PAUL VINOGRADOFF

VILLAINAGE IN ENGLAND: ESSAYS IN ENGLISH MEDIAEVAL HISTORY

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Содержание

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PREFACE

A foreigner's attempt to treat of difficult and much disputed points of English history requires some justification. Why should a Russian scholar turn to the arduous study of English mediaeval documents? Can he say anything of sufficient general interest to warrant his exploration of so distant a field?

The first question is easier to answer than the second.

There are many reasons why we in Russia are especially keen to study what may be called social history—the economic development of nations, their class divisions and forms of co-operation. We are still living in surroundings created by the social revolution of the peasant emancipation; many of our elder contemporaries remember both the period of serfdom and the passage from it to modern life; some have taken part in the working out and putting into practice of the emancipating acts. Questions entirely surrendered to antiquarian research in the West of Europe are still topics of contemporary interest with us.

It is not only the civil progress of the peasantry that we have to notice, but the transformation and partial decay of the landed gentry, the indirect influence of the economic convulsions on politics, ideas, and morality, and, in a more special way, the influence of free competition on soil and people that had been fettered for ages, the passage from 'natural husbandry' to the money system, the substitution of rents for labour, above all, the working of communal institutions under the sway of the lord and in their modern free shape. Government and society have to deal even now with problems that must be solved in the light of history, if in any light at all, and not by instinct groping in the dark. All such practical problems verge towards one main question: how far legislation can and should act upon the social development of the agrarian world. Are economic agencies to settle for themselves who has to till land and who shall own it? Or can we learn from Western history what is to be particularly avoided and what is to be aimed at? I do not think that anybody is likely to maintain at the present day, that, for instance, a study of the formation and dissolution of the village community in the West would be meaningless for politicians and thinkers who have to concern themselves with the actual life of the village community in the East.

Another powerful incitement comes from the scientific direction lately assumed by historical studies. They have been for a long time very closely connected with fine literature: their aim was a lifelike reproduction of the past; they required artistic power, and stirred up feelings as well as reflective thought. Such literary history has a natural bent towards national tradition, for the same reason that literature is attracted by national life: the artist gains by being personally in touch with his subject; it is more easy for him to cast his material into the right mould. Ancient history hardly constitutes an exception, because the elements of classical civilisation have been appropriated by European nations so as to form part of their own past. What I call literary history has by no means done all its work. There is too much in the actions of men that demands artistic perception and even divination on the part of the historian, to allow this mode of treatment to fall into decay. But nobody will deny that historical study is extending more and more in the direction of what is now called anthropology and social science. Historians are in quest of laws of development and of generalisations that shall unravel the complexity of human culture, as physical and biological generalisations have put into order our knowledge of the phenomena of nature.

There is no subject more promising from this point of view than the history of social arrangements. It borders on political economy, which has already attained a scientific standing; part of its material has been fashioned by juridical doctrine and practical law, and thereby moulded into a clear, well-defined shape; it deals with facts recurring again and again with much uniformity, and presenting great facilities for comparison; the objects of its observation are less complex than the phenomena of human thought, morality, or even political organisation. And from the point of view of the scientific investigator there can be no other reason for taking up a particular epoch or nation, but the hope of getting a good specimen for analysis, and of making use of such analysis for purposes of generalisation.

Now I think that there can be no better opportunity for studying early stages of agrarian development than that afforded by English mediaeval history. The sources of information are comparatively abundant in consequence of the powerful action of central authority; from far back in the feudal time we get legal and fiscal documents to enlighten us, not only about general arrangements but even about details in the history of landed property and of the poorer classes. And the task of studying the English line of development is rendered especially interesting because it stands evidently in close connexion with the variations of the same process on the continent. Scandinavian, German, French, Italian, and Spanish history constantly present points of comparison, and such differences as there are may be traced to their origins just because so many facts are in common to start with. I think that all these considerations open a glorious vista for the enquirer, and the interest excited by such publications as those of Fustel de Coulanges proves that the public is fully alive to the importance of those studies in spite of their dry details.

What could I personally undertake to further the great objects of such investigation? The ground has been surveyed by powerful minds, and many controversies show that it is not an easy one to explore. Two main courses seemed open in the present state of the study. A promising method would have been to restrict oneself to a definite provincial territory, to get intimately acquainted with all details of its geography, local history, peculiarities of custom, and to trace the social evolution of this tract of land as far back as possible, without losing sight of general connexions and analogies. How instructive such work may become may be gathered from Lamprecht's monumental monograph on the Moselland, which has been rightly called by its author 'Deutsches Wirthschaftsleben im Mittelalter.' Or else, one might try to gather the general features of the English mediaeval system as embodied in the numerous, one might almost say innumerable, records of the feudal period, and to work back from them into the imperfectly described pre-feudal age. Such enquiry would necessarily leave out local peculiarities, or treat them only as variations of general types. From the methodical point of view it has the same right to existence as any other study of 'universalities' which are always exemplified by individual beings, although the latter are not made up by them, but appear complicated in every single case by additional elements.

Being a foreigner, I was driven to take the second course. I could not trust myself to become sufficiently familiar with local life, even if I had the time and opportunity to study it closely. I hope such investigations may be taken up by scholars in every part of England and may prosper in their hands; the gain to general history would be simply invaluable. And I was not sorry of the necessity of going by the second track, because I could hope to achieve something useful even if I went wrong on many points. Every year brings publications of Cartularies, Surveys, Court-rolls; the importance of these legal and economic records has been duly realised, and historians take them more and more into account by the side of annals and statutes. But surely some attempt ought to be made to concentrate the results of scattered investigation in this field. The Cartularies of Ramsey, Battle, Bury St. Edmunds, St. Paul's, the Hundred Rolls, the Manorial Records of Broughton and King's Ripton, give us material of one and the same kind, which, for all its wealth and variety, presents great facilities for classification

and comparison[1]. I have seen a good many of these documents, both published and in manuscript, and I hope that my book may be of some service in the way of concentrating this particular study of manorial records. I am conscious how deficient my work is in many respects; but if by the help of corrections, alterations, additions, it may be made to serve to some extent for the purpose, I shall be glad to have written it. I may say also that it is intended to open the way, by a careful study of the feudal age, for another work on the origins of English peasant life in the Norman and pre-Norman periods.

One pleasant result the toil expended on mediaeval documents has brought me already. I have come into contact with English scholars, and I can say that I have received encouragement, advice, and support in every case when I had to apply for them, and in so large and liberal a measure as I could hardly hope for or expect. Of two men, now dead, I have to repeat what many have said before me. Henry Bradshaw was the first to lay an English MS. cartulary before me in the Cambridge University Library; and in all my travels through European libraries and archives I never again met such a guide, so ready to help from his inexhaustible store of palaeographical, linguistic and historical learning. Walford Selby was an invaluable friend to me at the Record Office—always willing and able to find exactly what was wanted for my researches.

It would be impossible to mention all those from whom I have received help in one way or another, but I should like to speak at least of a few. I have the pleasant duty of thanking the Marquis of Bath for the loan of the Longleat MS. of Bracton, which was sent for my use to the Bodleian Library. Lord Leigh was kind enough to allow of my coming to Stoneleigh Abbey to work at a beautiful cartulary in his possession, and the Hon. Miss Cordelia Leigh took the pains of making for me some additional extracts from that document. Sir Frederick Pollock and Mr. York Powell have gone through the work of reading my proofs, and I owe to them many suggestions for alterations and improvements. I have disputed some of Mr. Seebohm's opinions on mediaeval history; but I admit freely that nobody has exercised a stronger influence on the formation of my own views, and I feel proud that personal friendship has given me many opportunities of admiring the originality and width of conception of one who has done great things for the advancement of social history. As for F.W. Maitland, I can only say that my book would hardly have appeared at all if he had not taken infinite trouble to further its publication. He has not only done everything in his power to make it presentable to English readers in style and wording, but as to the subject-matter, many a friendly suggestion, many a criticism I have had from him, and if I have not always profited by them, the blame is to be cast entirely on my own obstinacy.

PAUL VINOGRADOFF.

[1] Miss Lamond's edition of Walter of Henley did not appear until the greater part of my book was in type. I had studied the work in MS. So also I studied the Cartulary of Battle Abbey in MS. without being aware that it had been edited by Mr. Scargill Bird. Had Mr. Gomme's Village Communities come to my hands at an earlier date I should have made more references to it.

INTRODUCTION

When the time comes for writing a history of the nineteenth century, one of the most important and attractive chapters will certainly be devoted to the development of historical literature. The last years of a great age are fast running out: great has been the strife and the work in the realm of thought as well as in the material arrangement of life. The generations of the nineteenth century have witnessed a mighty revival of religious feeling; they have attempted to set up philosophical systems as broad and as profound as any of the speculations of former times; they have raised the structure of theoretical and applied science to a height which could hardly have been foreshadowed some two hundred years ago. And still it is to historical study that we have to look as the most characteristic feature of the period. Medieval asceticism in its desperate struggle against the flesh, and Puritanism with its sense of individual reconciliation with God, were both more vigorous forms of religious life than the modern restorations of faith and Church, so curiously mixed up with helplessness, surrender of acquired truth, hereditary instincts, and utilitarian reflection. In philosophy, Hegel's metaphysical dialectic, Schopenhauer's transformation of Kant's teaching, and the attempts of English and French positivism at encyclopaedical science may be compared theoretically with Plato's poetical idealism or with the rationalistic schools of the seventeenth and eighteenth centuries. But it would be difficult to deny, that in point of influence on men's minds, those older systems held a more commanding position than these: Hegel seems too arbitrary and phantastical, Schopenhauer too pessimistic, positivism too incomplete and barren as to ultimate problems to suit the practical requirements of philosophy; and people are already complaining of the decay of philosophical study. In science, again, the age of Darwin is certainly second to none, but it has to share its glory with the age of Newton, and it may be reasonably doubted whether the astronomer, following in the footsteps of Galileo and Kepler, was not actuated by even greater thirst and pride of knowledge than the modern biologist or geologist. It is otherwise with regard to history.

Progress of historical methods.

Students of science are wont to inveigh against the inexact character of historical research, its incoherence and supposed inability to formulate laws. It would be out of place here to discuss the comparative value of methods and the one-sided preference given by such accusers to quantitative analysis; but I think that if these accusers were better acquainted with the subject of their attacks, or even more attentive to the expressions of men's life and thought around them, they would hardly dare to maintain that a study which in the short space of a century has led to a complete revolution in the treatment of all questions concerning man and society, has been operating only by vague assumptions and guesses at random. An investigation into methods cannot be undertaken in these introductory pages, but a general survey of results may be attempted. If we merely take a single volume, Tocqueville's Ancien Régime, and ask ourselves whether anything at all like it could have been produced even in the eighteenth century, we shall have a sense of what has been going on in the line of historical study during the nineteenth. Ever since Niebuhr's great stroke, historical criticism has been patiently engaged in testing, sifting, and classifying the original materials, and it has now rendered impossible that medley of discordant authorities in which eighteenth-century learning found its confused notions of Romans in French costume, or sought for modern constitutional ideas as manifest in the policy of the Franks. Whole subjects and aspects of social life which, if treated at all, used to be sketchily treated in some appendix by the historian, or guessed at like a puzzle by the antiquarian, have come to the fore and are recognised as the really important parts of history. In a word, the study of the past vacillates no longer between the two extremes of minute research leading to no general results and general statements not based on any real investigation into facts. The laws of development may still appear only as dim outlines which must be more definitely traced by

future generations of workers, but there is certainly a constant progress of generalisation on firmly established premises towards them.

Growing influence of history on kindred subjects.

What is more striking, the great change in the ways and results of history has made itself felt on all the subjects which surround it. Political economy and law are assuming an entirely new shape under the influence of historical conceptions: the tendency towards building up dogmatic doctrine on the foundation of abstract principle and by deductive methods is giving way to an exact study of facts in their historical surroundings, and to inquiries into the shifting conditions under which the problems of social economy and law are solved by different epochs. As a brilliant representative of legal learning has ironically put it, it would be better for one nowadays to be convicted of petty larceny than to be found deficient of 'historical-mindedness.' The influence of historical speculation on politics is yet more definite and direct: even the most devoted disciples of particular creeds, the most ardent advocates of reform or reaction dare not simply take up the high standing ground of abstract theory from which all political questions were discussed less than a hundred years ago: the socialist as well as the partisan of aristocracy is called on to make good his contention by historical arguments.

It may be urged that the new turn thus taken is not altogether beneficial for practical life. Men of fanatical conviction were more likely to act and die for the eternal truth revealed to them, than people reflecting on the relative character of human arrangements. But can one get blissfully onesided by merely wishing to be so? And is it not nobler to seek knowledge in the hope that it will right itself in the end, than to reject it for the sake of being comfortable? However this may be, the facts can hardly be denied: the aspiration of our age is intensely historical; we are doing more for the relative, than for the absolute, more for the study of evolution than for the elucidation of principles which do not vary.

Sketch of the literary development of social history as a necessary introduction to its treatment.

It will not be my object to give a sketch of the gradual rise of historical study in the present century: such an undertaking must be left to later students, who will command a broader view of the subject and look at it with less passion and prejudice than we do now. But Lord Acton's excellent article[2] has shown that the task is not quite hopeless even now, and I must try, before starting on my arduous inquiry into the social history of the middle ages in England, to point out what I make of the work achieved in this direction, and what object I have in view myself. Quite apart from any questions of detail which may come under consideration as the treatment of the subject requires it, I have to say in what perspective the chief schools of historians present themselves to my view, in what relation they stand to each other, to show how far they have pushed the inquiry, and what problems still remain unsolved. Such a preliminary sketch must not be carried out with a view to criticism and polemics, but rather as the general estimate of a literary movement in its various phases.

Late recognition of the value of social history.

It is a remarkable fact, that the vast importance of the social side of history has been recognised later than any other aspect of that study. Stating things very broadly, one may say that it was pushed to the fore about the middle of our century by the interests and forces at play in actual life: before 1848 the political tendency predominates; after 1848 the tide turns in favour of the social tendency. I mean that in the first half of the century men were chiefly engaged in reorganising the State, in trying to strike a balance between the influence of government and the liberties of the people. The second half of the century is engrossed by the conflict between classes, by questions of economical organisation, by reforms of civil order. Historical literature, growing as it was in the atmosphere of actual life, had to start from its interests, to put and solve its problems in accordance with them. But

[2] English Historical Review, No. 1.

it is no wonder that the preceding period had already touched upon a number of questions that were fated to attract most attention in later research. The rise of the Constitution, for instance, could not be treated without some regard being paid to the relative position of classes; it would have been out of the question to speak of political feudalism without taking into account the social bearing of the system. And so a sketch of the literary treatment of social questions must begin with books which did not aim directly at a description of social history.

Characteristics of the work done in the seventeenth and eighteenth centuries.

I shall not detain the reader over the work achieved in the seventeenth and eighteenth centuries. The learning of a Selden or of a Madox is astounding, and a student of the present day has to consult them constantly on particular questions; but they never had in mind to embrace the history of their country as a whole. Facts are brought into a system by Coke, but the system is strictly a legal one; undigested historical knowledge is made to yield the necessary store of leading cases, and, quite apart from the naive perversion of most particulars, the entire view of the subject is thoroughly opposed to historical requirements, for it makes the past an illustration of the present, and regards it as planned on the same lines. There is no lack of books setting forth historical proof for some favourite general thesis or arranging facts according to some general idea, but such attempts were distinguished by unbounded imagination and by endless sacrifices of fact to the object of the writer's devotion. The curious literary byplay to the struggle of political party which Aug. Thierry[3] has artistically illustrated in France from the writings of Boulainvilliers and Dubos, Mably and Lézardière, could certainly be matched in England by a tale of the historical argumentation of Brady[4], or Petyt[5], or Granville Sharp. Nothing can be more eloquent in a sense than the title given by this last author to his book on the system of frankpledge:—"An account of the Constitutional English Polity of Congregational Courts, and more particularly of the great annual court of the people, called the View of Frankpledge, wherein the whole body of the Nation was arranged into the regular divisions of Tythings, Hundreds, etc.:—the happy effect of that excellent institution, in preventing robberies, riots, etc., whereby, in law, it was justly deemed 'Summa et maxima securitas:'—that it would be equally beneficial to all other nations and countries, as well under monarchical as republican establishments; and that, to the English Nation in particular, it would afford an effectual means of reforming the corruption of Parliament by rendering the representation of the people perfectly equal, in exact numerical proportion to the total number of householders throughout the whole realm[6]."

Historical research, in the true sense of the word, was indeed making its first appearance in the eighteenth century, and it was more fruitful in England than in any other country, because England was so far ahead of the Continent in its political condition: the influence of an intelligent society in political affairs had for its counterpart a greater insight into the conditions of political development. But the great English historians of the eighteenth century were looking to problems in other fields than that of social history. Robertson was prompted by an interest in the origins of that peculiar community called Western Europe, so distinctly dismembered in its component States and so closely united by ideal and material ties; Gibbon could see the shadows of the old world in which the new world was living; both had been attracted to research by an admirable sense of influences deeper and stronger than nationality, or State, or class, and both remained indifferent to the humbler range of English social history. Hume took his stand on England, but he had to begin with a general outline and the explanation of the more apparent changes in State and Church.

Blackstone's Commentaries.

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[3] In his Considérations sur l'histoire de France.

[4] History of Boroughs.

[5] Ancient Rights of the Commons of England.

[6] Quoted by Palgrave, English Commonwealth, i. 192, from the second edition of 1786. The first appeared in 1784.

In this way current notions on our questions remained towards the close of the eighteenth century still undisturbed by writers of a high order. We may take as a fair sample of such current notions Sir William Blackstone's historical digressions, especially those in the second volume of his Commentaries[7]. There is no originality about them, and the lack of this quality is rather an advantage in this case: it enables us through one book to glance at an entire literature. I may be allowed to recall its most striking points to the mind of my readers.

The key to the whole medieval system and to the constitution emerging from it is to be found in feudalism. 'The constitution of feuds had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who poured themselves into all the regions of Europe, at the declension of the Roman Empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions, and to that end large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers.' 'Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world.'

'But this feudal polity, which was thus by degrees established over all the Continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of our national constitution, till the reign of William the Norman. This introduction, however, of the feudal tenures into England by King William does not seem to have been effected immediately after the Conquest, nor by the mere arbitrary will and power of the Conqueror, but to have been gradually established by the Norman barons, and afterwards universally consented to by the great Council of the nation.' 'The new polity therefore seems not to have been *imposed* by the Conqueror, but nationally and freely adopted by the general assembly of the whole realm.' 'By thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system. But whatever their meaning was, the Norman interpreters … gave a very different construction to this proceeding, and thereupon took a handle to introduce, not only the rigorous doctrine which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations.' 'And from hence arises the inference, that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, but a restoration of the ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.'

The structure of the component parts is (for Blackstone) as ancient as the constitution of the whole. The English manor is of Saxon origin in all its essential characteristics, but the treatment of the people within the manor underwent a very notable change in consequence of the Norman invasion. In Saxon times the common people settled on folkland were immersed in complete slavery. Their condition was improved by the Conquest, because the Normans admitted them to the oath of fealty. And the improvement did not stop there: although the peasantry held their plots only by base tenure and at the lord's will, the lord allowed in most cases a hereditary possession. In this way out of the lord's will custom arose, and as custom is the soul or vital principle of common law, the Courts undertook in the end to protect the base tenure of the peasantry against the very lord whose will had created it. Such was the rise of the copyhold estate of modern times.

Blackstone's work is a compilation, and it would be out of the question to reduce its statements to anything like consistency. The rationalistic mode of thought which has left such a peculiar stamp

[7] The first edition of the Commentaries appeared in 1765. I have been using that of 1800.

on the eighteenth century, appears in all its glory in the laying out of the wise military polity of feudalism. But scarcely has our author had time to show the rapid progress of this plan all round Europe, when he starts on an entirely new tack, suggested by his wish to introduce a historical justification of Constitutional Monarchy. Feudal polity is of late introduction in England, and appears as a compact between sovereign and subjects; original freedom was not destroyed by this compact, and later infringements of contractual rights by kings ultimately led to a restoration and development of ancient liberties. In the parts of the treatise which concern Private Law the keynote is given throughout by that very Norman jurisprudence on which such severe condemnation is passed with regard to Public Law. The Conquest is thus made to appear alternately as a source of danger, struggle, and hardship from one point of view, and as the origin of steady improvement in social condition from another. In any case the aristocratic cast of English life is deduced from its most ancient origins, and all the rights of the lower orders are taken as the results of good-humoured concession on the part of the lords of the soil and of quiet encroachment against them.

Revolution in Historical literature. The Romantic school.

Statements and arguments in Blackstone's style could hold water only before that great crisis in history and historical literature by which the nineteenth century was ushered into the world. The French Revolution, and the reaction against it, laid open and put to the test the working of all the chief forces engaged in historical life. Government and social order, nationality and religion, economic conditions and modes of thought, were thrown into the furnace to be consumed or remoulded. Ideas and institutions which had towered over centuries went down together, and their fall not only brought home the transitory character of human arrangements, but also laid bare the groundwork of society, which however held good in spite of the convulsions on its surface. The generation that witnessed these storms was taught to frame its politics and to understand history in a new fashion[8]. The disorderly scepticism of the eighteenth century was transformed by Niebuhr into a scientific method that paved the way by criticism to positive results. On the other hand, the Utopian doctrines of political rationalism were shattered by Savigny's teaching on the fundamental importance of tradition and the unconscious organic growth of nations. In his polemic with Thibaut, the founder of the historical school of law enters a mighty protest against wanton reform on the ground of a continuity of institutions not less real than the continuity of language, and his 'History of Roman Law during the Middle Ages' demonstrated that even such a convulsion as the Barbarian Invasion was not sufficient to sweep away the foundations of law and social order slowly formed in the past. Eichhorn's 'History of German Public and Private Law' gave detailed expression to an idea which occurs also in some of Savigny's minor works—to the idea, namely, that the German nations have had to run through their history with an engrained tendency in their character towards political dismemberment and social inequality. This rather crude attempt at generalising out some particular modern features and sanctioning them by the past is of historical interest, because it corresponds to the general problem propounded to history by the Romantic school: viz. to discover in the various manifestations of the life of a nation its permanent character and the leading ideas it is called to embody in history.

