by the decay of the Church and power of the bishops." In 1536, Thomas Cromwell, Chancellor of the University of Cambridge and Secretary of State, promulgated, in the name of the King, certain injunctions, of which the fifth was: "That as the whole realm, as well as clergy and laity, had renounced the Pope's right and acknowledged the King to be supreme head of the Church, no

one should, thereafter, read the Canon Law, nor should any degree in that law be conferred:" *2 Wood's History and Antiquities of the University of Oxford*, book i. § lxxix.

It was far from being the intention of Henry VIII. to depress the study of the Civil Law in this country; his intention was rather to elevate it on the ruins of the Canon Law. With this object, he enacted that those who had taken the degree of doctor of Civil Law should be able to hold two benefices with the cure of souls; and he, also, conferred the privilege on doctors of Civil Law of marrying and of yet being able to hold judicial employment of an ecclesiastical character. He founded out of the spoils of the Church five professorships and out of these five, one was instituted and endowed at each University for the teaching of the Civil Law. The foundation of these professorships, in some measure, counter-balanced the injury which the Civil Law received from the discredit into which the Canon Law had fallen.

About this period of history, a great change began to take place in the relations of the European communities towards each other, which rendered the preservation of the study of the Civil Law of indispensable necessity to this country. During the reign of the Tudors, the English had been compelled, by a multitude of causes, to abandon their hopes of permanent conquests in France; nevertheless, at this very period, Great Britain began to assume that attitude with respect to foreign powers which, from the days of Lord Burleigh to the present time, it has been the constant endeavor of her wisest and greatest statesmen to enable her to maintain. Her increasing prosperity enabled her to execute the wise policy of fighting the battles for her own preservation on the territory of her ally or her enemy, or on the ocean, the common highway of nations, thus preserving the freedom of her own soil from the horrors of foreign invasion. As the bond of international intercourse became closer, the need was felt for some international law, to whose decisions all members of the Commonwealth of Christendom might submit. A class of men sprang up, whose profession it became to apply the laws of natural justice to nations and to enforce the sanction

of individual morality upon communities. But the application of these laws and sanctions to independent states and still more any approach towards securing obedience to them was no easy achievement, as no one nation had a right to expect another to submit to the private regulations of her municipal code. In this position of affairs it was both a fortunate and remarkable circumstance that there was already in existence a system of law to which the Continent of Europe could have not the slightest objection, as every European nation had fully recognized the wisdom and justice of the Roman Law, when she made it the basis of her own system of law. Before the jurisprudence of Rome could become the umpire in the disputes of modern Europe, it was necessary that it should be considerably modified by custom, convention, the usages of Christendom and the various elements of thought and action which distinguished the sixteenth from the sixth century. The law of Rome had for centuries been held in the greatest veneration by mankind, whose national rights it had investigated with impartiality and explained with precision. It was richly stored with comprehensive principles of written reason, of the science and philosophy of law. It was the collected experience of an Empire which had included under its dominion the whole civilized world, and it was further recommended at the epoch of the revival of classical literature by the clearness of its style and the beauty of its language. Accordingly, from Grotius to Lord Stowell, it became the basis of all the great labors of jurists. References to it abound in the works of all those writers who have sought to reduce the law of nations to a system.

The Tudors, who were unquestionably a most accomplished and lettered race, always looked favorably upon Civilians, employed them in high offices of State and very greatly valued their services in all negotiations with foreign countries. Hardly any matters of embassy or treaty were concluded without first consulting the opinion of some person learned in the Civil Law.

We have before remarked that the enmity of Henry VIII. to the Canon Law greatly injured the profession of the Civil

Law, but this he neither contemplated nor desired. Amongst the early Tudors, ecclesiastics, many of them most renowned, were advocates of the Civil Law, but towards the close of the reign of Elizabeth, the profession became, and has ever since been, composed entirely of lay members.

James I., who, in addition to his classical and other attainments, imbibed a strong regard for the Civil Law from his native country, protected its advocates to the utmost that his feeble aid could extend. It was to James I. that Sir Thomas Ridley dedicated his *View of the Civil and Ecclesiastical Laws*, a work of great learning, the object of the book being to demonstrate the unreasonableness of the jealousy existing between the Common lawyers and the Civilians.

Many causes conspired in the reign of Charles II. to extend the influence of the Civilians. The rapid growth of commerce and increase of shipping, the creation of a navy-board, the widely-spreading relations with foreign states, and the great merits of the renowned Civilian of the day, Sir Leoline Jenkins, all contributed to produce this result. The name of Sir Leoline Jenkins stands out prominently as a great jurist, throughout whose works are scattered tracts upon various questions of public and international law, rich in deep learning and sound reasoning, and forming a mine from which subsequent jurists have abstracted materials of great value. He had a deep and accurate knowledge of the Civil Law, and he was often heard to regret that the Civil Law was so little favored in England. The learned decisions which he gave made his name famous in most parts of Europe, there being at that time almost a general war, and some of all nations frequently suitors to the Admiralty Court of this country; and his answers or reports of all matters referred to him were so judicious as to give universal satisfaction, because they showed not only the soundness of his judgment, but a great compass of knowledge in the general affairs of Europe and in the ancient as well as modern practice of other nations. Upon any questions arising beyond the sea between His Majesty's subjects and those of other princes, they often had recourse to Dr. Jenkins. Even those who presided in the seats of foreign

judicatures, in some cases, applied to him to know how the like points had been ruled in the Admiralty here, and his sentences were often exemplified and obtained as precedents there. For his opinions, whether on the Civil, Canon, or Law of Nations, generally passed as an incontrovertible authority, being always thoroughly considered and judiciously founded.

The name of the last jurist we will mention is that of Lord Stowell. He was a learned Civilian and one can doubt, if they read the reports of his judgments in the ecclesiastical and maritime tribunals of this kingdom and the courts of the Law of Nations, that he had a wide knowledge of and an accurate acquaintance with, the principles of foreign codes, with the ecclesiastical, maritime and municipal law of England and of Scotland, and with the Law of Nations, which constitutes the moral ligament of Christendom.

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