The comparative soundness of the English system had arrayed it from the very beginning on the side of Conservatism against Revolution, and Burke was the first to sound the blast of a crusade against subversive theories. No wonder the historical discoveries on the Continent found a responsive echo in English scholarship. Allen[9] took up the demonstration that the Royal power in England had developed from the conceptions of the Roman Empire. Palgrave[10] gave an entirely new construction

[8] 'Es war eine Zeit, in der wir Unerhörtes und Unglaubliches erlebten, eine Zeit, welche die Aufmerksamkeit auf viele vergessene und abgelebte Ordnungen durch deren Zusammensturz hinzog.' Niebuhr in the preface to the first volume of his Roman history, quoted by Wegele, Geschichte der deutschen Historiographie, 998.

[9] Enquiry into the Rise and Progress of the Royal Prerogative, 1831.

[10] History of the English Commonwealth, 1832; Normandy and England, 1840.

of Anglo-Saxon history, which could not but exercise a powerful influence on the study of subsequent periods. His book is certainly the first attempt to treat the problems of medieval social history on a large scale and by new methods. It deserves special attention[11].

Sir Francis Palgrave.

The author sat down to his work before the Revolution of 1830, although his two volumes were published in 1832. He shares the convictions of very moderate Liberalism, declares in favour of the gradual introduction of reforms, and against any reform not framed as a compromise between actual claims. Custom and tradition did not exclude change and development in England, and for this reason the movement towards progress did not tear that people from the inheritance of their ancestors, did not disregard the mighty agency of historical education. In order to study the relative force of the elements of progress and conservatism in English history, Palgrave goes behind the external play of institutions, and tries to connect them with the internal growth of legal principles. It is a great, though usual, mistake to begin with political events, to proceed from them to the study of institutions, and only quite at the end to take up law. The true sequence is the inverse one. And in England in particular the Constitution, with all its showy and famous qualities, was formed under the direct influence of judicial and legal institutions. In accordance with this leading view Palgrave's work begins by a disquisition on classes, forms of procedure and judicial organisation, followed up by an estimate of the effects of the different Conquests, and ultimately by an exposition of the history of government. We need not feel bound by that order, and may start from the conclusion which gives the key to Palgrave's whole system.

The limited monarchy of England is a result of the action of two distinct elements, equally necessary for its composition. It is a manifestation of the monarchical power descended both in principle and in particular attributes from the Roman Empire. If this political idea had not been at work the kingdoms of the barbarians would have presented only loose aggregates of separate and self-sufficient political bodies; on the other hand, if this political idea had been supreme, medieval kings would have been absolute. The principles of Teutonic and of Roman polity had to work together, and the result was the medieval State with an absolute king for its centre, and a great independence of local parts. The English system differed from the continental in this way, that in England the free judicial institutions of the localities reacted on the central power, and surrounded it by constitutional limitations, while the Continent had to content itself with estates of a very doubtful standing and future. It is easy to see in this connexion how great an importance we must assign to the constitution of local Courts: the shires, hundreds, and townships are not mere administrative divisions, but political bodies. That the kingdom formed itself on their basis, not as an absolute but as a parliamentary monarchy, must be explained in a great measure by the influence of the Norman Conquest, which led to a closer union of the isolated parts, and to a concentration of local liberty in parliament.

But (such is Palgrave's view) the importance of Conquests has been greatly overrated in history. The barbarian invasion did not effect anything like a sudden or complete subversion of things; it left in force and action most of the factors of the preceding period. The passage from one rule to another was particularly easy in England, as most tribes which occupied the island were closely related to each other. Palgrave holds that the Britons, Anglo-Saxons, Danes, and Normans all belong to one and the same Teutonic race. There were, of course (he allows), Celtic elements among the Britons, but the greater part consisted of Belgian Kymrys, whose neighbours and kin are to be found on the Continent as Saxons and Frisians. The conquest of the island by bands of seafaring Saxons did not

[11] I do not give an analysis of Hallam's remarkable chapters on England in his work on the Middle Ages (first edition, 1818), because they are mostly concerned with Constitutional history, and the notes on the classes of Saxon and Anglo-Norman Society are chiefly valuable as discussions of technical points of law. Hallam's general position in historical literature must not be underrated; he is the English representative of the school which had Guizot for its most brilliant exponent on the Continent. In our subject, however, the turning-point in the development of research is marked by Palgrave, and not by Hallam. Heywood (Dissertation on Ranks and Classes of Society, 1818) is sound and useful, but cannot rank among the leaders.

lead by any means to the wholesale destruction and depopulation which the legendary accounts of the chronicles report. The language of the Britons has not been preserved, but then no more has the Celtic language in Gaul. The Danish and Norman invasions had even less influence on social condition than the Saxon. It is only the Roman occupation that succeeded in introducing into the life of this island important and indestructible traits.

If we look at the results of all these migrations and ethnographical mixtures, we have first to notice the stratifications of English society according to rank. It is settled definitely enough in the Saxon period on an aristocratic basis. In the main, society consists of eorls and ceorls, noblemen and serfs. The difference does not consist merely in a diversity of legal value, social influence and occupation, but also in the fact that the ceorl may economically and legally be dependent on the eorl, and afterwards on the thane. How did this aristocratic constitution arise? Social distinctions of this kind may sometimes originate in the oppression of the weak by the strong, and in voluntary subjection, but, as a rule, they go back to conquest. There is every reason to believe that the Anglo-Saxon conquerors, who were very few in number, became the privileged class of the new States, and reduced the Britons to serfdom; a corroboration of this assumption may be found in the fact that the services of Celtic and Saxon peasantry are extremely alike.

It is more difficult to trace the influence of different races in the agrarian system, of which the township or manor is the unit. It is by comparing it with the forms in its immediate neighbourhood that one gets to understand its origin. The Roman organisation of husbandry and ownership on the basis of individualism is too well known to be described. In marked contrast with it stands the Celtic community, of which survivals were lingering for a long time in Ireland and Wales. Here the land is in the ownership of tribal groups: rights of individuals and families expand and collapse according to the requirements and decisions of the entire tribe; there is no hereditary succession, but every grown-up clansman has a claim to be endowed with a plot of land, and as a consequence of this, all land in separate possession is constantly liable to be divided by the tribal community. The Anglo-Saxon system is an intermediate stage between Roman individualism and Celtic communalism. No wonder that the Saxons, who at home followed a system closely resembling the Celtic, modified it when they got acquainted with Roman forms and entered into their Roman inheritance in Great Britain. The mixed organisation of the township was the result of the assimilation.

Estimate of Palgrave's work.

Such are in the main those conclusions of Palgrave which have a direct bearing on the questions before us. It is easy to perceive that they are permeated by certain very general historical conceptions. He is greatly impressed by the 'Vis inertiae' of social condition, and by the continuity of historical development arising from it. And so in his work the British population does not disappear without leaving any traces of its existence; the Roman dominion exercises a most conspicuous influence on important aspects of later condition—on central power, feudalism, and agrarian organisation: the most recent of the Conquests—the Norman invasion—is reduced to a comparatively secondary share in the framing of society. The close connexion between Palgrave's ideas and the currents of thought on the Continent is not less notable in his attempts to determine the peculiarities of national character as manifested in unconscious leanings towards certain institutions. The Teutonic system is characterised by a tendency towards federalism in politics and an aristocratic arrangement of society. The one tendency explains the growth of the Constitution as a concentration of local self-government, the other leads from the original and fundamental distinction between a privileged class and a servile peasantry to the original organisation of the township under a lord.

There can be no question as to the remarkable power displayed in Palgrave's work, or as to the value of his results. He had an enormous and varied store of erudition at his command, and the keenest eye for observation. No wonder that many of his theories on particular subjects have been eagerly taken up and worked out by later scholars. But apart from such successful solutions of questions, his

whole conception of development was undoubtedly very novel and fruitful. One of Palgrave's main positions—the intimate connexion between the external history of the Constitution and the working of private law in the courts—opened a wholly new perspective for the study of social history. But naturally enough the first cast turned out rather rough and distorted. Palgrave is as conspicuous for his arbitrary and fanciful treatment of his matter, as for his learning and ingenuity. He does not try to get his data into order or completeness, and has no notion of the methods of systematic work. Comparisons of English facts with all kinds of phenomena in the history of kindred and distant peoples sometimes give rise to suggestive combinations, but, in most cases, out of this medley of incongruous things they lead only to confusion of thought. In consequence of all these drawbacks, Palgrave's attempt only started the inquiry in most directions, but could not exhaust it in any.

Romanists and Germanists.

The two great elements of Western civilisation—Roman tradition and Teutonic tendencies—were more or less peacefully brought together in the books of Savigny, Eichhorn, and Palgrave. But in process of time they diverged into a position of antagonism. Their contrast not only came out as a result of more attention and developed study; it became acute, because in the keen competition of French and German scholarship, historians, consciously and unconsciously, took up the standpoint of national predilection, and followed their bias back into ancient times. Aug. Thierry, while protesting against the exaggerations of eighteenth-century systems, considered the development of European nations almost entirely as a national struggle culminating in conquest, but underlying most facts in the history of institutions. He began, for the sake of method, by tracing the conflict on English ground where everything resolved itself to his eye into open or hidden strife between Norman and Saxon[12]. But William the Bastard's invasion led him by a circuitous way to the real object of his interest—to the gradual rise of Gallo-Roman civilisation against the Teutonic conquest in France: historical tendencies towards centralised monarchy and municipal bourgeoisie were connected by him with the present political condition of France as the abiding legacy of Gallo-Roman culture[13].

Men of great power and note, from Raynouard[14] and B. Guérard[15] down to Fustel de Coulanges[16] in our own days, have followed the same track with more or less violence and exaggeration. They are all at one in their animosity towards Teutonic influence in the past, all at one in lessening its effects, and in trying to collect the scattered traces of Romanism in principle and application. The Germans did not submit meekly to the onslaught, but went as far as the Romanists on the other side. Löbell[17], Waitz[18], and Roth[19]—to speak only of the heads of the school—have held forth about the mighty part which the Teutons have played in Europe; they have enhanced the beneficial value of Germanic principles, and tried to show that there is no reason for laying to their account certain dark facts in the history of Europe. The Germanist school had to fight its way not only against Romanism, but against divers tenets of the Romantic school as represented by Savigny and Eichhorn, of which Romanists had availed themselves. The whole doctrine was to be reconsidered in the light of two fundamental assumptions. The foundations of social life were sought not in aristocracy, but in the common freedom of the majority of the people: the German middle class, the 'Bürgers,' who form the strength of contemporary Germany, looked to the past history of their race as vouching for their liberty; the destinies of that particular class became the test of

[12] Histoire de la conquête de l'Angleterre par les Normands.

[13] Histoire du tiers état.

[14] Histoire du droit municipal.

[15] Prolégomènes au polyptyque de l'abbé Irminon.

[16] Histoire des institutions de la France; Recherches sur quelques problèmes d'histoire.

[17] Gregor von Tours und seine Zeit.

[18] Deutsche Verfassungsgeschichte.

[19] Geschichte des Beneficialwesens, 1856; Feudalität und Unterthanenverband, 1863.

social development. Then again the disruptive tendency of German national character was stoutly denied, and all the historical instances of disruption were demonstrated to be quite independent of any leaning of the race. In the great fermentation of thought which led indirectly to the unification of Germany, the best men in the country refused to believe that Western Europe had fallen to pieces into feudalism because Teutonic development is doomed to strife and helplessness by deeply engrained traits of character[20]. German scholarship found a most powerful ally in this period of its history in the literature of kindred England: German and English investigators stood side by side in the same ranks. Kemble, K. Maurer, Freeman, Stubbs, and Gneist form the goodly array of the Germanist School on English soil.

Kemble.

Kemble's position is, strictly speaking, an intermediate one: in some respects he is very near to Eichhorn and Grimm; although his chief work was published in 1849, he was not acquainted with Waitz's first books. But Kemble is mostly in touch with those parts of Eichhorn's theory which could be accepted by later Germanists; other important tenets of the Romantic School are left in the shade or rejected, and as a whole Kemble's teaching is essentially Germanistic. Kemble's 'Saxons in England' takes its peculiar shape and marks an epoch in English historical literature, mainly because it presents the first attempt to utilise the enormous material of Saxon Charters, in the collection of which Kemble has done such invaluable work. With this copious and exact, but very onesided, material at his disposal, our author takes little notice of current tales about the invasion of Great Britain by Angles and Saxons. Such tales may be interesting from a mythological or literary point of view, but the historian cannot accept them as evidence. At the same time one cannot but wish to try and get certain knowledge of an historical fact, which, as far as the history of England is concerned, appears as the first manifestation of the Teutonic race in its stupendous greatness. Luckily enough we have some means to judge of the invasion in the names of localities and groups of population. Read in this light the history of Conquest appears very gradual and ancient. It began long before the recorded settlements, and while Britain was still under Roman sway. The struggle with the Celts was a comparatively easy one; the native population was by no means destroyed, but remained in large numbers in the lower orders of society. Notwithstanding such remnants, the history of the Anglo-Saxon period is entirely Teutonic in its aspect, and presents only one instance of the general process by which the provinces of the Empire were modified by conquerors of Teutonic race.

The root of the whole social system is to be found in the Mark, which is a division of the territory held jointly by a certain number of freemen for the purposes of cultivation, mutual help and defence. The community began as a kinship or tribe, but even when the original blood ties were lost sight of and modified by the influx of heterogeneous elements, the community remained self-sufficient and isolated. The whole fabric of society rested on property in land: as its political divisions were based on the possession of common lands, even so the rank of an individual depended entirely on his holding. The Teutonic world had no idea of a citizen severed from the soil. The curious fact that the normal holding, the hide, was equal all over England (33½ acres) can be explained only by its origin; it came full-formed from Germany and remained unchanged in spite of all diversities of geographical and economical conditions.

The transformation of medieval society is, for Kemble, intimately connected with the forms of ownership in land. The scanty population of ancient times had divided only a very small part of the country into separate holdings. The rest remained in the hands of the people to supply the wants of coming generations. The great turn towards feudalism was given by the fact that this reserve-fund lapsed into the hands of a few magnates: the mass of free people being deprived of its natural sphere of expansion was forced to seek its subsistence at the hands of private lords (loaf-givers). From the

[20] Roth is very strong on this point.

point of view of personal status the same process appears in the decrease of freedom among the people and in the increase of the so-called Gesíð. According to Teutonic principles a man is free only if he has land to feed upon, strength to work, and arms to defend himself. The landless man is unfree; and so is the Gesíðcundman, the follower, however strong and wealthy he may be through his chief's grace. The contrast between the free ceorls tilling their own land and the band of military followers, who are always considered as personally dependent—this contrast is a marked one. From the first this military following had played an important part in German history. Most raids and invasions had been its work, and sometimes whole tribes were attracted into its organisation, but during the first period of Saxon history the free people were sufficiently strong to hold down the power of military chiefs within certain bounds. Not so in later development. With the growth of population, of inequalities, of social competition, the relations of dependency are seen constantly gaining on the field of freedom. The spread of commendation leads not only to a change in the distribution of ranks, but to a dismemberment of political power, to all kinds of franchises and private encroachments on the State.

I may be excused for marshalling all these well-known points before the public by the consideration that they must serve to show how intimately these views are connected with the general principles of a great school. The stress laid by Kemble on property in land ought to be noticed especially: land gets to be the basis of all political and social condition. This is going much further than Palgrave ever went; though not further than Eichhorn. What actually severs Kemble from the Romantics is his estimate of the free element in the people. He does not try to picture a kind of political Arcadia in Saxon England, but there is no more talk about the rightless condition of the ceorls or the predominance of aristocracy. The Teutonic race towers above everything. Although the existence of Celts after the Conquests is admitted, neither Celtic nor Roman elements appear as exercising any influence in the course of history. Everything takes place as if Germanic communities had been living and growing on soil that had never before been appropriated. Curiously enough the weakest point of Kemble's doctrine seems to lie in its very centre—in his theory of social groups. One is often reminded of Grimm by his account of the Mark, and it was an achievement to call attention to such a community as distinct from the tribal group, but the political, legal, and economical description of the Mark is very vague. As to the reasoning about gilds, tithings, and hundreds, it is based on a constant confusion of widely different subjects.

Generally speaking, it is not for a lawyer's acuteness and precision that one has to look in Kemble's book: important distinctions very often get blurred in his exposition, and though constantly protesting against abstract theories and suppositions not based on fact, he indulges in them a great deal himself. Still Kemble's work was very remarkable: his extensive, if not very critical study of the charters opened his eyes to the first-rate importance of the law of real property in the course of medieval history: this was a great step in advance of Palgrave, who had recognised law as the background of history, but whose attention had been directed almost exclusively to the formal side —to judicial institutions. And Kemble actually succeeded in bringing forward some of the questions which were to remain for a long time the main points of debate among historians.

K. Maurer.

The development of the school was evidently to proceed in the direction of greater accuracy and improved methods. Great service has been done in this respect by Konrad Maurer[21]. He is perhaps sometimes inclined to magnify his own independence and dissent from Kemble's opinions, but he has undoubtedly contributed to strengthen and clear up some of Kemble's views, and has gone further than his predecessor on important subjects. He accepts in the main Kemble's doctrines as to the Mark, the allotment of land, the opposition of folkland and book-land, and expounds them with

[21] Ueber angelsächsische Rechtsverhältnisse, in the Munich Kritische Ueberschau, i. sqq. (1853).

greater fulness and better insight into the evidence. On the other hand he goes his own way as to the Gesíðs (Gefolgschaft), and the part played by large estates in the political process. Maurer reduces the importance of the former and lays more stress on the latter than Kemble[22]. Altogether the German scholar's investigations have been of great moment, and this not only for methodical reasons, but also because they lead to a complete emancipation of the school from Eichhorn's influence.

Freeman.

As to the Conquests, Germanist views have been formulated with great authority by Freeman. A comparison of the course of development in Romance countries with the history of England, and a careful study of that evidence of the chronicles which Kemble disregarded, has led the historian of the Norman Conquest to the conclusion, that the Teutonic invaders actually rooted out most of the Romanised Celtic population of English Britain, and reduced it to utter insignificance in those western counties where they did not destroy it. It is the only inference that can be drawn from the temporary disappearance of Christianity, from the all but complete absence of Celtic and Latin words in the English tongue, from the immunity of English legal and social life from Roman influence. The Teutonic bias which was given to the history of the island by the Conquest of Angles and Saxons has not been altered by the Conquest of the Normans. The foreign colouring imparted to the language is no testimony of any radical change in the internal structure of the people: it remained on the surface, and the history of the island remained English, that is, Teutonic. Even feudalism, which appears in its full shape after William the Bastard's invasion, had been prepared in its component parts by the Saxon period. In working out particulars Freeman had to reckon largely with Kemble's work and to strike the balance between the conflicting and onesided theories of Thierry and Palgrave. Questions of legal and social research concern him only so far as they illustrate the problem of the struggle and fusion of national civilisations. His material is chiefly drawn from chronicles, and the history of external facts of war, government, and legislation comes naturally to the fore. But all the numberless details tend towards one end: they illustrate the Teutonic aspect of English culture, and assign it a definite place in the historical system of Europe.

Stubbs.

Stubbs' 'Constitutional History,' embracing as it does the whole of the Middle Ages, is not designed to trace out some one idea for the sake of its being new or to take up questions which had remained unheeded by earlier scholars. Solid learning, critical caution and accuracy are the great requirements of such an undertaking, and every one who has had anything to do with the Bishop of Oxford's publications knows to what extent his work is distinguished by these qualities. If one may speak of a main idea in such a book as the Constitutional History of a people, Stubbs' main idea seems to be, that the English Constitution is the result of administrative concentration in the age of the Normans of local self-govermment formed in the age of the Saxons. This conclusion is foreshadowed in Palgrave's work, but what appears there as a mere hypothesis and in confusion with all kinds of heterogeneous elements, comes out in the later work with the overwhelming force of careful and impartial induction. Stubbs' point of view is a Germanist one. The book begins with an estimate of Teutonic influence in the different countries of Europe, and England is taken in one sense as the most perfect manifestation of the Teutonic historical tendency. The influx of Frenchmen and French ideas under William the Conqueror and after him had important effects in rousing national energy, contributing to national unification, settling the forms of administration and justice, but at bottom there remained the Teutonic character of the nation. The 'Constitutional History' approaches the question of the village community, but its object is strictly limited to the bearing of the problem on general history and to the testimony of direct authority. It starts from the community in land as described by Cæsar and Tacitus, and notices that Saxon times present only a few scattered references

[22] K. Maurer is very near Waitz in this respect.

to communal ownership. Most of the arable land was held separately, but the woods, meadow, and pasture still remained in the ownership of village groups. The township with its rights and duties as to police, justice, and husbandry was modified but not destroyed by feudalism. The change from personal relations to territorial, and from the freedom of the masses to their dependency, is already very noticeable in the Saxon period. The Norman epoch completed the process by substituting proprietary rights in the place of personal subordination and political subjection. Still even after conquest and legal theory had been over the ground, the compact self-government of the township is easily discernible under the crust of the manorial system, and the condition of medieval villains presents many traces of original freedom.

Gneist.

Gneist's work is somewhat different in colouring and closely connected with a definite political theory. Tocqueville in France has done most to draw attention to the vital importance of local self-government in the development of liberal institutions; and Stubbs' history goes far to demonstrate Tocqueville's general view by a masterly statement as to the origins of English institutions. In Gneist's hands the doctrine of decentralisation assumes a particular shape by the fact that it is constructed on a social foundation; the German thinker has been trying all along to show that the English influence is not one of self-government only, but of aristocratical self-government. The part played by the gentry in local and central affairs is the great point of historical interest in Gneist's eyes. Even in the Saxon period he lays stress chiefly on the early rise of great property, and the great importance of 'Hlafords' in social organisation. He pays no attention to the village community, and chiefly cares for the landlord. But still even Gneist admits the original personal freedom of the great mass of the people, and his analysis of the English condition is based on the assumption, that it represents one variation of Teutonic development: this gives Gneist a place among the Germanists, although his views on particular subjects differ from those of other scholars of the same school.[23]

The Mark system.

Its chief representatives have acquired such a celebrity that it is hardly necessary to insist again, that excellent work has been done by them for the study of the past. But the direction of their work has been rather one-sided; it was undertaken either from the standpoint of political institutions or from that of general culture and external growth; the facts of agriculture, of the evolution of classes, of legal organisation were touched upon only as subsidiary to the main objects of general history. And yet, even from the middle of the century, the attention of Europe begins to turn towards those very facts. The 'masses' come up with their claims behind the 'classes,' the social question emerges in theory and in practice, in reform and revolution; Liberals and Conservatives have to reckon with the fact that the great majority of the people are more excited, and more likely to be moved by the problems of work and wages than by problems of political influence. The everlasting, ever-human struggle for power gets to be considered chiefly in the light of the distribution of wealth; the distribution of society into classes and conditions appears as the connecting link between the economical process and the political process. This great change in the aspect of modern life could not but react powerfully on the aspect of historical literature. G.F. von Maurer and Hanssen stand out as the main initiators of the new movement in our studies. The many volumes devoted by G.F. Maurer[24] to the village and the town of Germany are planned on a basis entirely different from that of his predecessors. Instead of proceeding from the whole to the parts, and of using social facts merely as a background to political history, he concentrates everything round the analysis of the Mark, as the elementary organisation for purposes of husbandry and ownership. The Mark is thus taken up not in the vague sense and manner

[23] See especially his Englische Verfassungsgeschichte.

[24] Einleitung in die Geschichte der Hof-, Dorf-, Mark- und Städteverfassung in Deutschland, 1 vol.; Geschichte der Frohnhöfe, 4 vol.; Geschichte der Dorfverfassung, 1 vol.; Geschichte der Markenverfassung, 1 vol.; Geschichte der Städteverfassung, 4 vol.

in which it was treated by Kemble and his followers; it is described and explained on the strength of copious, though not very well sifted, evidence. On the other hand, Hanssen's masterly essays[25] on agrarian questions, and especially on the field-systems, gave an example of the way in which work was to be done as to facts of husbandry proper.

Nasse.

Nasse's pamphlet on the village community[26] may be considered as the first application of the new methods and new results to English history. The importance of his little volume cannot easily be overrated: all subsequent work has had to start from its conclusions.

Nasse's picture of the ancient English agricultural system, though drawn from scanty sources, is a very definite one. Most of the land is enclosed only during the latter part of the year, and during the rest of the year remains in the hands of the community. Temporary enclosures rise upon the ploughed field while the crop is growing; their object, however, is not to divide the land between neighbours but to protect the crop against pasturing animals; the strips of the several members of the township lie intermixed, and their cultivation is not left to the views and interests of the owners, but settled by the community according to a general plan. The meadows are also divided into strips, but these change hands in a certain rotation determined by lot or otherwise. The pasture ground remains in the possession of the whole community. The notion of private property, therefore, can be applied in this system only to the houses and closes immediately adjoining them.

Then the feudal epoch divides the country into manors, a form which originated at the end of the Saxon period and spread everywhere in Norman times. The soil of the manor consists of demesne lands and tributary lands. These two classes of lands do not quite correspond to the distinction between land cultivated by the lord himself and soil held of him by dependants; there may be leaseholders on the demesne, but there the lord is always free to change the mode of cultivation and occupation, while he has no right to alter the arrangements on the tributary portion. This last is divided between free socmen holding on certain conditions, villains and cottagers. The villains occupy equal holdings; their legal condition is a very low one, although they are clearly distinguished from slaves, and belong more to the soil than to the lord. The cottagers have homesteads and crofts, but no holdings in the common fields; the whole group presents the material from which, in process of time, the agricultural labourers have been developed.

The common system of husbandry manifests itself in many ways: the small holders club together for ploughing; four virgates or yardlands have to co-operate in order to start an eight-oxen plough. The services are often laid upon the whole village and not on separate householders; on the other hand the village, as a whole, enters into agreement with the lord about leases or commutation of services for money.

Each holding is formed of strips which lie intermixed with the component parts of other holdings in different fields, and this fact is intimately connected with the principle of joint ownership. The whole system begins to break up in the thirteenth century, much earlier than in France or Germany. As soon as services get commuted for money rents, it becomes impossible to retain the labouring people in serfdom. Hired labourers and farmers take the place of villains, and the villain's holding is turned into a copyhold and protected by law. Although the passage to modern forms begins thus early, traces of the original communalism may be found everywhere, even in the eighteenth century.

Maine.

Nasse's pamphlet is based on a careful study of authorities, and despite its shortness must be treated as a work of scientific research. But if all subsequent workers have to reckon with it in settling

[25] Collected in 2 volumes of Agrarhistorische Untersuchungen.

[26] Zur Geschichte der mittelalterlichen Feldgemeinschaft in England, 1869.

particular questions, general conceptions have been more widely influenced by Sir Henry Maine's lectures, which did not aim at research, and had in view the broad aspects of the subject. Their peculiar method is well known to be that of comparing facts from very different environments—from the Teutonic, the Celtic, the Hindu world; Maine tries to sketch a general process where other people only see particular connexions and special reasons. The chapters which fall within the line of our inquiry are based chiefly on a comparison between Western Europe and India. The agrarian organisation of many parts of India presents at this very day, in full work and in all stages of growth and decay, the village community of which some traces are still scattered in the records of Europe. There and here the process is in the main the same, the passage from collective ownership to individualism is influenced by the same great forces, notwithstanding all the differences of time and place. The original form of agrarian arrangement is due to the settlement of a group of free men, which surrenders to its individual members the use of arable land, meadows, pasture and wood, but retains the ownership and the power to control and modify the rights of using the common land. There can be no doubt that the legal theory, which sees in the modern rights of commoners mere encroachments upon the lord, carries feudal notions back into too early a period.

The real question as conceived by Maine is this—By what means was the free village community turned into the manor of the lord? The petty struggles between townships must have led to the subjugation of some groups by others; in each particular village the headman had the means to use his authority in order to improve his material position; and when a family contrived to retain an office in the hands of its members this at once gave matters an aristocratical turn. In Western Europe external causes had to account for a great deal in the gradual rise of territorial lordship. When the barbarian invaders came into contact with Roman civilisation and took possession of the provincial soil, they found private ownership and great property in full development, and naturally fell under the influence of these accomplished facts; their village community was broken up and transformed gradually into the manorial system[27].

Maine traces economic history from an originally free community; Nasse takes the existence of such a community for granted. The statements of one are too general, however, and sometimes too hypothetical, the other has in view husbandry proper rather than the legal development of social classes. Maurer's tenets, to which both go back, present a very coherent system in which all parts hold well together; but each part taken separately is not very well grounded on fact. The one-sided preference given to one element does not allow other important elements to appear; the wish to find in the authorities suitable arguments for a favourite thesis leads to a confusion of materials derived from different epochs. These defects naturally called for protest and rectification; but the reaction against Maurer's teaching has gone so far and comes from such different quarters, that one has to look for its explanation beyond the range of historical research.

Reactionary movement.

Late years have witnessed everywhere in Europe a movement of thought which would have been called reactionary some twenty years ago[28]. Some people are becoming very sceptical as to principles which were held sacred by preceding generations; at the same time elements likely to

[27] I do not mention some well-known books treating of medieval husbandry and social history, because I am immediately concerned only with those works which discuss the formation of the medieval system. Thorold Rogers, History of Agriculture and Prices, and Six Centuries of Work and Wages, begins with the close of the thirteenth century, and the passage from medieval organisation to modern times. Ochenkovsky, Die wirtschaftliche Entwicklung Englands am Ende des Mittelalters, and Kovalevsky, England's Social Organisation at the close of the Middle Ages (Russian), start on their inquiry from even a later period.

[28] Is it necessary to say that I am speaking of general currents of thought and not of the position of a man at the polling booth? An author may be personally a liberal and still his work may connect itself with a stream of opinion which is not in favour of liberalism. Again, one and the same man may fall in with different movements in different parts of his career. Actual life throws a peculiar light on the past: certain questions are placed prominently in view and certain others are thrown into the shade by it, so that the individual worker has to find his path within relatively narrow limits.

be slighted formerly are coming to the front in great strength nowadays. There have been liberals and conservatives at all times, but the direction of the European mind, saving the reaction against the French Revolution and Napoleon, has been steadily favourable to the liberal tendency. For two centuries the greatest thinkers and the course of general opinion have been striving for liberty in different ways, for the emancipation of individuals, and the self-government of communities, and the rights of masses. This liberal creed has been, on the whole, an eminently idealist one, assuming the easy perfectibility of human nature, the sound common sense of the many, the regulating influence of consciousness on instinct, the immense value of high political aspirations for the regeneration of mankind. In every single attempt at realising its high-flying hopes the brutal side of human nature has made itself felt very effectually, and has become all the more conspicuous just by reason of the ironical contrast between aims and means. But the movement as a whole was certainly an idealist one, not only in the eighteenth but even in the nineteenth century, and the necessary repressive tendency appeared in close alliance with officialism, with unthinking tradition, and with the egotism of classes and individuals. Many events have contributed of late years to raise a current of independent thought which has gone far in criticising and stemming back liberal doctrines, if not in suppressing them. The brilliant achievements of historical monarchy in Germany, the ridiculous misery to which France has been reduced by conceited and impotent politicians, the excesses of terrorist nihilism in Russia, the growing sense of a coming struggle on questions of radical reform—all these facts have worked together to generate a feeling which is far from being propitious to liberal doctrines. Socialism itself has been contributing to it directly by laying an emphatic stress on the conditions of material existence, and treating political life merely as subordinate to economic aims. In England the repressive tendency has been felt less than on the Continent, but even here some of the foremost men in the country are beginning, in consequence of social well-known events, to ask themselves: Whither are we drifting? The book which best illustrates the new direction of thought is probably Taine's 'Origines de la France Contemporaine.' It is highly characteristic, both in its literary connexion with the profound and melancholy liberalism of Tocqueville, and in its almost savage onslaught on revolutionary legend and doctrine.

In the field of historical research the fermentation of political thought of which I have been speaking has been powerfully seconded by a growing distrust among scholars for preconceived theories, and by the wish to reconsider solutions which had been too easily taken for granted. The combined action of these forces has been curiously experienced in the particular subject of our study. The Germanist school had held very high the principle of individual liberty, had tried to connect it with the Teutonic element in history, had explained its working in the society described by Tacitus, and had regretfully followed its decay in later times. For the representatives of the New School this 'original Teutonic freedom' has entirely lost its significance, and they regard the process of social development as starting with the domination of the few and the serfdom of the many. The votaries of the free village community have been studying with interest epochs and ethnographical variations unacquainted with the economic individualism of modern Europe, they have been attentive in tracing out even the secondary details of the agrarian associations which have directed the husbandry of so many centuries, but the New School subordinates communal practice to private property and connects it with serfdom. We may already notice the new tendency in Inama-Sternegg's Wirthschaftsgeschichte[29]: he enters the lists against Maurer, denies that the Mark ever had anything to do with political work, reduces its influence on husbandry, and enhances that of great property. The most remarkable of French medievalists—Fustel de Coulanges—has been fighting all along against the Teutonic village community, and for an early development of private property in

[29] The last great German work on our questions, Lamprecht, Deutsches Wirthschaftsleben im Mittelalter, is nearer Maurer than Sternegg.

connexion with Roman influence. English scholarship has to reckon with similar views in Seebohm's well-known work.

Seebohm.

Let us recall to mind the chief points of his theory. The village community of medieval England is founded on the equality of the holdings in the open fields of the village. The normal holding of a peasant family is not only equal in each separate village, but it is substantially the same all over England. Variations there are, but in most cases by far it consists of the virgate of thirty acres, which makes the fourth part of the hide of a hundred and twenty acres, because the peasant holder owns only the fourth part of the ploughteam of eight oxen corresponding to the hide. The holders of virgates or yardlands are not the only people in the village; their neighbours may have more or less land, but there are not many classes as a rule, all the people in the same class are equalised, and the virgate remains the chief manifestation of the system. It is plain that such equality could be maintained only on the principle that each plot was a unit which was neither to be divided nor thrown together with other plots. Why did such a system spread all over Europe? It could not develop out of a free village community, as has been commonly supposed, because the Germanic law regulating free land does not prevent its being divided; indeed, where this law applies, holdings get broken up into irregular plots. If the system does not form itself out of Germanic elements, it must come from Roman influence; one has only the choice between the two as to facts which prevail everywhere in Western Europe. Indeed, the Roman villa presents all the chief features of the medieval manor. The lord's demesne acted as a centre, round which *coloni* clustered—cultivators who did not divide their tenancies because they did not own them. The Roman system was the more readily taken up by the Germans, as their own husbandry, described by Tacitus, had kindred elements to show—the condition of their slaves, for instance, was very like that of Roman coloni. It must be added, that we may trace in Roman authorities not only the organisation of the holdings, but such features as the three-field partition of the arable and the intermixed position of the strips belonging to a single holding.

The importance of these observations taken as a whole becomes especially apparent, if we compare medieval England with Wales or Ireland, with countries settled by the Celts on the principle of the tribal community: no fixed holdings there; it is not the population that has to conform itself to fixed divisions of land, but the divisions of land have to change according to the movement of the population. Such usage was prevalent in Germany itself for a time, and would have been prevalent there as long as in Celtic countries, if the Germans had not come under Roman influence. And so the continuous development of society in England starts from the position of Roman provincial soil.

The Saxon invasion did not destroy what it found in the island. Roman villas and their labourers passed from one lord to the other—that is all. The ceorls of Saxon times are the direct descendants of Roman slaves and coloni, some of them personally free, but all in agrarian subjection. Indeed, social development is a movement from serfdom to freedom, and the village community of its early stages is connected not with freedom, but with serfdom.

Seebohm's results have a marked resemblance to some of the views held by the eighteenth-century lawyers, and also to those held by Palgrave and by Coote, but his theory is nevertheless original, both in the connexion of the parts with the whole, and in its arguments: he knows how to place in a new light evidence which has been known and discussed for a long time, and for this reason his work will be suggestive reading even to those who do not agree with the results. The chief strength of his work lies in the chapters devoted to husbandry; but if one accepts his conclusions, what is to be done with the social part of the question? Both sides, the economic and the social, are indissolubly allied, and at the same time the extreme consequences drawn from them give the lie direct to everything that has hitherto been taken for granted and accepted as proved as to this period. Can it really be true that the great bulk of free men was originally in territorial subjection, or rather that there never was such a thing as a great number of free men of German blood, and that the German

conquest introduced only a cluster of privileged people which merged into the habits and rights of Roman possessors? If this be not true and English history testifies on every point to a deeper influence exercised by the German conquerors, does not the collapse of the social conclusion call in question the economical premisses? Does not a logical development of Seebohm's views lead to conclusions that we cannot accept? These are all perplexing questions, but one thing is certain; this last review of the subject has been powerful enough to necessitate a reconsideration of all its chief points.

Results attained by conflict between successive theories.

Happily, this does not mean that former work has been lost. I have not been trying the patience of my readers by a repetition of well-known views without some cogent reasons. The subject is far too wide and important to admit of a brilliantly unexpected solution by one mind or even one generation of workers. A superficial observer may be so much struck by the variations and contradictions, that he will fail to realise the intimate dependence of every new investigator on his predecessors. 'The subjective side of history,' as the Germans would say, has been noticed before now and the taunt has been administered with great force: 'Was Ihr den Geist der Zeiten heisst, das ist im Grund der Herren eigener Geist, in dem die Zeiten sich bespiegeln.' Those who do not care to fall a prey to Faust's scepticism, will easily perceive that individual peculiarities and political or national pretensions will not account for the whole of the process. Their action is powerful indeed: the wish to put one's own stamp on a theory and the reaction of present life on the past are mighty incitements to work. But new schools do not rise in order to pull down everything that has been raised by former schools, new theories always absorb old notions both in treatment of details and in the construction of the whole. We may try, as conclusion of our review of historical literature, to notice the permanent gains of consecutive generations in the forward movement of our studies. The progress will strike us, not only if we compare the state of learning at both ends of the development, but even if we take up the links of the chain one by one.

The greatest scholars of the time before the French Revolution failed in two important respects: they were not sufficiently aware of the differences between epochs; they were too ready with explanations drawn from conscious plans and arrangements. The shock of Revolution and Reaction taught people to look deeper for the laws of the social and political organism. The material for study was not exactly enlarged, but instead of being thrown together without discrimination, it was sifted and tried. Preliminary criticism came in as an improvement in method and led at once to important results. Speaking broadly, the field of conscious change was narrowed, the field of organic development and unconscious tradition widened. On this basis Savigny's school demonstrated the influence of Roman civilisation in the Middle Ages, started the inquiry as to national characteristics, and shifted the attention of historians from the play of events on the surface to the great moral and intellectual currents which direct the stream. Palgrave's book bears the mark of all these ideas, and it may be noticed especially that his chief effort was to give a proper background to English history by throwing light on the abiding institutions of the law.

None of these achievements was lost by the next generation of workers. But it had to start from a new basis, and had a good deal to add and to correct. Modern life was busy with two problems after the collapse of reaction had given way to new aspirations: Europe was trying to strike a due balance between order and liberty in the constitutional system; nationalities that had been rent by casual and artificial influences were struggling for independence and unity. The Germanist School arose to show the extent to which modern constitutional ideas were connected with medieval facts, and the share that the German element has had in the development of institutions and classes. As to material, Kemble opened a new field by the publication of the Saxon charters, and the gain was felt at once in the turn given towards the investigation of private law, which took the place of Palgrave's vague leaning towards legal history. The methods of careful and cautious inquiry as to particular facts took shape in the hands of K. Maurer and Stubbs, and the school really succeeded, it seems to me,

in establishing the characteristically Germanic general aspect of English history, a result which does not exclude Roman influence, but has to be reckoned with in all attempts to estimate definitely its bearing and strength.

The rise of the social question about the middle of our century had, as its necessary consequence, to impress upon the mind of intelligent people the vast importance of social conditions, of those primary conditions of husbandry, distribution of wealth and distribution of classes, which ever, as it were, loom up behind the pageant of political institutions and parties. Nasse follows up the thread of investigation from the study of private law towards the study of economic conditions. G.F. v. Maurer and Maine enlarge it in scope, material, and means by their comparative inquiry, taking into view, first, all varieties of the Teutonic race, and then the development of other ethnographical branches. The village community comes out of the inquiry as the constitutive cell of society during an age of the world, quite as characteristic of medieval structure, as the town community or 'civitas' was of ancient polity.

The consciousness that political and scientific construction has been rather hasty in its work, that it has often been based upon doctrines instead of building on the firm foundation of facts—the widely spread perception of these defects has been of late inciting statesmen and thinkers to put to use some of those very elements which were formerly ignored or rejected. The manorial School —if I may be allowed to use this expression—has brought forward the influence of great landed estates against the democratical conception of the village community. The work spent upon this last phenomenon is by no means undone; on the contrary, it was received in most of its parts. But new material was found in the manorial documents of the later middle ages, the method of investigation 'from the known to the unknown' was used both openly and unconsciously, comparative inquiry was handled for more definite, even if more limited purposes. Great results cannot be contested: to name one—the organising force of aristocratic property has been acknowledged and has come to its rights.

But the new impetus given to research has caused its originators to overleap themselves, as it were. They have occupied so exclusively the point of view whence the manor of the later middle ages is visible that they have disregarded the evidence which comes from other quarters instead of finding an explanation which will satisfy all the facts. The investigation 'from the known to the unknown' has its definite danger, against which one has to be constantly on one's guard: its obvious danger is to destroy perspective and ignore development by carrying into the 'unknown' of early times that which is known of later conditions. Altogether the attempt to overthrow some of the established results of investigation as to race and classes does not seem to be a happy one. And so, although great work has been done in our field of study, it cannot be said that it has been brought to a close—'bis an die Sterne weit.' Many things remain to be done, and some problems are especially pressing. The legal and the economical side of the inquiry must be worked up to the same level; manorial documents must be examined systematically, if not exhaustively, and their material made to fit with the evidence established from other sources of information; the whole field has to be gone over with an eye for proof and not for doctrine. A review of the work already done, and of the names of scholars engaged in it, is certainly an incitement to modesty for every new reaper in the field, but it is also a source of hope. It shows that schools and leading scholars displace one another more under the influence of general currents of thought than of individual talent. The ferment towards the formation of groups comes from the outside, from the modern life which surrounds research, forms the scholar, suggests solutions. Moreover, theoretical development has a continuity of its own; all the strength of this manifold life cannot break or turn back its course, but is reduced to drive it forward in ever new bends and curves. The present time is especially propitious to our study: one feels, as it were, that it is ripening to far-reaching conclusions. So much has been done already for this field of enquiry in the different countries of Europe, that the hope to see in our age a general treatment of the social origins of Western Europe will not seem an extravagant one. And such a treatment must form as it were the corner-stone of any attempt to trace the law of development of human society. It is in this

consciousness of being borne by a mighty general current, that the single scholar may gather hope that may buoy him against the insignificance of his forces and the drudgery of his work.

FIRST ESSAY.
THE PEASANTRY OF THE FEUDAL AGE

CHAPTER I.
THE LEGAL ASPECT OF VILLAINAGE.
GENERAL CONCEPTIONS

Medieval serfdom.

It has become a commonplace to oppose medieval serfdom to ancient slavery, one implying dependence on the lord of the soil and attachment to the glebe, the other being based on complete subjection to an owner. There is no doubt that great landmarks in the course of social development are set by the three modes hitherto employed of organising human labour: using the working man (1) as a chattel at will, (2) as a subordinate whose duties are fixed by custom, (3) as a free agent bound by contract. These landmarks probably indicate molecular changes in the structure of society scarcely less important than those political and intellectual revolutions which are usually taken as the turning-points of ancient, medieval, and modern history.

And still we must not forget, in drawing such definitions, that we reach them only by looking at things from such a height that all lesser inequalities and accidental features of the soil are no longer sensible to the eyesight. In finding one's way over the land one must needs go over these very inequalities and take into account these very features. If, from a general survey of medieval servitude, we turn to the actual condition of the English peasantry, say in the thirteenth century, the first fact we have to meet will stand in very marked contrast to our general proposition.

Importance of legal treatment.

The majority of the peasants are villains, and the legal conception of villainage has its roots not in the connexion of the villain with the soil, but in his personal dependence on the lord.

If this is a fact, it is a most important one. It would be reckless to treat it as a product of mere legal pedantry[30]. The great work achieved by the English lawyers of the twelfth and thirteenth centuries was prompted by a spirit which had nothing to do with pedantry. They were fashioning state and society, proudly conscious of high aims and power, enlightened by the scholastic training of their day, but sufficiently strong to use it for their own purposes; sound enough not to indulge in mere abstractions, and firm enough not to surrender to mere technicalities[31]. In the treatment of questions of status and tenure by the lawyers of Henry II, Henry III, and Edward I, we must recognise a mighty influence which was brought to bear on the actual condition of things, and our records show us on every page that this treatment was by no means a matter of mere theory. Indeed one of the best means that we have for estimating the social process of those times is afforded by the formation and the break up of legal notions in their cross influences with surrounding political and economic facts.

Definition and terminology of villainage at Common Law.

As to the general aspect of villainage in the legal theory of English feudalism there can be no doubt. The 'Dialogus de Scaccario' gives it in a few words: the lords are owners not only of the chattels but of the bodies of their *ascripticii*, they may transfer them wherever they please, 'and sell or

[30] Thorold Rogers, History of Agriculture and Prices, i. 70; Six Centuries of Work and Wages, 44. Cf. Chandler, Five Court Rolls of Great Cressingham in the county of Norfolk, 1885, pp. viii, ix.

[31] Stubbs, Seventeen Lectures, 304, 305; Maitland, Introduction to the Note-book of Bracton, 4 sqq.

otherwise alienate them if they like[32].' Glanville and Bracton, Fleta and Britton[33] follow in substance the same doctrine, although they use different terms. They appropriate the Roman view that there is no difference of quality between serfs and serfs: all are in the same abject state. Legal theory keeps a very firm grasp of the distinction between status and tenure, between a villain and a free man holding in villainage, but it does not admit of any distinction of status among serfs: *servus*, *villanus*, and *nativus* are equivalent terms as to personal condition, although this last is primarily meant to indicate something else besides condition, namely, the fact that a person has come to it by birth[34]. The close connexion between the terms is well illustrated by the early use of *nativa*, nieve, 'as a feminine to *villanus*.'

Treatment of villainage in legal practice.

These notions are by no means abstractions bereft of practical import. Quite in keeping with them, manorial lords could remove peasants from their holdings at their will and pleasure. An appeal to the courts was of no avail: the lord in reply had only to oppose his right over the plaintiff's person, and to refuse to go into the subject-matter of the case[35]. Nor could the villain have any help as to the amount and the nature of his services[36]; the King's Courts will not examine any complaint in this respect, and may sometimes go so far as to explain that it is no business of theirs to interfere between the lord and his man[37]. In fact any attempt on the part of the dependant to assert civil rights as to his master will be met and defeated by the 'exceptio villenagii[38].' The state refuses to regulate the position

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[32] Dial. de Scacc. ii. 10 (Select Charters, p. 222). Cf. i. 10; p. 192.

[33] Glanville, v. 5; Bracton, 4, 5; Fleta, i. 2; Britton, ed. Nichols, i. 194.

[34] Bracton, 5; Britton, i, 197. Pollock, Land-laws, App. C, is quite right as to the fundamental distinction between status and tenure, but he goes too far, I think, in trying to trace the steps by which names originally applying to different things got confused in the terminology of the Common Law. Annotators sometimes indulged in distinctions which contradict each other and give us no help as to the law. The same Cambridge MS. from which Nichols gives an explanation of *servus*, *nativus*, and *villanus* (i. 195) has a different etymology in a marginal note to Bracton. 'Nativus dicitur a nativitate—quasi in servitute natus, villanus dicitur a villa, quasi faciens villanas consuetudines racione tenementi, vel sicut ille qui se recognoscit ad villanum in curia quae recordum habet, servus vero dicitur a servando quasi per captivitatem, per vim et injustam detentionem villanus captus et detentus contra mores et consuetudines juris naturalis' (Cambr. Univers. MSS. Dd. vii. 6. I have the reference from my friend F.W. Maitland).

[35] Placita Coram Rege, Easter, 14 Edw. I, m. 9: 'Willelmus Barantyn et Radulfus attachiati fuerunt ad respondendum Agneti de Chalgraue de placito quare in ipsam Agnetem apud Chalgraue insultum fecerunt et ipsam verberaverunt, vulneraverunt et male tractaverunt, et bona et catalla sua in domibus ipsius Agnetis apud Chalgraue scilicet ordeum et avenam, argentum, archas et alia bona ad valenciam quadraginta solidorum ceperunt et asportaverunt; et ipsam Agnetem effugaverunt de uno mesuagio et dimidia virgata terre de quibus fuit in seysina per predictum Willelmum que fuerunt de antiquo dominico per longum tempus; nec permiserunt ipsam Agnetem morari in predicta villa de Chalgraue; et eciam quandam sororem ipsius Agnetis eo quod ipsa soror eam hospitavit per duas noctes de domibus suis eiecit, terra et catalla sua abstulit. Et predicti Willelmus et Radulfus veniunt. Et quo ad insultacionem et verberacionem dicunt quod non sunt inde culpabiles. Et quo ad hoc quod ipsa Agnes dicit quod ipsam eiecerunt de domibus et terris suis, dicunt quod predicta Agnes est natiua ipsius Willelmi et tenuit predicta tenementa in villenagio ad voluntatem ipsius Willelmi propter quod bene licebat eidem Willelmo ipsam de predicto tenemento ammouere.—Juratores dicunt … quod predicta tenementa sunt villenagium predicti Willelmi de Barentyn et quod predicta Agnes tenuit eadem tenementa ad voluntatem ipsius Willelmi.' Cf. Y.B. 12/13 Edw. III (ed. Pike), p. 233 sqq., 'or vous savez bien qe par ley de terre tout ceo qe le vileyn ad si est a soun seignour;' 229 sqq., 'qar cest sa terre demene, et il les puet ouster a sa volunte demene.'

[36] Coram Rege, Mich., 3 4 Edw. I, m. 1: 'Ricardus de Assheburnham summonitus fuit ad respondendum Petro de Attebuckhole et Johanni de eadem de placito quare, cum ipsi teneant quasdam terras et tenementa de predicto Ricardo in Hasseburnham ac ipsi parati sunt ad faciendum ei consuetudines et servicia que antecessores sui terras et tenementa illa tenentes facere consueverint, predictus Ricardus diversas commoditates quam ipsi tam in boscis ipsius Ricardi quam in aliis locis habere consueverint eisdem subtrahens ipsos ad intollerabiles servitutes et consuetudines faciendas taliter compellit quod ex sua duricia mendicare coguntur. Et unde queruntur quod, cum teneant tenementa sua per certas consuetudines et certa servicia, et cum percipere consueverunt boscum ad focum et materiam de bosco crescente in propriis terris suis, predictus Ricardus ipsos non permittit aliquid in boscis suis capere et eciam capit aueria sua et non permittit eos terram suam colere.—Ricardus dicit, quod non debet eis ad aliquam accionem respondere nisi questi essent de vita vel membris vel de iniuria facta corpori suo. Dicit eciam quod nativi sui sunt, et quod omnes antecessores sui nativi fuerunt antecessorum suorum et in villenagio suo manentes.'

[37] Note-book of Bracton, pl. 1237: 'dominus Rex non vult se de eis intromittere.'

[38] It occurs in the oldest extant Plea Roll, 6 Ric. I; Rot. Cur. Regis, ed. Palgrave, p. 84: 'Thomas venit et dicit quod ipsa fuit uxorata cuidam Turkillo, qui habuit duos filios qui clamabant libertatem tenementi sui in curia domini Regis … et quod ibi dirationavit eos esse villanos suos, et non defendit disseisinam … Et ipsi Elilda et Ricardus defendunt vilenagium et ponunt se super juratam,' etc.

of this class on the land, and therefore there can be no question about any legal 'ascription' to the soil. Even as to his person, the villain was liable to be punished and put into prison by the lord, if the punishment inflicted did not amount to loss of life or injury to his body[39]. The extant Plea Rolls and other judicial records are full of allusions to all these rights of the lord and disabilities of the villain, and it must be taken into account that only an infinitely small part of the actual cases can have left any trace in such records, as it was almost hopeless to bring them to the notice of the Royal Courts[40].

Identification with Roman slavery.

It is not strange that in view of such disabilities Bracton thought himself entitled to assume equality of condition between the English villain and the Roman slave, and to use the terms *servus*, *villanus*, and *nativus* indiscriminately. The characteristics of slavery are copied by him from Azo's commentary on the Institutes, as material for a description of the English bondmen, and he distinguishes them carefully even from the Roman *adscripticii* or *coloni* of base condition. The villains are protected in some measure against their lord in criminal law; they cannot be slain or maimed at pleasure; but such protection is also afforded to slaves in the later law of the Empire, and in fact it is based in Bracton on the text of the Institutes given by Azo, which in its turn is simply a summary of enactments made by Hadrian and Antonine. The minor law books of the thirteenth century follow Bracton in this identification of villainage with slavery. Although this identification could not but exercise a decisive influence on the theory of the subject, it must be borne in mind that it did not originate in a wanton attempt to bring together in the books dissimilar facts from dissimilar ages. On the contrary, it came into the books because practice had paved the way for it. Bracton was enabled to state it because he did not see much difference between the definitions of Azo and the principles of Common Law, as they had been established by his masters Martin of Pateshull and William Raleigh. He was wrong, as will be shown by-and-by, but certainly he had facts to lean upon, and his theory cannot be dismissed on the ground of his having simply copied it from a foreigner's treatise.

Villains in gross and villains regardant.

Most modern writers on the subject have laid stress upon a difference between *villains regardant* and *villains in gross*, said to be found in the law books[41]. It has been taken to denote two degrees of servitude—the predial dependence of a *colonus* and the personal dependence of a true slave. The villain *regardant* was (it is said) a villain who laboured under disabilities in relation to his lord only, the villain in gross possessed none of the qualities of a freeman. One sub-division would illustrate the debasement of freemen who had lost their own land, while the other would present the survival of ancient slavery.

In opposition to these notions I cannot help thinking that Hallam was quite right in saying: 'In the condition of these (villains regardant and villains in gross), whatever has been said by some writers, I can find no manner of difference; the distinction was merely technical, and affected only the mode of pleading. The term *in gross* is appropriated in our legal language to property held absolutely and without reference to any other. Thus it is applied to rights of advowson or of common, when

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[39] Maitland, Select Pleas of the Crown (Selden Soc. I), pl. 3: 'Quendam nativum suum quem habuit in vinculis eo quod voluit fugere.' Bract. Notebook, pl. 1041: 'Petrus de Herefordia attachiatus fuit ad respondendum R. fil. Th. quare ipse cepit Ricardum et eum imprisonauit et coegit ad redempcionem 1 marce. Et Petrus venit alias et defendit capcionem et imprisonacionem set dicit quod villanus fuit,' etc.It must be noted, however, that in such cases it was difficult to draw the line as to the amount of bodily injury allowed by the law, and therefore the King's courts were much more free to interfere. In the trial quoted on p. 45, note 2, the defendants distinguish carefully between the accusation and the civil suit. They plead 'not guilty' as to the former. And so Bishop Stubbs' conjecture as to the 'rusticus verberatus' in Pipe Roll, 31 Henry I, p. 55 (Constit. Hist. i. 487), seems quite appropriate. The case is a very early one, and may testify to the better condition of the peasantry in the first half of the twelfth century.

[40] As to the actual treatment experienced by the peasants at the hands of their feudal masters, see a picturesque case in Maitland's Select Pleas of the Crown (Selden Soc.), 203.

[41] Stubbs, Constitutional History, ii. 652, 654; Freeman, Norman Conquest, v. 477; Digby, Introduction to the Law of Real Property, 244.

possessed simply, and not as incident to any particular lands. And there can be no doubt that it was used in the same sense for the possession of a villein.' (Middle Ages, iii. 173; cf. note XIV.) Hallam's statement did not carry conviction with it however, and as the question is of considerable importance in itself and its discussion will incidentally help to bring out one of the chief points about villainage, I may be allowed to go into it at some length.

Littleton's view.

Matters would be greatly simplified if the distinction could really be traced through the authorities. In point of fact it turns out to be a late one. We may start from Coke in tracing back its history. His commentary upon Littleton certainly has a passage which shows that he came across opinions implying a difference of status between villains regardant and villains in gross. He speaks of the right of the villain to pursue every kind of action against every person except his lord, and adds: 'there is no diversity herein, whether he be a villain regardant or in gross, although some have said to the contrary[42]' (Co. Lit. 123 b). Littleton himself treats of the terms in several sections, and it is clear that he never takes them to indicate status or define variation of condition. As has been pointed out by Hallam, he uses them only in connexion with a diversity in title, and a consequent diversity in the mode of pleading. If the lord has a deed or a recorded confession to prove a man's bondage, he may implead him as his villain in gross; if the lord has to rely upon prescription, he has to point out the manor to which the party and his ancestors have been regardant, have belonged, time out of mind[43]. As it is a question of title and not of condition, Littleton currently uses the mere 'villain' without any qualification, whereas such a qualification could not be dispensed with, if there had been really two different classes of villains. Last but not least, any thought of a diversity of condition is precluded by the fact, that Littleton assumes the transfer from one sub-division to the other to depend entirely on the free will of the lord (sections 175, 181, 182, 185). But still, although even Littleton does not countenance the classification I am now analysing, it seems to me that some of his remarks may have given origin to the prevalent misconception on the subject.

The 'villain regardant' of the Year Books.

Let us take up the Year Books, which, even in their present state, afford such an inestimable source of information for the history of legal conceptions in the fourteenth and fifteenth centuries[44]. An examination of the reports in the age of the Edwards will show at once that the terms *regardant* and *in gross* are used, or rather come into use, in the fourteenth century as definitions of the mode of pleading in particular cases. They are suggested by difference in title, but they do not coincide with it, and any attempt to make them coincide must certainly lead to misapprehension. I mean this—the term 'villain regardant' applied to a man does not imply that the person in question has any status superior to that of the 'villain in gross,' and it does not imply that the lord has acquired a title to him by some particular mode of acquisition, e.g. by prescription as contrasted with grant or confession; it simply implies that for the purpose of the matter then in hand, for the purpose of the case that is then being argued, the lord is asserting and hoping to prove a title to the villain by relying on a title to a manor with which the villain is or has been connected—title it must be remembered is one

[42] Sir Thomas Smith, The Commonwealth of England, ed. 1609, p. 123, shows that the notion of two classes corresponding to the Roman *servus* and the Roman *adscriptus glebae* had taken root firmly about the middle of the sixteenth century. 'Villeins in gross, as ye would say immediately bond to the person and his heirs.... (The adscripti) were not bond to the person but to the mannor or place, and did follow him who had the mannors, and in our law are called villains regardants (sic), for because they be as members or belonging to the mannor or place. Neither of the one sort nor of the other have we any number in England. And of the first I never knew any in the Realme in my time. Of the second so fewe there bee, that it is not almost worth the speaking, but our law doth acknowledge them in both these sorts.'

[43] Section 182 is not quite consistent with such an exposition, but I do not think there can be any doubt as to the general doctrine.

[44] I need not say that the work done by Mr. Horwood, and especially by Mr. Pike, for the Rolls' Series quite fulfil the requirements of students. But in comparison with it the old Year Books in Rastall's, and even more so in Maynard's edition, appear only the more wretchedly misprinted.

thing, proof of title is another. As the contrast is based on pleading and not on title, one and the same person may be taken and described in one case as a villain regardant to a manor, and in another as a villain in gross. And now for the proof.

The expression 'regardant' never occurs in the pleadings at all, but 'regardant to a manor' is used often. From Edward III's time it is used quite as a matter of course in the formula of the 'exceptio' or special plea of villainage[45]. That is, if the defendant pleaded in bar of an action that the plaintiff was his bondman he generally said, I am not bound to answer A, because he is my villain and I am seised of him as of my villain as regardant to my manor of C. Of course there are other cases when the term is employed, but the plea in bar is by far the most common one and may stand for a test. This manner of pleading is only coming gradually into use in the fourteenth century, and we actually see how it is taking shape and spreading. As a rule the Year Books of Edward I's time have not got it. The defendant puts in his plea unqualified. 'He ought not to be answered because he is our villain' (Y.B. 21/22 Edward I, p. 166, ed. Horwood). There is a case in 1313 when a preliminary skirmish between the counsel on either side took place as to the sufficiency of the defendant's plea in bar, the plaintiff contending that it was not precise enough. Here, if any where, we should expect the term '*regardant*,' but it is not forthcoming[46]. What is more, and what ought to have prevented any mistake, the official records of trials on the Plea Rolls up to Edward II always use the plain assertion, 'villanus … et tenet in villenagio[47].' The practice of naming the manor to which a villain belonged begins however to come in during the reign of Edward II, and the terminology is by no means settled at the outset; expressions are often used as equivalent to 'regardant' which could hardly have misled later antiquaries as to the meaning of the qualification[48]. In a case of 1322, for instance, we have 'within the manor' where we should expect to find 'regardant to the manor[49].' This would be very nearly equivalent to the Latin formula adopted by the Plea Rolls, which is simply *ut de manerio*[50]. Every now and then cases occur which gradually settle the terminology, because the weight of legal argumentation in them is made to turn on the fact that a particular person was connected with a particular manor and not with another. A case from 1317 is well in point. B.P. the defendant excepts against the plaintiff T.A. on the ground of villainage (*qil est nostre vileyn*, and nothing else). The plaintiff replies that he was enfranchised by being suffered to plead in an assize of mort d'ancestor against B.P.'s grandmother. By this the

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[45] For instance, Liber Assisarum, ann. 44, pl. 4 (f. 283): 'Quil fuit son villein et il seisi de luy come de son villein come regardant a son maneir de B. en la Counte de Dorset.'

[46] Y.B. Hil. 5 Edw. II: 'Iohan de Rose port son [ne] vexes vers Labbe de Seint Bennet de Holme, et il counta qil luy travaille, etc., e luy demande.' *Migg.*: 'defent tort et force, ou et quant il devera et dit qil fuist le vilein Labbe, per qi il ne deveroit estre resceve.' *Devom.*: 'il covient qe vous disez plus qe vous estes seisi, ut supra,' etc. *Migg.*: 'il est nostre vileyn, et nous seisi de luy come de nostre vileyn.' *Ber.*: 'Coment seisi come,' etc.? *Migg.*: 'de luy et de ces auncestres come de nos vileynes, en fesant de luy nostre provost en prenant de luy rechate de char et de saunk et redemption pur fille et fitz marier de luy et de ces auncestres et a tailler haut et bas a nostre volente, prest,' etc. (Les reports des cases del Roy Edward le II. London, 1678; f. 157.)

[47] I do not think it ever came into any one's mind to look at the Plea Rolls in this matter. Even Hargrave, when preparing his famous argument in Somersett's case, carried his search no further than the Year Books then in print. And in consequence he just missed the true solution. He says (Howell's State Trials, xx. 42, 43),'As to the villeins in gross the cases relative to them are very few; and I am inclined to think that there never was any great number of them in England.... However, after a long search, I do find places in the Year Books where the form of alledging villenage in gross is expressed, not in full terms, but in a general way; and in all the cases I have yet seen, the villenage is alledged in the ancestors of the person against whom it was pleaded.' And he quotes 1 Edw. II, 4; 5 Edw. II, 157 (corr. for 15); 7 Edw. II, 242, and 11 Edw. II, 344. But all these cases are of Edward II's time, and instead of being exceptional give the normal form of pleading as it was used up to the second quarter of the fourteenth century. They looked exceptional to Hargrave only because he restricted his search to the later Year Books, and did not take up the Plea Rolls. By admitting the cases quoted to indicate villainage in gross, he in fact admitted that there were only villains in gross before 1350 or thereabouts, or rather that all villains were alike before this time, and no such thing as the difference between *in gross* and *regardant* existed. I give in App. I the report of the interesting case quoted from 1 Edw. II.

[48] Y.B. 32/33 Edw. I (Horwood), p. 57: 'Quant un home est seisi de son vilein, issi qil est reseant dans son vilenage.' Fitzherbert, Abr. Vill. 3 (39 Edw. III): '… villeins sunt appendant as maners qe sount auncien demesne.' On the other hand, 'regardant' is used quite independently of villainage. Y.B. 12/13 Edw. III (Pike), p. 133: 'come services regardaunts al manoir de H.'

[49] Y.B. Hil. 14 Edw. II, f. 417: 'R. est bailli … del manoir de Clifton … deins quel manoir cesti J. est villein.'

[50] See App. I and II.

defendant's counsel is driven to maintain that his client's right against T.A. descended not from his grandmother but from his grandfather, who was seised of the manor of H. to which T.A. belonged as a villain[51]. The connexion with the manor is adduced to show from what quarter the right to the villain had descended, and, of course, implies nothing as to any peculiarity of this villain's status, or as to the kind of title, the mode of acquiring rights, upon which the lord relies—it was ground common to both parties that if the lord had any rights at all he acquired them by inheritance.

Prior of the Hospitalers *v.* Thomas Barentyn and Ralph Crips.

Another case seems even more interesting. It dates from 1355, that is from a time when the usual terminology had already become fixed. It arose under that celebrated Statute of Labourers which played such a prominent part in the social history of the fourteenth century. One of the difficulties in working the statute came from the fact that it had to recognise two different sets of relations between the employer and the workman. The statute dealt with the contract between master and servant, but it did not do away with the dependence of the villain on the lord, and in case of conflict it gave precedence to this latter claim; a lord had the right to withdraw his villain from a stranger's service. Such cross influences could not but occasion a great deal of confusion, and our case gives a good instance of it. Thomas Barentyn has reclaimed Ralph Crips from the service of the Prior of the Hospitalers, and the employer sues in consequence both his former servant and Barentyn. This last answers, that the servant in question is his villain regardant to the manor of C. The plaintiff's counsel maintains that he could not have been regardant to the manor, as he was going about at large at his free will and as a free man; for this reason A. the former owner of the manor was never seised of him, and not being seised could not transfer the seisin to the present owner, although he transferred the manor. For the defendant it is pleaded, that going about freely is no enfranchisement, that by the gift of the manor every right connected with the manor was also conferred and that consequently the new lord could at any moment lay hands on his man, as the former lord could have done in his time. Ultimately the plaintiff offers to join issue on the question, whether the servant had been a villain regardant to the manor of C. or not. The defendant asserts, rather late in the day, that even if the person in question was not a villain regardant to the manor of C. the mere fact of his being a villain in gross would entitle his lord to call him away. This attempt to start on a new line is not allowed by the Court because the claim had originally been traversed on the ground of the connexion with the manor[52].

The peculiarity of the case is that a third person has an interest to prove that the man claimed as villain had been as a free man. Usually there were but two parties in the contest about status; the lord pulling one way and the person claimed pulling the other way, but, through the influence of the Statute of Labourers, in our case lord and labourer were at one against a third party, the labourer's employer. The acknowledgment of villainage by the servant did not settle the question, because, though binding for the future, it was not sufficient to show that villainage had existed in the past, that is at the time when the contract of hire and service was broken through the interference of the lord. Everything depended on the settlement of one question—was the lord seised at the time, or not? Both parties agree that the lord was not actually seised of the person, both agree that he was seised of the manor, and both suppose that if the person had as a matter of fact been attached to the manor it would have amounted to a seisin of the person. And so the contention is shifted to this point: can a man be claimed through the medium of a manor, if he has not been actually living, working and serving in it? The court assumes the possibility, and so the parties appeal to the country to decide whether in point of fact Ralph Crips the shepherd had been in legal if not in actual connexion with the manor, i.e. could be traced to it personally or through his relatives.

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[51] Y.B. Trin. 9 Edw. II, f. 294: 'Le manoir de H. fuit en ascun temps en la seisine Hubert nostre ael, a quel manoir cest vileyn est regardant.'

[52] Y.B. Trin. 29 Edw. III, f. 41. For the report of this case and the corresponding entry in the Common Pleas Roll, see Appendix II.

Results as to 'villain regardant' and 'villain in gross.'

The case is interesting in many ways. It shows that the same man could be according to the point of view considered both as a villain in regard to a manor, and as a villain in gross. The relative character of the classification is thus illustrated as well as its importance for practical purposes. The transmission of a manor is taken to include the persons engaged in the cultivation of its soil, and even those whose ancestors have been engaged in such cultivation, and who have no special plea for severing the connexion.

As to the outcome of the whole inquiry, we may, it seems to me, safely establish the following points: 1. The terms 'regardant' and 'in gross' have nothing to do with a legal distinction of status. 2. They come up in connexion with the modes of proof and pleading during the fourteenth century. 3. They may apply to the same person from different points of view. 4. 'Villain in gross' means a villain without further qualification; 'villain regardant to a manor' means villain by reference to a manor. 5. The connexion with a manor, though only a matter of fact and not binding the lord in any way, might yet be legally serviceable to him, as a means of establishing and proving his rights over the person he claimed.

The astrier.

I need hardly mention, after what has been said, that there is no such thing as this distinction in the thirteenth century law books. I must not omit, however, to refer to one expression which may be taken to stand in the place of the later 'villain regardant to a manor.' Britton (ii. 55) gives the formula of the special plea of villainage to the assize of mort d'ancestor in the following words: 'Ou il poie dire qe il est soen vileyn et soen astrier et demourrant en son villenage.' There can be no doubt that residence on the lord's land is meant, and the term *astrier* leads even further, it implies residence at a particular hearth or in a particular house. Fleta gives the assize of novel disseisin to those who have been a long time away from their villain hearth[53] ('extra astrum suum villanum,' p. 217). If the term 'astrier' were restricted to villains it would have proved a great deal more than the 'villain regardant' usually relied upon. But it is of very wide application. Britton uses it of free men entitled to rights of common by reason of tenements they hold in a township (i. 392). Bracton speaks of the case of a nephew coming into an inheritance in preference to the uncle because he had been living at the same hearth or in the same hall (in *atrio* or *astro*) with the former owner[54], and in such or a similar sense the word appears to have been usually employed by lawyers[55]. On the other hand, if we look in Bracton's treatise for parallel passages to those quoted from the Fleta and Britton about the villain astrier, we find only a reference to the fact that the person in question was a serf and holding in villainage and under the sway of a lord[56], and so there is nothing to denote special condition in the *astrier*. When the term occurs in connexion with villainage it serves to show that a person was not only a bondman born, but actually living in the power of his lord, and not in a state of liberty. The allusion to the hearth cannot possibly mean that the man sits in his own homestead, because only a few of the villains could have been holders of separate homesteads, and so it must mean that he was sitting in a homestead belonging to his lord, which is quite in keeping with the application of the term in the case of inheritance.

The territorial hold of villainage.

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[53] Cf. Annals of Dunstaple, Ann. Mon. iii. 371: 'Quia astrarius eius fuit,' in the sense of a person living on one's land.

[54] Bracton, f. 267, b.

[55] Bract. Note-book, pl. 230, 951, 988. Cf. Spelman, Gloss. v. astrarius. Kentish Custumal, Statutes of the Realm, i. 224. Fleta has it once in the sense of the Anglo-Saxon heorð-fæst, i. cap. 47, § 10 (f. 62).

[56] Bracton, f. 190.

The facts we have been examining certainly suppose that in the villains we have chiefly to do with peasants tilling the earth and dependent on manorial organisation. They disclose the working of one element which is not to be simply deduced from the idea of personal dependence.

It may be called subjection to territorial power. The possession of a manor carries the possession of cultivators with it. It is always important to decide whether a bondman is in the seisin of his lord or not, and the chief means to show it is to trace his connexion with the territorial lordship. The interposition of the manor in the relation between master and man is, of course, a striking feature and it gives a very characteristic turn to medieval servitude. But if it is not consistent with the general theory laid down in the thirteenth century law books, it does not lead to anything like the Roman *colonatus*. The serf is not placed on a particular plot of land to do definite services under the protection of the State. He may be shifted from one plot within the jurisdiction of his lord to another, from one area of jurisdiction to another, from rural labour to industrial work or house work, from one set of customs and services to another. He is not protected by his predial connexion against his lord, and in fact such predial connexion is utilised to hold and bind him to his lord. We may say, that the unfree peasant of English feudalism was legally a personal dependant, but that his personal dependence was enforced through territorial lordship.

CHAPTER II.
RIGHTS AND DISABILITIES OF THE VILLAIN

Legal theory as we have seen endeavoured to bring the general conception of villainage under the principles of the Roman law of slavery, and important features in the practice of the common law went far to support it in so doing. On the other hand, even the general legal theory discloses the presence of an element quite foreign to the Roman conception. If we proceed from principles to their application in detail, we at once find, that in most cases the broad rules laid down on the subject do not fit all the particular aspects of villainage. These require quite different assumptions for their explanation, and the whole doctrine turns out to be very complex, and to have been put together out of elements which do not work well together.

Villainage by birth.

We meet discrepancies and confusion at the very threshold in the treatment of the modes in which the villain status has its origin. The most common way of becoming a villain was to be born to this estate, and it seems that we ought to find very definite rules as to this case. In truth, the doctrine was changing. Glanville (v. 6) tried in a way to conform to the Roman rule of the child following the condition of the mother, but it could not be made to work in England, and ever since Bracton, both common law and jurisprudence reject it. At the close of the Middle Ages it was held that if born in wedlock the child took after his father[57], and that a bastard was to be accepted as *filius nullius* and presumed free[58]. Bracton is more intricate; the bastard follows the mother, the legitimate child follows the father; and there is one exception, in this way, that the legitimate child of a free man and a nief born in villainage takes after the mother[59]. It is not difficult to see why the Roman rule did not fit; it was too plain for a state of things which had to be considered from three different sides[60]. The Roman lawyer merely looked to the question of status and decided it on the ground of material demonstrability of origin[61], if such an expression may be used. The Medieval lawyer had the Christian sanctification of marriage to reckon with, and so the one old rule had to be broken up into two rules—one applicable to legitimate children, the other to bastards. In case of *bastardy* the tendency was decidedly in favour of retaining the Roman rule, equally suiting animals and slaves, and the later theory embodied in Littleton belongs already to the development of modern ideas in favour of liberty[62]. In case of *legitimacy* the recognition of marriage led to the recognition of the family and indirectly to the closer connexion with the father as the head of the family. In addition to this a third element comes in, which may be called properly feudal. The action of the father-rule is modified by the influence of territorial subjection. The marriage of a free man with a nief may be considered from a special point of view, if, as the feudal phraseology goes, he enters to her into her villainage[63]. By this fact the free man puts his child under the sway of the lord, to whose villainage

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[57] Littleton, sect. 187. Cf. Fortescue, 'De laudibus legum Angliae,' c. 42.

[58] Littleton, sect. 188.

[59] Bracton, ff. 5, 193, b.

[60] I need not say that there were very notable variations in the history of the Roman rule itself (cf. for instance, Puchta, Institutionen, § 211), but these do not concern us, as we are taking the Roman doctrine as broadly as it was taken by medieval lawyers.

[61] Mater certa est. Gai. Inst. i. 82.

[62] See Fitz. Abr. Villenage, pl. 5 (43 Edw. III): 'Ou il allege bastardise pur ceo qe si son auncestor fuit bastard il ne puit estre villein, sinon par connusance.' There was a special reason for turning the tables in favour of bastardy, which is hinted at in this case. The bastard's parents could not be produced against a bastard. He had no father, and his mother would be no proof against him because she was a woman [Fitz. Abr. Vill. 37 (13 Edw. I), Par ce qe la feme ne puit estre admise pur prove par lour fraylte et ausi cest qi est demaunde est pluiz digne person qe un feme]. It followed strictly that he could be a villain by confession, but not by birth. The fact is a good instance of the insoluble contradictions in which feudal law sometimes involved itself.

[63] Bracton, f. 5: 'Servus ratione qui se copulaverit villanae in villenagio constitutae.' Bract. Note-book, 1839: 'Juratores dicunt quod

the mother belongs. It is not the character of the tenement itself which is important in this case, but the fact of subjection to a territorial lord, whose interest it is to retain a dependant's progeny in a state of dependency. The whole system is historically important, because it illustrates the working of one of the chief ingredients of villainage, an ingredient entirely absent from ancient slavery; whereas medieval villainage depends primarily on subjection to the territorial power of the lord. Once more we are shown the practical importance of the manorial system in fashioning the state of the peasantry. Generally a villain must be claimed with reference to a manor, in connexion with an unfree hearth; he is born in a nest[64], which makes him a bondman. The strict legal notion has to be modified to meet the emergency, and villainage, instead of indicating complete personal subjection, comes to mean subjection to a territorial lord.

This same territorial element not only influences the status of the issue of a marriage, it also affects the status of the parties to a marriage, when those parties are of unequal condition. Most notable is the case of the free wife of a villain husband lapsing into servitude, when she enters the villain tenement of her consort; her servitude endures as long as her husband is in the lord's power, as long as he is alive and not enfranchised. The judicial practice of the thirteenth century gives a great number of cases where the tribunals refuse to vindicate the rights of women entangled in villainage by a mesalliance[65]. Such subjection is not absolute, however. The courts make a distinction between acquiring possession and retaining it. The same woman who will be refused a portion of her father's inheritance because she has married a serf, has the assize of novel disseisin against any person trying to oust her from a tenement of which she had been seised before her marriage[66]. The conditional disabilities of the free woman are not directly determined by the holding which she has entered, but by her marital subordination to an unfree husband ('sub virga,' Bract. Note-book, pl. 1685). For this reason the position of a free husband towards the villainage of his wife a nief is not exactly parallel. He is only subject to the general rules as to free men holding in villainage[67]. In any case, however, the instances which we have been discussing afford good illustrations of the fact, that villainage by no means flows from the simple source of personal subjection; it is largely influenced by the Christian organisation of the family and by the feudal mixture of rights of property and sovereignty embodied in the manorial system.

Prescription.

There are two other ways of becoming a villain besides being born to the condition; the acknowledgment of unfree status in a court of record, and prescription. We need not speak of the first, as it does not present any particulars of interest from a historical point of view. As to prescription, there is a very characteristic vacillation in our sources. In pleadings of Edward III's time its possibility

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predictus Aluredus habuit duos fratres Hugonem [medium] medio tempore natum et Gilibertum postnatum qui nunc petit, set Hugo cepit quamdam terram in uillenagio et duxit uxorem [uillanam] et in uillenagio illo procreauit quemdam filium qui ad huc superest.... Et bene dicunt quod … iste Gilibertus propinquior heres eius est, ea racione quod filius Hugonis genitus fuit in uillenagio.'

[64] Y.B. 30/31 Edw. I, p. 167 sqq.: 'Usage de Cornwall est cecy qe la ou neyfe deyt estre marier hors de maner ou ele est reseant, qe ele trovera seurte … de revenir a son *ny* ov ses chateux apres la mort de son baroun.' Bracton, f. 26, 'Quasi avis in nido.'

[65] Bract. Note-book, pl. 702: 'Nota quod libera femina maritata uillano non recuperat partem alicuius hereditatis quamdiu uillanus uixerit.'

[66] Bract. Note-book, pl. 1837: 'Nota quod mulier que est libera uel in statu libero saltem ad minus non debet disseisiri quin recuperare possit per assisam quamuis nupta fuerit uillano set hereditatem petere non poterit.' Bract. Note-book, pl. 1010: 'Et uillani mori poterunt per quod predicte sorores petere possint ius suum.' Fitzherb. Villen. 27 (P. 7 Edw. II.): 'Les femmes sont sans recouverie *vers le seignior* uiuant leur barons pur ce que ils sont villens.' Cf. Bracton, f. 202.

[67] Another instance of the influence of marriage on the condition of contracting parties is afforded by the enfranchisement of the wife in certain cases. The common law was, however, by no means settled as to this point. Y.B. 30/31 Edw. I, p. 167 sqq.: 'La ou le seygnur espouse sa neyfe, si est enfranchi pur toz jurs; secus est la ou un homme estrange ly espose, qe donk nest ele enfraunchi si non vivant son baroun, et post mortem viri redit ad pristinum statum.' Fitzherb. Vill. 21 (P. 33 Edw. III): 'Si home espouse femme qe est son villein el est franke durant les espousailles. Mes quand son baron est mort el est in statu quo prius, et issint el puis estre villein a son fils demesne.' It is quite likely that gentlemen sometimes got into a state of moral bondage to their own bondwomen, and were even led to marriage in a few instances, but the law had not much to feed upon in this direction, I imagine.

is admitted, and it is pointed out, that it is a good plea if the person claimed by prescription shows that his father and grandfather[68] were strangers.

There is a curious explanatory gloss, in a Cambridge MS. of Bracton, which seems to go back at least to the beginning of the fourteenth century, and it maintains that free stock doing villain service lapses into villainage in the fifth generation only[69]. On the other hand, Britton flatly denies the possibility of such a thing; according to him no length of time can render free men villains or make villains free men. Moreover he gives a supposed case (possibly based on an actual trial), in which a person claimed as a villain is made to go back to the sixth generation to establish his freedom.[70] It does not seem likely that people could often vindicate their freedom by such elaborate argument, but the legal assumption expounded in Britton deserves full attention. It is only a consequence of the general view, that neither the holding nor the services ought to have any influence on the status of a man, and in so far it seems legally correct. But it is easy to see how difficult it must have been to keep up these nice distinctions in practice, how difficult for those who for generations had been placed in the same material position with serfs to maintain personal freedom.[71] For both views, though absolutely opposed to each other, are in a sense equally true: the one giving the logical development of a fundamental rule of the law, the other testifying to the facts. And so we have one more general observation to make as to the legal aspect of villainage. Even in the definition of its fundamental principles we see notable discrepancies and vacillations, which are the result of the conflict between logical requirements and fluctuating facts.

Criminal law in its relation to villainage.

The original unity of purpose and firmness of distinction are even more broken up when we look at the criminal and the police law where they touch villainage. In the criminal law of the feudal epoch there is hardly any distinction between free men and villains. In point of amercements there is the well-known difference as to the 'contenement' of a free landholder, a merchant and a villain, but this difference is prompted not by privilege but by the diversity of occupations. The Dialogus de Scaccario shows that villains being reputed English are in a lower position than free men as regards the presumption of Englishry and the payment of the murder-fine,[72] but this feature seems to have become obliterated in the thirteenth century. In some cases corporal punishment may have differed according to the rank of the culprit, and the formalities of ordeal were certainly different[73]. The main fact remains, that both villains and free men were alike able to prosecute anybody by way of 'appeal'[74]

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[68] Fitzherbert, Vill. 24 (H. 50 Edw. III; P. 40 Edw. III, 17): 'Si home demurt en terre tenue en villenage de temps dount, etc., il sera villen, et est bon prescripcion et encountre tel prescripcion est bon ple a dire qe son pere ou ayle fuit adventiffe,' etc. I suppose *ayle* here to be a simple error for *ayl* or *ael*, grandfather.

[69] Cambridge Univ., Dd. vij. 6, f. 231: 'Nota de tempore quo servus dicere poterit quia fecerit consuetudines villanas racione tenementi non racione persone. Et sciendum, quod quamdiu servus poterit verificare stipitem suam liberam non dicitur nativus, set quam citius dominus dicere poterit villicus noster est ex auo et tritauo, tunc primo desinit gaudere replicacione omnimoda et privilegio libertatis racione stipitis, ut si A. primo ingressus villenagium tenuerit de F. per villana servitia, deinde B. filius A., deinde C. filius B., deinde D. filius C., et sic tenuerint in villenagium de gradu in gradum usque ad quartum gradum de F. et heredibus suis, ille uillanus inuentus in quinto gradu descendente natiuus dicitur.' I am indebted for this passage to the kindness of Prof. Maitland.

[70] Britton, i. 196, 206.

[71] Hale, Pleas of the Crown (ed. 1736), ii. 298, gives an interesting record from Edward I's reign, which shows that even the general theory was doubtful.

[72] Dial. de Scacc. i. 10. p. 193: 'Ea propter pene quicumque sic hodie occisus reperitur, ut murdrum punitur, exceptis his quibus certa sunt ut diximus servilis condicionis indicia.' On the other hand the Dialogus lays stress on the fact, that if a villain's chattels get confiscated they go to the king and not to the lord (ii. 10. p. 222), but this is regarded as a breach of a general principle.

[73] Glanville, xiv. 1: 'Per ferrum callidum si fuerit homo liber, per aquam si fuerit rusticus.'

[74] Lighter offences committed by the lord could not give rise to prosecution, but the *persona standi in iudicio* was admitted in a general way even in this case. A curious illustration of the different footing of villains in civil and criminal cases is afforded by a trial of Richard I's time. Richard of Waure brings an appeal against his man and reeve, Robert Thistleful, for conspiring with his enemies against his person. He offers to prove it against him, 'ut dominus, vel ut homo maimatus, sicut curia consideraverit.' Reeves were mostly villains, and the duty of serving as a reeve was considered as a characteristic of base condition. The lord probably goes to the King's court because he wants his man subjected to more severe punishment than he could inflict on him by his own power.

for injury to their life, honour, and even property[75], and equally liable to be punished and prosecuted for offences of any kind. Their equal right was completely recognized by the criminal law, and as a natural sequence of this, the pleas of the crown generally omit to take any notice of the status of parties connected with them. One may read through Mr. Maitland's collection of Pleas of the Crown edited for the Selden Society, or through his book of Gloucestershire pleas, without coming across any but exceptional and quite accidental mentions of villainage. In fact were we to form our view of the condition of England exclusively on the material afforded by such documents, we might well believe that the whole class was all but an extinct one. One glance at Assize Rolls or at Cartularies would teach us better. Still the silence of the Corona Rolls is most eloquent. It shows convincingly that the distinction hardly influenced criminal law at all.

Police in relation to villainage.

It is curious that, as regards police, villains are grouped under an institution which, even by its name, according to the then accepted etymology, was essentially a free institution. The system of frank pledge (*plegium liberale*), which should have included every one 'worthy of his *were* and his *wite*,' is, as a matter of fact, a system which all through the feudal period is chiefly composed of villains[76]. Free men possessed of land are not obliged to join the tithing because they are amenable to law which has a direct hold on their land[77], and so the great mass of free men appear to be outside these arrangements, for the police representation of the free, or, putting it the other way, feudal serfs actually seem to represent the bulk of free society. The thirteenth-century arrangements do not afford a clue to such paradoxes, and one has to look for explanation to the *history* of the classes.

The frankpledge system is a most conspicuous link between both sections of society in this way also, that it directly connects the subjugated population with the hundred court, which is the starting-point of free judicial organisation. Twice a year the whole of this population, with very few exceptions, has to meet in the hundred in order to verify the working of the tithings. Besides this, the class of villains must appear by representatives in the ordinary tribunals of the hundred and the shire: the reeve and the four men, mostly unfree men[78], with their important duties in the administration of justice, serve as a counterpoise to the exclusive employment of 'liberi et legales homines' on juries.

Civil disability of a villain as to his lord.

And now I come to the most intricate and important part of the subject—to the civil rights and disabilities of the villain. After what has been said of the villain in other respects, one may be prepared to find that his disabilities were by no means so complete as the strict operation of general rules would have required. The villain was able in many cases to do valid civil acts, to acquire property and to defend it in his own name. It is true that, both in theory and in practice, it was held that whatever was acquired by the bondman was acquired by the lord. The bondman could not buy anything but with

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(Rot. Cur. Regis Ricardi, 60.)

[75] The lord had power over their property, but against everybody else they were protected by the criminal law.

[76] Sometimes the system is used so as to enforce servitude. See Court Rolls of Ramsey Abbey. Augmentation Court Rolls, Edw. I, Portf. 34, No. 46, m. 1 d. (Aylington): 'Adhuc dicunt quod Johannes filius Ricardi Dunning est tannator et manet apud Heyham, set dat per annum pro recognicione duos capones. Et quia potens est et habet multa bona, preceptum fuit Hugoni Achard et eius decennae ad ultimum visum ad habendum ipsum ad istam curiam, et non habuit. Ideo ipse et decenna sua in misericordia.' (This case is now being printed in Selden Soc. vol. ii. p. 64.)

[77] Bracton, 124 b: 'Quia omnis homo siue liber siue seruus, aut est aut debet esse in franco plegio aut de alicuius manupastu, nisi sit aliquis itinerans de loco in locum, qui non plus se teneat ad unum quam ad alium, vel quid habeat quod sufficiat pro franco plegio, sicut dignitatem vel ordinem vel liberum tenementum, vel in civitatem rem immobilem.' Nichols, Britton, i. 181, gives a note from Cambr. MS. Dd. vii. 6, to the effect that 'Villeins and naifs ought not to be in tithings, secundum quosdam.' This is certainly a misunderstanding, but it can hardly be accounted for either by the enfranchisement of the peasant or the decay of the frank-pledge. I think the annotator may have seen the passages in Leg. Cnuti or Leg. Henrici I, which speak about free men joining the tithings, or speculated about the meaning of 'plegium liberale.' There could be no thought of excluding the villains in practice during the feudal period. As to the allusion in the Mirror of Justices, I shall refer to it in Appendix III.

[78] See below, Essay I. chap. vi.

his lord's money, as he had no money or chattels of his own[79]. But the working of these rules was limited by the medieval doctrine of possession. Land or goods acquired by the serf do not *eo ipso* lapse into his lord's possession, but only if the latter has taken them into his hand[80]. If the lord has not done so for any reason, for want of time, or carelessness, or because he did not choose to do so, the bondman is as good as the owner in respect of third persons. He can give away[81] or otherwise alienate land or chattels, he has the assize of novel disseisin to defend the land, and leaves the assize of mort d'ancestor to his heirs. In this case it would be no good plea to object that the plaintiff is a villain. In fact this objection can be raised by a third person only with the addition that, as villain, the plaintiff does not hold in his own name, but in the name of his lord[82]. A third person cannot except against a plaintiff merely on the ground of his personal status. As to third persons, a villain is said to be free and capable to sue all actions[83]. This of course does not mean that he has any action for recovering or defending his possession of the tenements which he holds *in villainage*, but this disability is no consequence of his servile blood, for he shares it with the free man who holds in villainage; it is a consequence of the doctrine that the possession of the tenant in villainage is in law the possession of him who has the freehold. It may be convenient for a villain as defendant to shelter himself behind the authority of his lord[84], and it was difficult to prevent him from doing so, although some attempts were made by the courts even in this case to distinguish whether a person had been in possession as a dependant or not. But there was absolutely nothing to prevent a villain from acting in every respect

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[79] Bract. Note-book, pl. 1256: 'Et Ricardus dicit quod assisa non debet inde fieri quia predictus Iohannes dedit terram illam cuidam uillano ipsius Ricardi, et ipse uillanus reddidit terram illam domino suo sicut emptam catallis domini sui, et quod ita ingressum habuit per uillanum illum in terram illam ponit se super iuratam.' Liber Assisarum, ann. 41. pl. 4. f. 252, shows that the statute *de religiosis* could be evaded by the lord entering into his villain's acquest. 'Levesque d'Exester port un Assise de no. diss. vers le tenaunt et *Persey* pur Leuesque en euidence dit, que un A. que fuit villeine le Evesque come de droit de sa Eglise purchase les tenements a luy et ses heyres et morust seisie, apres que mort entra B. come fitz et heire, sur que possession pur cause de villeinage entra Leuesque.—*Wich.* Home de religion ne puit pas recoverer per assise terre si title de droit ne soit troue en luy, et ou le title que est trouue en Leuesque est pur cause de la purchace de son villein, en quel cas Leuesque ne fuit compellable de entre sil nust vola mes puit auer eu ses seruices, et le statute voit Quod terrae et tenementa ad manum mortuam nullo modo deueniant, per que il semble que nous ne possomus pas doner iudgement pur Leuesque en ceo cas. *Sanke*: de son villein ne puit il pas leuer ses seruices, ne accepter lesse par sa maine, car a ceo que ieo entend par acceptacion de homage ou de fealty per sa maine il serra enfraunchi, per quey necessite luy arcte dentre, et le statut nestoit pas fait mes de restreindre purchaus a faire de nouel, et non pas a defaire ceo qe fuit launcien droit dez eglises. Et sur ceo fuerent aiournes en common bank, et illonque le judgement done pur Leuesque sans difficultie,' etc. (See also the report of the same case in Y.B. Mich. 41 Edw. III, pl. 8. f. 21.)

[80] Bracton, f. 25: 'Si … stipulatus sit servus sibi ipsi, et non domino, id non statim acquiritur domino, quamuis illud (corr. ille) sit sub voluntate et potestate sua, antequam dominus apprehensus fuerit possessionem. Quod quidem impune facere poterit, si voluerit, propter exceptionem,' etc. Fitz. Abr. Vill. pl. 22 (Pasch. 35 Edw. III): 'Si le villen le roy purchase biens ou chatteux le properte de eux est en le roy sauns seisier. Mes auter est de auter home, etc. Mes sil purchas terre le roy doit seisier, etc. car *Thorp.* dit que terre demurt terre tout temps, mes biens come boefs ou vache puit estre mange.'

[81] Bracton, f. 25 b: 'Sic constat, quod qui sub potestate alterius fuerit, dare poterit. Sed qualiter hoc cum ipse, qui ab aliis possidetur, nihil possidere possit? Ergo videtur quod nihil dare possit, quia non potest quis dare quod non habet, et nisi fuerit in possessione rei dandae. Respondeo, dare potest qui seisinam habet qualemcunque, et servus dare potest,' etc. In case of an execution for debt due to the king the goods of the villain were to be taken only when the lord's goods were exhausted. Dialog. de Scacc. ii. 14. p. 229.

[82] Bracton, f. 190: 'Et non competit alicui hujusmodi exceptio de villenagio, praeterquam vero domino, nisi utrumque probet, scilicet quod villanus sit et teneat in villenagio, cum per hoc sequatur, quod ad ipsum non pertineat querela sive assisa, sed ad verum dominum, et ideo cadit assisa quantum ad personam suam et non quantum ad personam domini.' Cf. Britton, i. 325.

[83] Britton, i. 199; Littleton, 189; Bract. Note-book, pl. 1025: 'Assisa venit recognitura utrum una uirgata terre cum pertinenciis in R. sit libera elemosina pertinens ad ecclesiam Magistri Iohannis de R. de R. an laicum feodum Gaufridi Beieudehe. Qui venit et dicit quod non debet inde assisa fieri quia antecessores sui *feoffati fuerunt a conquestu Anglie* ita quod tenerent de ecclesia illa et redderent ei per annum x. solidos.... Iuratores dicunt quod terra illa est feodum eiusdem ecclesie ita quod idem G. et antecessores sui semper tenuerunt de ecclesia.... Et dicunt quod idem Gaufridus est natiuus Comitis Warenne et de eo tenet in uilenagio aliud tenementum. Postea uenit Gaufridus et cognouit quod est uillanus Comitis Warenne. Postea concordati sunt,' etc.

[84] Example, Fitz. Abr. Villen. 16. The proper reply to such a plea is shown by Bract. Note-book, pl. 1833: 'Et Iohannes dicit quod hoc ei nocere non debet, quia quicquid idem dicat de uillenagio, ipsemet ut liber homo sine contradiccione domini sui terram illam dedit Iohanni del Frid patri istius Iohannis pro homagio et seruicio suo … Consideratum est quod predictus Iohannes recuperauit seisinam suam, et Richerus in misericordia.' Liber Assis. ann. 43. pl. 1. f. 265 gives the contrary decision: 'Lassise agarde et prise, per quel il fuit troue quil [le defendant] fuit villein al Counte.... mes troue fuit ouster que le Counte ne fut unques seisie de la terre, ne onques claima riens en la terre, et troue fuit que le plaintif fuit seisie et disseisie. Et sur ceo, le quel le plaintif recouerer, ou que le brief abateroit sont ajornes deuant eux mesmes a Westminster. A que jour per opinion de la Court le briefe abatu, per que le plaintif fuit non sue,' etc.

like a free man if he was so minded and was not interrupted by his lord. There was no need of any accessory action to make his acts complete and legal[85]. Again we come to an anomaly: the slave is free against everybody but his lord.

Convention with the lord.

Even against his lord the bondman had some standing ground for a civil action. It has rightly been maintained, that he could implead his master in consequence of an agreement with him. The assertion is not quite easy to prove however, and has been put forward too sweepingly[86]. At first sight it seems even that the old law books, i.e. those of Bracton and his followers, teach the opposite doctrine. They deal almost exclusively with the case of a feoffment made by the lord to a villain and his heirs, and give the feoffee an action only on the ground of implied manumission. The feoffor enfranchises his serf indirectly, even if he does not say so in as many words, because he has spoken of the feoffee's heirs, and the villain has no other heirs besides the lord[87]. The action eventually proceeds in this case, because it is brought not by a serf but by a freed man. One difficult passage in Bracton points another way; it is printed in a foot-note[88]. There can be no doubt, that in it Bracton is speaking of a covenant made by the lord not with a free man or a freed man, but with a villain. This comes out strongly when it is said, that the lord, and not the villain, has the assize against intruders, and when the author puts the main question—is the feoffor bound to hold the covenant or not? The whole drift of the quotation can be understood only on the fundamental assumption that we have lord and villain before us. But there are four words which militate against this obvious explanation; the words '*sibi et heredibus suis*.' We know what their meaning is—they imply enfranchisement and a freehold estate of inheritance. They involve a hopeless contradiction to the doctrine previously stated, a doctrine which might be further supported by references to Britton, Fleta and Bracton himself[89]. In short, if we accept them, we can hardly get out of confusion. Were our text of Bracton much more definitely and satisfactorily settled than it is[90], one would still feel tempted to strike them out; as it is we have a text studded with interpolations and errors, and it seems quite certain that 'sibi et heredibus suis' has got into it simply because the compositor of Tottell's edition repeated it from the conclusion of the sentence immediately preceding, and so mixed up two cases, which were to be distinguished by this very qualification. The four words are missing in all the MSS. of the British Museum, the Bodleian and the Cambridge University Library[91]. I have no doubt that further verification will only confirm my opinion. On my assumption Bracton clearly distinguishes between two possibilities. In one case the deed simply binds the lord as to a particular person, in the other it binds him in perpetuity; and in

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[85] A different view is taken by Stubbs, i. 484.

[86] Digby, Real Property, 3rd ed. p. 128. I may say at once that I fail to see any connexion between copyhold tenure and any express agreements between lord and villain.

[87] Bracton, 192 b: 'Si autem dominus ita dederit sine manumissione, servo et heredibus suis tenendum libere, presumi poterit de hoc quod servum voluit esse liberum, cum aliter servus heredes habere non possit nisi cum libertate et ita contra dominum excipientem de villenagio competit ei replicatio.' Cf. 23 b and Britton, i. 247; Fleta, 238; Littleton, secs. 205, 207.

[88] Bracton, 24 b: 'Si autem in charta hoc tantum contineatur, habendum et tenendum tali (cum sit servus) per liberum servitium huiusmodi verba non faciunt servum liberum nec dant ei liberum tenementum … Quia tenementum nichil confert nec detrahit personae, nisi praecedat, ut dictum est, homagium vel manumissio, vel quod tantundem valet de concessione domini, scilicet quod villanus libere teneat et quiete et per liberum servitium, *sibi et haeredibus suis*. Si autem hoc solum dicatur, quod teneat per liberum servitium [sibi et heredibus suis], si ejectus fuerit a quocunque non recuperet per assisam noue disseisine, ut liberum tenementum, quia domino competit assisa et non villano. Si tamen dominus ipsum ejecerit, quaeritur, an contra dominum agere possit de conventione, cum prima facie non habet personam standi in judicio ad hoc, quod dominus teneat ei conventionem, videtur quod sic, propter factum domini sui, ut si agat de conventione, et dominus excipiat de servitute, replicare poterit de facto domini sui, sicut supra dicitur de feoffamento. Nec debent jura juvare dominum contra voluntatem suam, quia semel voluit conventionem, et quamvis damnum sentiat, non tamen fit ei injuria et ex quo prudenter et scienter contraxit cum servo suo, tacite renunciavit exceptionem villenagii.'

[89] The freehold would be given and still 'non recuperet per assisam no. diss. quia domino competit assisa et non villano.'

[90] See my article, 'The Text of Bracton,' in the Law Quarterly Review, i. 189, et sqq.; and Maitland, Introduction to the Note-book of Bracton, 26 sqq.

[91] The Cambridge MSS. have been inspected for me by Mr. Maitland.

this latter case, as there ought not to be any heirs of a bondman but the lord, bondage is annihilated by the deed. It is not annihilated when one person is granted a certain privilege as to a particular piece of land, and in every other respect the grantee and all his descendants remain unfree[92]:—he has no freehold, but he has a special covenant to fall back upon. This seems to lie at the root of what Bracton calls privileged villainage by covenant as distinguished from villain socage[93].

Legal practice as to conventions.

The reader may well ask whether there are any traces of such an institution in practice, as it is not likely that Bracton would have indulged in mere theoretical disquisitions on such an important point. Now it would be difficult to find very many instances in point; the line between covenant and enfranchisement was so easily passed, and an incautious step would have such unpleasant consequences for landlords, that they kept as clear as possible of any deeds which might indirectly destroy their claims as to the persons of their villains[94]. On the other hand, even privileged serfs would have a great difficulty in vindicating their rights on the basis of covenant if they remained at the same time under the sway of the lord in general. The difficulties on both sides explain why Fleta and Britton endorse only the chief point of Bracton's doctrine, namely, the implied manumission, and do not put the alternative as to a covenant when heirs are not mentioned. Still I have come across some traces in legal practice[95] of contracts in the shape of the one discussed. A very interesting case occurred in Norfolk in 1227, before Martin Pateshull himself. A certain Roger of Sufford gave a piece of land to one of his villains, William Tailor, to hold freely by free services, and when Roger died, his son and heir William of Sufford confirmed the lease. When it pleased the lord afterwards to eject the tenant, this latter actually brought an assize of novel disseisin and recovered possession. Bracton's marginal note to the case runs thus: 'Note, that the son of a villain recovered by an assize of novel disseisin a piece of land which his father had held in villainage, because the lord of the villain by his charter gave it to the son [i.e. to the plaintiff], even without manumission[96].' The court went in this case

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[92] Comp. Bracton, f. 194 b: 'Quia ex quo mentionem fecit de heredibus praesumitur vehementer, quod dominus voluit servum esse liberum *quod quidem non esset, si de heredibus mentionem non fecerit*.'

[93] Bracton, f. 208 b: 'Est etiam villenagium non ita purum, sive concedatur libero homini *vel villano* ex conventione tenendum pro certis servitiis et consuetudinibus nominatis et expressis, quamvis servitia et consuetudines sunt villanae. Et unde si liber ejectus fuerit vel villanus *manumissus vel alienatus* (*corr. alienus* best MSS.) recuperare non poterunt ut liberum tenementum, cum sit villenagium et cadit assisa, vertitur tamen in juratam ad inquirendum de conventione propter voluntatem dimittentis et consensum, quia si quaerentes in tali casu recuperarint villenagium, non erit propter hoc domino injuriatum propter ipsius voluntatem et consensum, et contra voluntatem suam jura ei non subveniunt, quia si dominus potest *villanum manumittere et feoffare* multo fortius poterit *ei quandam conventionem facere*, et quia si potest id quod plus est, potest multo fortius id quod minus est.' We have here another difficulty with the text. The wording is so closely allied to the passage on 24 b. just quoted, and the last sentences seem to indicate so clearly that the case of a privileged villain is here opposed to manumission and feoffment, that the 'villanus manumissus vel alienus' looks quite out of place. Is it a later gloss? Even if it is retained, however, the passage points to a very material limitation of the lord's power. The holding in question can certainly not be described as being held 'at will.' To me the words in question look like a gloss or an addition, although very probably they were inserted early, perhaps by Bracton himself, who found it difficult to maintain consistently a villain's contractual rights against the lord. Another solution of the difficulty is suggested to me by Sir Frederick Pollock. He thinks '*villanus manumissus vel alienus*' correct, and lays stress on the fact, that personal condition does not matter in this case: that even though the tenant be free or *quoad* that lord as good as free, the assize lies not and there shall only be an action on the covenant. If we accept this explanation which saves the words under suspicion, we shall have to face another difficulty: the text would turn from *villanus (suus)* to *villanus alienus* and back to *villanus (suus)* without any intimation that the subject under discussion had been altered.

[94] The later practice is well known. Any agreement with a bondman led to a forfeiture of the lord's rights. It may be seen at a glance that such could not have been the original doctrine. Otherwise why should the old books lay such stress on the mention of heirs?

[95] Besides the case from the Note-book which I discuss in the text, Bracton, f. 199, is in point: 'Item esto quod villanus teneat per liberum servitium sibi tantum, nulla facta mentione de heredibus, si cum ejectus fuerit proferat assisam, et cum objecta fuerit exceptio villenagii, replicet quod libere teneat et petat assisam, non valebit replicatio, ex quo nulla mentio facta est de heredibus, *quia liberum tenementum in hoc casu non mutat statum*, si fuerit sub potestate domini constitutus. Ut in eodem itinere (in ultimo itinere Martini de Pateshull) in comitatu Essex, assisa noue disseisine, si Radulphus de Goggenhal.' The villain fails in his assize and there has been no manumission, still it seems admitted that in this case the villain has acquired *liberum tenementum* by the lord's act. How can this be except on the supposition that there is a covenant enforceable by the villain against the lord?

[96] Bract. Note-book, pl. 1814: 'Nota quod filius villani recuperat per assisam noue disseisine terram quam pater suus tenuit in villenagio quia dominus villani illam dedit filio suo per cartam suam eciam sine manumissione.'

even further than Bracton's treatise would have warranted: the villain was considered as having the freehold, and an assize of novel disseisin was granted; but although such a treatment of the case was perhaps not altogether sound, the chief point on which the contention rested is brought out clearly enough. There was a covenant, and in consequence an action, although there was no manumission; and it is to this point that the marginal note draws special attention[97].

Waynage.

Again, we find in the beginning of Bracton's treatise a remark[98] which is quite out of keeping with the doctrine that the villain had no property to vindicate against his lord; it is contradicted by other passages in the same book, and deserves to be considered the more carefully on that account. Our author is enumerating the cases in which the serf has an action against his lord. He follows Azo closely, and mentions injury to life or to limb as one cause. Azo goes on to say that a plaint may be originated by *intollerabilis injuria*, in the sense of corporeal injury. Bracton takes the expression in a very different sense; he thinks that economic ruin is meant, and adds, 'Should the lord go so far as to take away the villain's very *waynage*, i.e. plough and plough-team, the villain has an action.' It is true that Bracton's text, as printed in existing editions, contains a qualification of this remark; it is said that only serfs on ancient demesne land are possessed of such a right. But the qualification is meaningless; the right of ancient demesne tenants was quite different, as we shall see by-and-by. The qualifying clause turns out to be inserted only in later MSS. of the treatise, is wanting in the better MSS., and altogether presents all the characters of a bad gloss[99]. When the gloss is removed, we come in sight of the fact that Bracton in the beginning of his treatise admits a distinct case of civil action on the part of a villain against his lord. The remark is in contradiction with the Roman as well as with the established English doctrine, it is not supported by legal practice in the thirteenth century, it is omitted by Bracton when he comes to speak again of the 'persona standi in judicio contra dominum[100].' But there it is, and it cannot be explained otherwise than as a survival of a time when some part of the peasantry at least had not been surrendered to the lord's discretion, but was possessed of civil rights and of the power to vindicate them. The notion that the peasant ought to be specially protected in the possession of instruments of agricultural labour comes out, singularly enough, in the passage commented upon, but it is not a singular notion in itself. It occurs, as every one knows, in the clause of the Great Charter, which says that the villain who falls into the king's mercy is to be amerced 'saving his waynage.' We come across it often enough in Plea Rolls in cases against guardians accused of having wasted their ward's property. One of the special points in such cases often is, that a guardian or his steward has been ruining the villains in the ward's manors by destroying their waynage[101]. Of course, the protection of the peasant's prosperity, guaranteed by the courts in such trials, is wholly due to a consideration of the interests of the ward; and the care taken of villains is exactly parallel to the attention bestowed upon oaks and elms. Still, the notion of waynage is in itself a peculiar and an important one, and whatever its ultimate origin may be, it points to a civil condition which does not quite fall within the lines of feudal law.

Villains not to be devised.

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[97] F.W. Maitland tells me, that Concanen's Report of *Rowe* v. *Brenton* describes *bond conventioners* in Cornwall.

[98] Bracton, f. 6: 'Et in hoc legem habent contra dominos, quod stare possunt in judicio contra eos de vita et membris propter saevitiam dominorum, vel propter intollerabilem injuriam, ut si eos destruant, quod salvum non possit eis esse waynagium suum. [Hoc autem verum est de illis servis, qui tenent de antiquo dominico coronae, sed de aliis secus est, quia quandocunque placuerit domino, auferre poterit a villano suo waynagium suum et omnia bona sua.] Expedit enim reipublicae ne quis re sua male utatur.'

[99] See my article in the L.Q.R., i. 195.

[100] Bracton, f. 196-202.

[101] Coram Rege, 15 Edw. I, m. 18: '… licet habeant alia averia per que distringi possent distringit eos per averia de carucis suis quod est contra statutum domini Regis.' (Record Office.)

Another anomaly is supplied by Britton. After putting the case as strongly as possible against serfs, after treating them as mere chattels to be given and sold, he adds, 'But as bondmen are annexed to the freehold of the lord, they are not devisable by testament, and therefore Holy Church can take no cognisance of them in Court Christian, although devised in testament.' (I. 197.) The exclusion of villains is not peculiar to them; they share it with the greater part of landed possessions. 'As all the courts of civil jurisdiction had been prohibited from holding jurisdiction as to testamentary matters, and the Ecclesiastical Courts were not permitted to exercise jurisdiction as to any question relating to freehold, there was no court which could properly take cognisance of a testamentary gift of land as such[102].' The point to be noted is, that villains are held to be annexed to the freehold, although in theory they ought to be treated as chattels. The contradiction gives us another instance of the peculiar modification of personal servitude by the territorial element. The serf is not a colonus, he is not bound up with any particular homestead or plot of land, but he is considered primarily as a cultivator under manorial organisation, and for this reason there is a limitation on the lord's power of alienating him. Let it be understood, however, that the limitation in this case does not come before us as a remnant of independent rights of the peasant. It is imposed by those interests of the feudal suzerain and of the kin which precluded the possibility of alienating land by devise[103].

Villain tenure and villain service.

An inquiry into the condition of villains would be altogether incomplete, if it did not touch on the questions of villain tenure and villain services. Both are intimately connected with personal status, as may be seen from the very names, and both have to be very carefully distinguished from it. I have had to speak of prescription as a source of villainage. Opinions were very uncertain in this respect, and yet, from the mere legal point of view, there ought not to have been any difficulty about the matter. Bracton takes his stand firmly on the fundamental difference between status and tenure in order to distinguish clearly between serfs and free men in a servile position[104]. The villain is a man belonging to his lord personally; a villain holding (*villenagium*) is land held at the will of the lord, without any certainty as to title or term of enjoyment, as to kind or amount of services[105]. Serfs are mostly, though not necessarily, found on villain land; it does not follow that all those seated on villain land are serfs. Free men are constantly seen taking up a *villenagium*; they do not lose by it in personal condition; they have no protection against the lord, if he choose to alter their services or oust them from the holding, but, on the other hand, they are free to go when they please. There is still less reason to treat as serfs such free peasants as are subjected to base services, i.e. to the same kind of services and payments as the villains, but on certain conditions, not more and not less. Whatever the customs may be, if they are certain, not only the person holding by them but the plot he is using are free, and the tenure may be defended at law[106].

Such are the fundamental positions in Bracton's treatise, and there can be no doubt that they are borne out in a general way by legal practice. But if from the general we turn to the particular, if we analyse the thirteenth-century decisions which are at the bottom of Bracton's teaching, we shall find in many cases notions cropping up, which do not at all coincide with the received views on the

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[102] Spence, Equitable Jurisdiction, i. 136.

[103] The Mirror of Justices, p. 110, follows Britton in this matter. This curious book is altogether very interesting on the subject of villeinage, but as its information is of a very peculiar stamp, I have not attempted to use it currently on the same level with other authorities. I prefer discussing it by itself in App. III.

[104] Bracton, f. 26 b, 200. Cf. Bract. Note-book, pl. 141: 'Dicit quod tunc temporis scilicet in itinere iusticiariorum tenuit ipse quamdam terram in uillenagium quam emerat, et tunc cognouit quod terra illa fuit uillenagium, et precise defendit quod nunquam cognouit se esse uillanum.'

[105] Britton, ii. 13; Y.B. 20/21 Edw. I, p. 41: 'Kar nent plus neit a dire, jeo tenk les tenements en vileynage de le Deen etc. ke neit a dire ke jeo tenk les tenements … a la volunte le Deen etc.'

[106] Bracton, f. 168.

subject. In fact we come across many apparent contradictions which can be attributed only to a state of fermentation and transition in the law of the thirteenth century.

Martin of Bestenover's case.

Martin of Bestenover's case is used by Bracton in his treatise as illustrating the view that tenure has no influence on status[107]. It was a long litigation, or rather a series of litigations. Already in the first year of King John's reign we hear of a final concord between John of Montacute and Martin of Bestenover as to a hundred acres held by the latter[108]. The tenant is ejected however, and brings an assize of mort d'ancestor against Beatrice of Montacute, who, as holding in dower, vouches her son John to warranty. The latter excepts against Martin as a villain. A jury by consent of the parties is called in, and we have their verdict reported three times in different records[109]. They say that Martin's father Ailfric held of John Montacute's father a hundred acres of land and fifty sheep besides, for which he had to pay 20*s.* a year, to be tallaged reasonably, when the lord tallaged his subjects, and that he was not allowed to give his daughter away in marriage before making a fine to the lord according to agreement. We do not know the decision of the judges in John's time, but both from the tenor of the verdict and from what followed, we may conclude that Martin succeeded in vindicating his right to the land. Proceedings break out again at the beginning of Henry III's reign.

In 1219 John of Montacute is again maintaining that Martin is his villain, in answer as it seems to an action *de libertate probanda* which Martin has brought against him. The court goes back to the verdict of the jury in John's time, and finds that by this verdict the land is proved to be of base tenure, and the person to be free. The whole is repeated again[110] on a roll of 1220; whether we have two decisions, one of 1219 and the other of 1220, or merely two records of the same decision, is not very clear, nor is it very important. But there are several interesting points about this case. The decision in 1220 is undoubtedly very strong on the distinction between status and tenure: 'nullum erat placitum in curia domini Regis de villenagio corporis ipsius Martini nisi tantum de villenagio et consuetudinibus terre,' etc. As to tenure, the court delivers an opinion which is entitled to special consideration, and has been specially noticed by Bracton both in his Note-book and in his treatise. 'If Martin,' say the judges on the roll of 1219, 'wishes to hold the land, let him perform the services which his father has been performing; if not, the lord may take the land into his hands[111].' The same thing is repeated almost literally on the roll of 1220. Bracton draws two inferences from these decisions. One is suggested by the beginning of the sentence; 'If Martin wishes to hold the land.' Both in the Note-book and in the treatise Bracton deduces from it, that holding and remaining on the land depended on the wish of Martin, who as a free man was entitled to go away when he pleased[112]. The judgment does not exactly say this, but as to the right of a free person to leave the land there can be no doubt.

Tenant right of free man holding in villainage.

The second conclusion is, that if a free man hold in villainage by villain services he cannot be ejected by the lord against his will, provided he is performing the services due from the holding. What Bracton says here is distinctly implied by the decisions of 1219 and 1220, which subject the lord's power of dealing with the land to a condition—non-performance of services[113]. There can be

[107] Ibid., f. 199 b.

[108] Palgrave, Rotuli Curiae Regis, ii. 192.

[109] Placitorum Abbrev. 25, 29; Note-book, pl. 88. (The father is called Ailfricus in the Plea Roll Divers terms 2 John, 2 d., at the Record Office.)

[110] Bract. Note-book, pl. 88.

[111] Case 70: 'Consideratum est quod terra illa est uilenagium ipsius Hugonis (corr. Johannis), et quod si Martinus uoluerit terram tenere faciat consuetudines quas pater suus fecit, sin autem capiat terram suam in manum suam.'

[112] Marginal remark in the Note-book to pl. 70: 'Nota quod liber homo potest facere uillanas consuetudines racione tenementi uillani set propter hoc non erit uillanus, quia potest relinquere tenementum.' Comp. Mr. Maitland's note to the case.

[113] Bracton, f. 199 b: 'Unde videtur per hoc, quod licet liber homo teneat villenagium per villanas consuetudines, contra voluntatem

no question as to the importance of such a view; it contains, as it were, the germ of copyhold tenure[114]. It places villainage substantially on the same footing as freehold, which may also be forfeited by discontinuance of the services, although the procedure for establishing a forfeiture in that case would be a far more elaborate one. And it must be understood that Bracton's deduction by no means rests on the single case before us. He appeals also to a decision of William Raleigh, who granted an assize of mort d'ancestor to a free man holding in villainage[115]. Unfortunately the original record of this case has been lost. The decision in a case of 1225 goes even further. It is an assize of novel disseisin brought by a certain William the son of Henry against his lord Bartholomew the son of Eustace. The defendant excepts against the plaintiff as his villain; the court finds, on the strength of a verdict, that he is a villain, and still they decide that William may hold the land in dispute, if he consents to perform the services; if not, he forfeits his land[116]. Undoubtedly the decision before us is quite isolated, and it goes against the rules of procedure in such cases. Once the exception proved, nothing ought to have been said as to the conditions of the tenure. Still the mistake is characteristic of a state of things which had not quite been brought under the well-known hard and fast rule. And the best way to explain it is to suppose that the judges had in their mind the more familiar case of free men holding in villainage, and gave decision in accordance with Martin of Bestenover *v.* Montacute, and the case decided by Raleigh[117]. All these instances go clean against the usually accepted doctrine, that holding in villainage is the same as holding at the will of the lord: the celebrated addition 'according to the custom of the manor' would quite fit them. They bring home forcibly one main consideration, that although in the thirteenth century the feudal doctrine of non-interference of the state between lord and servile tenantry was possessed of the field, its victory was by no means complete. Everywhere we come across remnants of a state of things in which one portion at least of the servile class had civil rights as well as duties in regard to the lord.

The test of services.

Matters were even more unsettled as to customs and services in their relation to status and tenure. What services, what customs are incompatible with free status, with free tenure? Is the test to be the kind of services or merely their certainty? Bracton remarks that the payment of merchet, i.e. of a fine for giving away one's daughter to be married, is not in keeping with personal freedom. But he immediately puts in a kind of retractation[118], and indeed in the case of Martin of Bestenover it was held that the peasant was free although paying merchet. To tenure, merchet, being a personal payment, should have no relation whatever. In case of doubt as to the character of the tenure, the inquiry ought to have been entirely limited to the question whether rents and services were certain or not[119], because it was established that even a free tenement could be encumbered with base services.

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suam ejici non debet, dum tamen facere voluerit consuetudines quae pertinent ad villenagium, et quae praestantur ratione villenagii, et non ratione personae.'

[114] Cf. Blackstone's characteristic of copyholds: 'But it is the very condition of the tenure in question that the lands be holden only so long as the stipulated service is performed, quamdiu velint et possint facere debitum servitium et solvere debitas pensiones.' (Law Tracts, ii. 153.)

[115] Bract, f. 200.

[116] Bract. Note-book, pl. 1103: 'Et ideo consideratum est quod Willelmus conuictus est de uilenagio et si facere uoluerit predictas consuetudines teneat illam bouatam terre per easdem consuetudines, sin autem faciat Bartholomeus de terra et de ipso Willelmo uoluntatem suam ut de uillano suo et ei liberatur. Cf. Mr. Maitland's note.

[117] I should like to draw attention to one more case which completes the picture from another side. Bract. Note-book, pl. 784: 'Symon de T. petit versus Adam de H. et Thomam P. quod faciant ei consuetudines et recta seruicia que ei facere debent de tenemento quod de eo tenent in uillenagio in T. Et ipsi ueniunt et cognoscunt quod uillani sunt. Et Symon concedit eis quod teneant tenementa sua faciendo inde seruicia quae pertinent ad uillenagium, ita tamen quod non dent plus in auxilium ad festum St. Mich. nec per annum quam duodecim denarios scilicet quilibet ipsorum et hoc nomine tallagii.'—The writ of customs and services was out of place between lord and villain. The usual course was distraint. The case is clearly one of privileged villainage, but it is well to note that although the services are in one respect certain, the persons remain unfree.

[118] Bracton, f. 208 b.

[119] Ibid., f. 200.

In reality the earlier practice of the courts was to inquire of what special kind the services and customs were, whether merchet and fine for selling horses and oxen had been paid, whether a man was liable to be tallaged at will or bound to serve as reeve, whether he succeeded to his tenancy by 'junior right' (the so-called Borough English rule), and the like.

All this was held to be servile and characteristic of villainage[120]. I shall have to discuss the question of services and customs again, when I come to the information supplied by manorial documents. It is sufficient for my present purpose to point out that two contradictory views were taken of it during the thirteenth century; 'certain or uncertain?' was the catchword in one case; 'of what kind?' in the other. A good illustration of the unsettled condition of the law is afforded by the case Prior of Ripley *v.* Thomas Fitz-Adam. According to the Prior, the jurors called to testify as to services and tenures had, while admitting the payment of tallage and merchet, asked leave to take the advice of Robert Lexington, a great authority on the bench, whether a holding encumbered by such customs could be free[121].

The subject is important, not only because its treatment shows to what extent the whole law of social distinctions was still in a state of fermentation, but also because the classification of tenures according to the nature of customs may afford valuable clues to the origin of legal disabilities in economic and political facts. The plain and formal rule of later law, which is undoubtedly quite fitted to test the main issue as to the power of the lord, is represented in earlier times by a congeries of opinions, each of which had its foundation in some matter of fact. We see here a state of things which on the one hand is very likely to invite an artificial simplification, by an application of some one-sided legal conception of serfdom, while on the other hand it seems to have originated in a mixture and confusion of divers classes of serfs and free men, which shaded off into each other by insensible degrees.

The procedure in questions of *status*.

The procedure in trials touching the question of status was decidedly favourable to liberty. To begin with, only one proof was accepted as conclusive against it—absolute proof that the kinsfolk of the person claimed were villains by descent[122]. The verdict of a jury was not sufficient to settle the question[123], and a man who had been refused an assize in consequence of the defendant pleading villainage in bar had the right notwithstanding such decision to sue for his liberty. When the proof by kinship came on, two limitations were imposed on the party maintaining servitude: women were not admitted to stand as links in the proof because of their frailty and of the greater dignity of a man, and one man was not deemed sufficient to establish the servile condition of the person claimed[124]. If the defendant in a plea of niefty, or a plaintiff in an action of liberty, could convincingly show that his father or any not too remote ancestor had come to settle on the lord's land as a stranger, his

[120] Bract. Note-book, pl. 63: 'Dicunt quod idem W. nullum habuit liberum tenementum quia ipse uillanus fuit et fecit omnimoda uilenagia quia non potuit filiam suam maritare nec bouem suum uendere. 1819: R. de M. posuit se in magnam assisam Dom. Reg. in comitatu de consuetudinibus et seruiciis que Th. B. petit uersus eum, unde idem Th. exigebat ab eodem R. quod redderet ei de uillenagio per annum 19 den. et aruram trium dierum et messuram trium dierum … et gersumam pro filia sua maritanda et unam gallinam ad Natale et tot oua ad Pascha et tallagium et quod sit prepositus suus. Set quia illa sunt servilia et ad uillenagium spectancia et non ad liberum tenementum, consideratum est quod magna assisa non iacet inter eos, set fiat inquisicio per xii,' etc. Cf. 794, 1005, 1225, 1661.

[121] Bract. Note-book, 281: 'Et Prior dicit quod in parte bene recordantur set in parte parum dicunt quia iuratores dixerunt quod debuit dare xii. den. pro filia sua maritanda, et debuit plures alias consuetudines et petierunt respectum ut assensum habere possent a domino Roberto de Lexintona utrum hoc esset liberum tenementum ex quo sciunt quid debuit facere et quid non et nullum respectum habere potuerunt.'

[122] Example—Bract. Note-book, pl. 1887. Fitzherbert, Abr. Villen. 38 (13 Ed. I): 'Quia predictus J. nullam probacionem producit neque sectam et cognoscit quod ille est in seisina … de patre predicti W. quem potuit produxisse ad probacionem, consideratum est quod predicti W. et R. liberi maneant.'

[123] Bracton, f. 199. The jury came in only by consent of the parties.

[124] Britton, i. 207; Fitzherbert, Abr. Villen. 37.

liberty as a descendant was sufficiently proved[125]. In this way to prove personal villainage one had to prove villainage by birth. Recognition of servile status in a court of record and reference to a deed are quite exceptional.

The coincidence in all these points against the party maintaining servitude is by no means casual; the courts proclaimed their leaning 'in favour of liberty' quite openly, and followed it in many instances besides those just quoted. It was held, for instance, that in defending liberty every means ought to be admitted. The counsel pleading for it sometimes set up two or three pleas against his adversary and declined to narrow his contention, thus transgressing the rules against duplicity of plea 'in favour of liberty[126].' In the case of a stranger settling on the land, his liberty was always assumed, and the court declined to construe any uncertainty of condition against him[127]. When villainage was pleaded in bar against a person out of the power of the lord, the special question was very often examined by a jury from the place where the person excepted to had been lately resident, and not by a jury from the country where he had been born[128]. This told against the lord, of course, because the jurors might often have very vague notions as to the previous condition of their new fellow-countryman[129].

It would be impossible to say in what particular cases this partiality of the law is to be taken as a consequence of enlightened and humanitarian views making towards the liberation of the servile class, and in what cases it may be traced to the fact that an original element of freedom had been attracted into the constitution of villainage and was influencing its legal development despite any general theory of a servile character. There is this to be noticed in any case, that most of the limitations we have been speaking of are found in full work at the very time when villainage was treated as slavery in the books. One feature, perhaps the most important of all, is certainly not dependent on any progress of ideas: however complete the lord's power over the serf may have been, it was entirely bound up with the manorial organisation. As soon as the villain had got out of its boundaries he was regularly treated as a free man and protected in the enjoyment of liberty so long as his servile status had not been proved[130]. Such protection was a legal necessity, a necessary complement to the warranty offered by the state to its real free men. There could be no question of allowing the lord to seize on any person whom he thought fit to claim as his serf. And, again, if the political power inherent in the manor gave the lord *A* great privileges and immunities as to the people living under his sway, this same manorial power began to tell against him as soon as such people had got under the sway of lord *B* or within the privileged town *C*. The dependant could be effectually coerced only if he got back to his unfree nest again or through the means of such kinsfolk as he had left in the unfree nest[131]. And so the settlement of disputed rights connected with status brings home forcibly two important positions: first the theory of personal subjection is modified in its legal application by influence in favour of liberty; and next this influence is not to be traced exclusively to moral and intellectual progress, but must be accounted for to a great extent by peculiarities in the political structure of feudalism.

Enfranchisement.

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[125] Court Rolls of Havering atte Bower, Essex, Augment. Off. Rolls, xiv. 38. (Curia—die Jovis proxima ante festum St. Bartholomaei Apostoli anno r. r. Ricardi II, 21mo.) 'Inquisicio … dicit … quod non est aliquis homo natiuus de sanguine ingressus feodum domini, set dicunt quod est quidam Johannes Shillyng qui Sepius dictus fuerat natiuus. Et dicunt ultra quod quidam Johannes Shillyng pater predicti Johannis fuit alienigena et quod predictus Johannes Shillyng quod ad eorum cognitionem est liber et libere condicionis et non natiuus.'

[126] Fitzherbert, Abr. Villen. 32 (H. 19 Edw. II).

[127] Ibid. 5 (13 Edw. I).

[128] Fitzherbert, l. c.: 'E ce issu fuit trie par gents de paiis ou le maner est e nemi ou il nasquist par touts les justices.'

[129] Rotuli Parliam. ii. 192. Hargrave's argument in the Negro Somerset's case is very good on all these points. Howell, State Trials, xx. 38, 39.

[130] Bracton, 201; Britton, i. 202 sq.

[131] Bracton, f. 6, and on many other occasions.

One point remains to be investigated in the institution of villainage, namely modes in which a villain might become free. I have had occasion to notice the implied manumission which followed from a donation of land to a bondman and his heirs, which in process of time was extended to all contracts and concords between a lord and his serf. A villain was freed also, as is well known, by remaining for a year and a day on the privileged soil of a crown manor or a chartered town[132]. As to direct manumission, its usual mode was the grant of a charter by which the lord renounced all rights as to the person of his villain. Traces of other and more archaic customs may have survived in certain localities, but, if so, they were quite exceptional. Manumission is one of the few subjects touched by Glanville in the doctrine of villainage, and he is very particular as to its conditions and effects. He says that a serf cannot buy his freedom, because he has no money or goods of his own. His liberty may be bought by a third person however, and his lord may liberate him as to himself, but not as regards third persons. There seems to be a want of clearness in, if not some contradiction between these two last statements, because one does not see how manumission by a stranger could possibly be wider than that effected by the lord. Again, the whole position of a freed man who remains a serf as regards everybody but his lord is very difficult to realize, even if one does not take the later view into account, which is exactly the reverse, namely that a villain is free against everybody but his lord. I may be allowed to start a conjecture which will find some support in a later chapter, when we come to speak about the treatment of freedom and serfdom in manorial documents. It seems to me that Glanville has in mind liberation *de facto* from certain duties and customs, such as agricultural work for instance, or the payment of merchet. Such liberation would not amount to raising the status of a villain, although it would put him on a very different footing as to his lord[133]. However this may be, if from Glanville's times we come down to Bracton and to his authorities, we shall find all requirements changed, but distinct traces of the former view still lingering in occasional decisions and practices. There are frequent cases of villains buying their freedom with their own money[134], but the practice of selling them for manumission to a stranger is mentioned both in Bracton's Treatise[135] and in his Notebook. A decision of 1226 distinctly repeats Glanville's teaching that a man may liberate his serf as to himself and not as to others. The marginal note in the Note-book very appropriately protests against such a view, which is certainly quite inconsistent with later practice[136]. Such flagrant contradictions between authorities which are separated barely by some sixty or seventy years, and on points of primary importance too, can only tend to strengthen the inference previously drawn from

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[132] Co. Lit. 137, b. Cf. King Henry I's writ in favour of the Monastery of Abingdon. Bigelow, Placita Anglo-Normannica, 96: 'Facias habere F. abbati omnes homines suos qui de terra sua exierunt propter herberiam curie mee.' Henry II puts it the other way, p. 220: 'Nisi sunt in dominio meo.'

[133] A most curious pleading based on the conceptions of Glanville occurs in a Cor. Rege case of 10 Henry III, which was pointed out to me by F. Maitland. See App. IV. Mr. York Powell suggests that the limitation may have originated in the fact, that in early times a man could no more give away a slave from his family estate without the consent of the family than he could give away the estate itself or part of it. There was no reason for such limitation in the case of a slave that had been bought with one's private money. Hence the necessity of selling a slave in order to emancipate him. The conjecture seems a very probable one, but the question remains, how such ancient practice could have left a trace in the feudal period. The explanation in the text may possibly account for the tenacity of the notion.

[134] Note-book, pl. 31, 343.

[135] Bracton, f. 194, 195. Bracton's text has been rendered almost unintelligible here by the careless punctuation of his editors, and Sir Travers Twiss' translation is as wrong and misleading as usual. I will just give the passage in accordance with the reading of Digby, 222 (Bodleian Libr.), which is the best of all the MSS. I have seen: 'Quia esto quod seruus uelit manumitti et cum nichil habeat proprium eligat fidem alicuius qui eum emat quasi pro denariis suis, per talem emptionem non consequitur emptus aliquam libertatem nisi tantum quod mutat dominum. In re empta in primis solui debet pretium, postea sequitur traditio rei: soluitur hic pretium pro natiuo, set nulla subsequitur traditio, sed semper manet in uillenagio quo prius. Si tenementum adquirat tenendum libere et heres manumissoris uel alius successor eum eiciat, si petat per assisam et heres opponat uillenagium, et villanus replicet de manumissione et emptione, heres triplicare poterit, quod imperfecta fuit emptio siue manumissio eo quod nunquam in uita uenditoris subsecuta fuit traditio, et ita talis semper remanebit sub potestate heredis.'

[136] Note-book, pl. 1749: 'Iudicatum est quod liber sit quantum ad heredem manumittentis et non quantum ad alios, quod iudicium non est uerum.'

other facts—that the law on the subject was by no means square and settled even by the time of Bracton, but was in every respect in a state of transition.

CHAPTER III.
ANCIENT DEMESNE

Definition.

The old law books mention one kind of villainage which stands out in marked contrast with the other species of servile tenure. The peasants belonging to manors which were vested in the crown at the time of the Conquest follow a law of their own. Barring certain exceptions, of which more will be said presently, they enjoy a certainty of condition protected by law. They are personally free, and although holding in villainage, nobody has the right to deprive them of their lands, or to alter the condition of the tenure, by increasing or changing the services. Bracton calls their condition one of privileged villainage, because their services are base but certain, and because they are protected not by the usual remedies supplied at common law to free tenants, but by peculiar writs which enforce the custom of the manor[137]. It seems well worth the while to carefully investigate this curious case with a view to get at the reasons of a notable deviation from the general course, for such investigation may throw some reflected light on the treatment of villainage in the common law.

Legal practice is very explicit as to the limitation of ancient demesne in time and space. It is composed of the manors which belonged to the crown at the time of the Conquest[138]. This includes manors which had been given away subsequently, and excludes such as had lapsed to the king after the Conquest by escheat or forfeiture[139]. Possessions granted away by Saxon kings before the Conquest are equally excluded[140]. In order to ascertain what these manors were the courts reverted to the Domesday description of *Terra Regis*. As a rule these lands were entered as crown lands, T.R.E. and T.R.W., that is, were considered to have been in the hand of King Edward in 1066, and in the hand of King William in 1086. But strictly and legally they were crown lands at the moment when King William's claim inured, or to use the contemporary phrase, 'on the day when King Edward was alive and dead.' The important point evidently was that the Norman king's right in this case bridged over the Conquest, and for this reason such possessions are often simply said to have been royal demesne in the time of Edward the Confessor. This legal view is well illustrated by a decision of the King's Council, quoted by Belknap, Chief Justice of the Common Pleas, in 1375. It was held that the manor of Tottenham, although granted by William the Conqueror to the Earl of Chester before the compilation of Domesday, was ancient demesne, as having been in the hands both of St. Edward and of the Conqueror[141]. And so 1066 and not 1086 is the decisive year for the legal formation of this class of manors[142].

Tenure in ancient demesne a kind of villainage.

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[137] Bracton, 209; cf. 7 and 200. Britton, ii. 13.

[138] Bracton, 209: 'Villenagium privilegiatum … tenetur de Rege a Conquestu Angliae.' Cf. Blackstone, Law Tracts, ii. 128.

[139] Madox, History of the Exchequer, i. 704: 'Tallagium dominiorum et escaetarum et custodiarum.'

[140] Bract. Note-book, 1237 (the prior of St. Swithin denies a manor to be ancient demesne): '… per cc annos ante conquestum Anglie [terre] date fuerunt priori et conventui et ab aliis quam regibus.'

[141] Y.B. Trin. 49 Edw. III, pl. 8 (Fitzherbert, Abr. Monstraver. 4): '… touts les demesnes qui fuerent en la maine Seint E. sont aunciens demesne, mesque ils fuerent aliens a estraunge mains quant le liver de Domesday se fist, come il avient del manor de Totenham qui fut en autre maine a temps de Domesday fait, come en le dit livers fait mencion, que il fuit adonques al Counte de Cestre.'

[142] Very curious pleadings occurred in 1323. Y.B. 15 Edw. II, p. 455: '*Ber(wick)* Ils dient en l'Exchequer que serra (*corr.* terra) R. serra ecrit sur le margin en cas ou cest ancien demene en Domesday, mes ceo fust escript sur le dyme foille apres sur un title terra R., mesine (*corr.* mes une *or* mesqe?) R. fuit escript sur le margin de chescun foille apres, e tout ceo la est anciene demene a ceo quil nient (*corr.* dient), mes ascunes gens entendent que les terres qui furent les demenes le Roy St. Edward sont auncien demene, e autres dient fors les terres que le Conquerour conquist, que furent en la seissin St. Edward le jour quil mourust sont anciene demene.' Although a difference of opinion is mentioned it is not material, for this reason, that the entry as *Terra Regis*, at least T.R.E., is absolutely required to prove a manor ancient demesne. I give the entry on the Plea Roll in App. V.

In many respects the position of the peasantry in ancient demesne is nearly allied to that of men holding in villainage at common law. They perform all kinds of agricultural services and are subject to duties quite analogous to those which prevail in other places; we may find on these ancient manors almost all the incidents of servile custom. Sometimes very harsh forms of distress are used against the tenants[143]; forfeiture for non-performance of services and non-payments of rents was always impending, in marked contrast with the considerate treatment of free tenantry in such cases[144]. We often come across such base customs as the payment of merchet in connexion with the 'villain socmen' of ancient demesne[145]. And such instances would afford ample proof of the fact that their status has branched off from the same stem as villainage, if such proof were otherwise needed.

Privileges of ancient demesne.

The side of privilege is not less conspicuous. The indications given by the law books must be largely supplemented from plea rolls and charters. The special favour shown to the population on soil of ancient demesne extends much further than a regulation of manorial duties would imply, it resolves itself to a large extent into an exemption from public burdens. The king's manor is treated as a franchise isolated from the surrounding hundred and shire, its tenants are not bound to attend the county court or the hundred moot[146], they are not assessed with the rest for danegeld or common amercements or the murder fine[147], they are exempted from the jurisdiction of the sheriff[148], and do not serve on juries and assizes before the king's justices[149]; they are free from toll in all markets and custom-houses[150]. Last, but not least, they do not get taxed with the country at large, and for this reason they have originally no representatives in parliament when parliament forms itself. On the other hand, they are liable to be tallaged by the king without consent of parliament, by virtue of his private right as opposed to his political right[151]. This last privilege gave rise to a very abnormal state of things, when ancient demesne land had passed from the crown to a subject. The rule was, that the new lord could not tallage his tenants unless in consequence of a royal writ, and then only at the same time and in the same proportion as the king tallaged the demesnes remaining in his hand[152].

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[143] I think only distress can be implied by the remark of Bereford J. Y.B. 30/31 Edw. I, p. 19: 'Quant vous vendrez a loustel, fetes de vostre archevileyn ceo qe vous vodrez.' The words are strange and possibly corrupt.

[144] Blackstone, Law Tracts, ii. 153: 'They cannot alienate tenements otherwise than by surrender into the lord's hand.' Bracton, 209.

[145] In a most curious description of the customs of villain sokemen of Stoneleigh, Warwick, in the Register of Stoneleigh Abbey, I find the following entries: 'Item sokemanni predicti filias suas non possunt maritare sine licencia domini prout patet anno viij Regis E. filii Regis E. per rotulum curie in quo continetur quod Matildis de Canle in plena curia fecit finem cum domino pro ij sol. quia maritauit filiam suam Thome de Horwelle sine licencia domini.... Item anno Regis H. lvj continetur in rotulo curie quod Willelmus Michel fuit in misericordia quia maritauit filiam suam sine licencia domini et similiter decenarii fuerunt in misericordia quia hoc concelauerunt.' As to the Stoneleigh Register, see App. VI. Another instance of merchet in an ancient demesne manor is afforded by the Ledecumbe (Letcombe) Regis Court Rolls of 1272. Chapter House, County Bags, Berks. No. 3, m. 12: 'Johannes le Jeune se redemit ad maritandum et fecit finem xij sol.... Johannes Atwel redemit filiam suam anno predicto' (Record Office).

[146] Henry II's charter to Stoneleigh Abbey: 'Quieta de schiris et hundredis, et murdro et danegeldo, et placitis et querelis, et geldis et auxiliis, et omni consuetudine et exactione' (Dugdale, Monasticon, v. 447).

[147] Close Roll, 12 Henry III., m. 11, d: 'Monstrauerunt domino Regi homines de Esindene et de Beyford, quod occasione misericordiae c. librarum, in quam totus Comitatus Hertfordie incidit coram iusticiariis ultimo itinerantibus … hidagium quoddam assedit vicecomes super eos ad auxilium faciendum ceteris de comitatu ad misericordiam illam acquietandam et inde eos distringit. Quia vero predicti homines nec alii de dominicis domini Regis sectam faciunt ad comitatum et ea racione non tenentur ad misericordiam ceterorum de comitatu illo acquietandam auxilium facere aut inde participes esse, mandatum est vicecomiti Hertfordie quod homines predictos in hidagio et demanda pacem habere permittat' (Record Office). Placita de Quo Warranto, 777, 778: 'Non quieti de communi amerciamento nisi tantum in Stonle.'

[148] Viner, Abr. v. Anc. Dem. C^2, 1; cf. E, 20. Madox, Hist. of Exch., i. 418, note *l*: 'Quieti de auxilio vicecomitis et baillivorum suorum.'

[149] Cor. Rege, Mich. 5 E. II, m. 77: '(Juratores dicunt quod homines de Wycle) in itinere respondent per quatuor et prepositum sicut cetere ville de corpore comitatus.' This against their claim to hold in ancient demesne.

[150] Viner, Abr. Anc. Dem. B. 1, 4, 6.

[151] Madox, Exch., i. 412, 698.

[152] Stubbs, ii. 566, 567 (Libr. ed.); Madox, Exch., i. 751.

This was an important limitation of the lord's power, and a consequence of the wish to guard against encroachments and arbitrary acts. But it was at the same time a curious perversion of sovereignty: —the person living on land of this description could not be taxed with the county[153], and if he was taxed with the demesnes, his lord received the tax, and not the sovereign. I need not say that all this got righted in time, but the anomalous condition described did exist originally. There are traces of a different view by which the power of imposing tallage would have been vested exclusively in the king, even when the manor to be taxed was one that had passed out of his hand[154]. But the general rule up to the fourteenth century was undoubtedly to relinquish the proceeds to the holder of the manor. Such treatment is eminently characteristic of the conception which lies at the bottom of the whole institution of ancient demesne. It is undoubtedly based on the private privilege of royalty. All the numerous exceptions and exemptions from public liabilities and duties flow from one source: the king does not want his land and his men to be subjected to any vexatious burdens which would lessen their power of yielding income[155]. Once fenced in by royal privilege, the ancient demesne manor keeps up its private immunity, even though it ceases to be royal. And this is the second fact, with which one has to reckon. If the privileged villainage of ancient demesne is founded on the same causes as villainage pure and simple, the distinguishing element of 'privilege' is supplied to it by the private interest of the king. This seems obvious enough, but it must be insisted upon, because it guards against any construction which would pick out one particular set of rights, or one particular kind of relations as characteristic of the institution. Legal practice and later theory concerned themselves mostly with peculiarities of procedure, and with the eventuality of a subject owning the manor. But the peculiar modes of litigation appropriate to the ancient demesne must not be disconnected from other immunities, and the ownership of a private lord is to be considered only as engrafted on the original right of the king. With this preliminary caution, we may proceed to an examination of those features which are undoubtedly entitled to attract most attention, namely, the special procedure which is put in action when questions arise in any way connected with the soil of ancient demesne.

Parvum breve de recto.

Bracton says, that in such cases the usual assizes and actions do not lie, and the 'little writ of right close' must be used 'according to the custom of the manor.' The writ is a 'little and a close' one, because it is directed by the king to the bailiffs of the manor and not to the justices or to the sheriff[156].

It does not concern freehold estate, but only land of base though privileged tenure. An action for freehold also may be begun in a manorial court, but in that case the writ will be 'the writ of right patent' and not 'the little writ of right close[157].'

The exclusion of the tenants from the public courts is a self-evident consequence of their base condition; in fact, pleading ancient demesne in bar of an action is, in legal substance, the same thing

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[153] Cor. R. M. 5 E. II, m. 77: 'Quando communitas comitatus talliatur … predicti homines taxantur sicut ceteri villani ejusdem comitatus' (against the ancient demesne claim).

[154] Fitzherbert, Abr. Monstauerunt, 6 (H. 32 E. III): '… quant le roi taile les burghs a taunt come ils paia a taile pur tant il nous distreint.' *Th.*: 'Entend qe les feoffes le roy auront taile?' quasi diceret non, 'car cest un regalte qui proprement attient al roy et a nul auter.' *Clam.*: 'Tout aura il tail il serra leue en due maner sil auront breve hors del chauncerie al viconte, sc. quod habere facias racionable taile.' The men of King's Ripton, Hunts., who were constantly wrangling about their rights with the Abbot of Ramsey, the lord of the manor, maintained that they had never been tallaged nisi tantummodo ad opus Regis, and their claim was corroborated by an inspection of the Exchequer Rolls (Madox, Exch., i. 757, n). Before granting a writ of tallage to the Abbot of Stoneleigh in 1253, Henry III had an inquisition made as to the precedents. It was found that 'Nunquam predictum manerium de Stonle talliatum fuit postquam Johannes Rex predictum manerium dedit predicti Abbati et Conventui' (Stoneleigh Reg., f. 25).

[155] The Law-books say so distinctly. Britton, ii. 13: 'Et pur ceo qe teus sokemans sount nos gaynours de nos terres, ne voloms mie qe teles gentz seint a nule part somouns de travailer en jurez ne en enquestes, for qe en maners a queus il appendent.' Cf. Fleta, p. 4.

[156] Natura Brevium, f. 3 b (ed. Pynson).

[157] Y.B. H. 49 E. III, pl. 12 (Fitzherbert, Abr. Aunc. Dem. 42, quotes pl. 7 instead of 12 by mistake): *Belk(nap)*, 'Verite est qe le terre est demandable par le briefe de droit patent en le court le seigniour apres la confirmacion (*sc.* par chartre) par ce qe le brief de droit serra commence en le court le seignior, mes apres la confirmacion il ne serra demande en auncien demesne par brief de droit close secundum consuetudinem,' etc.

as pleading villainage[158]. Of course, an outlet was provided by the manorial writ in this case, and there was no such outlet for villains outside the ancient demesne; but as to the original jurisdiction in common law courts, jurisdiction that is in the first instance, the position was identical. Though legally self-evident, this matter is often specially noticed, and sometimes stress is laid on peculiarities of procedure, such as the inapplicability of the duel and the grand assize[159] in land to ancient demesne, peculiarities which, however, are not universally found[160], and which, even if they were universally found, would stand as consequence and not as cause. This may be accounted for by the observation that the legal protection bestowed on this particular class of holdings, notwithstanding its limitations, actually imparted to them something of the nature of freehold, and led to a great confusion of attributes and principles. Indeed, the difficulty of keeping within the lines of privileged 'villainage' is clearly illustrated by the fact that the 'little writ,' with all its restrictions, and quite apart from any contention with the lord, recognises the tenant in ancient demesne as capable of independent action.

Villains, or men holding in villainage, have no writ, either manorial or extra-manorial, for the protection or recovery of their holdings, and the existence of such an action for villain socmen is in itself a limitation of the power of lord and steward, even when they are no parties to the case. And so the distinction between freehold and ancient demesne villainage is narrowed to a distinction of jurisdiction and procedure. This is so much the case that if, by a mere slip as it were, a tenement in ancient demesne has been once recovered by an assize of novel disseisin, the exclusive use of the 'little writ' is broken, and assizes will ever lie hereafter, that is, the tenement can be sued for as 'freehold' in common law courts[161]. Surely this could happen only because the tenure in ancient demesne, although a kind of villainage, closely resembled freehold.

The 'little writ' in manors alienated from the Crown.

One has primarily to look for an explanation of these great privileges to manors, which had been granted by the king to private lords. On such lands the 'little writ' lay both when 'villain socmen' were pleading against each other[162], and when a socman was opposed to his lord as a plaintiff[163]. This last eventuality is, of course, the most striking and important one. There were some disputes and some mistakes in practice as to the operation of the rule. The judges were much exercised over the question whether an action was to be allowed against the lord in the king's court. The difficulty was, that the contending parties had different estates in the land, the one being possessed of the customary tenancy in ancient demesne, and the other of the frank fee. There are authoritative fourteenth-century decisions to the effect that, in such an action, the tenant had the option between going to the court at Westminster or to the ancient demesne jurisdiction[164].

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[158] Bracton actually calls the plea of ancient demesne an exception of villainage, f. 200: 'Si autem in sokagio villano, sicut de dominico domini Regis, licet servitia certa sunt, obstabit ei exceptio villenagii, quia talis sokmannus liberum tenementum non habet quia tenet nomine alieno.' Cf. Fitzherbert, Abr. Aunc. Dem. 32.

[159] Bract. Note-book, pl. 652: 'Non debent extra manerium illud placitare quia non possunt [ponere] se in magnam assisam nec defendunt se per duellum.' On the cases when an assize could be taken as to tenements in ancient demesne, see the opinion printed in Horwood's Introduction to Y.B. 21/22 Edw. I, p. xviii.

[160] Stoneleigh Reg., f. 76 sqq: 'Item in placito terre possunt partes si voluerint ponere jus terre sue in duello campionum vel per magnam assisam, prout patet in recordo rotuli de anno xlv Regis Henrici inter Walterum H. et Johannem del Hul etc. et inter Galfridum Crulefeld et Willelmum Elisaundre anno xx Regis Edwardi filii Regis Henrici,' etc.

[161] Bract. Note-book, 1973: 'Nota quod si manerium quod solet esse de dominico domini Regis datum fuerit alicui et postea semel capta fuerit assisa noue uel mortis de consuetudine, iterum capiantur assise propter consuetudinem.'

[162] Britton, ii, 142.

[163] If the lord brings an action against the tenant, ancient demesne is no plea, Viner, Abr., Anc. Dem. G. 4. This was not quite clear however, because ancient demesne is a good plea whenever recovery in the action would make the land frank fee.

[164] Y.B., M. 41 Edw. III, 22: '*Chold*: Si le seigniour disseisie son tenaunt il est en eleccion del tenant de user accion en le court le seigniour ou en le court le roy' (Fitzherbert, Abr. Aunc. Dem. 9). Liber assis. 41 Edw. III, pl. 7, f. 253: '*Wichingham*: Si le tenant en auncien demesne fuit disseisi par le seignior en auncien demesne il est a volunte le tenant de porter lassise al comen ley ou en auncien demesne mes e contra si le seignior soit disseisi par le tenant, il ne puit aillours aver son recoverie que en le court le roy.'

The main fact remains, that a privileged villain had 'personam standi in judicio' against his lord, and actually could be a plaintiff against him. Court rolls of ancient demesne manors frequently exhibit the curious case of a manorial lord who is summoned to appear, distrained, admitted to plead, and subjected to judgment by his own court[165]. And as I said, one looks naturally to such instances of egregious independence, in order to explain the affinity between privileged villainage and freehold. The explanation would be insufficient, however, and this for two simple reasons. The passage of the manor into the hands of a subject only modifies the institution of ancient demesne, but does not constitute it; the 'little writ of right' is by no means framed to suit the exceptional case of a contention between lord and tenant; its object is also to protect the tenants against each other in a way which is out of the question where ordinary villainage is concerned. The two reasons converge, as it were, in the fact that the 'little writ of right' is suable in all ancient demesne manors without exception, that it applies quite as much to those which remain in the crown as to those which have been alienated from it[166]. And this leads us to a very important deduction. If the affinity of privileged villainage and freehold is connected with the 'little writ of right' as such, and not merely with a particular application of it, if the little writ of right is framed for all the manors of ancient demesne alike, the affinity of privileged villainage and freehold is to be traced to the general condition of the king's manors in ancient demesne[167].

Although the tenants in ancient demesne are admitted to use the 'little writ of right' only, their court made it go a long way; and in fact, all or almost all the real actions of the common law had their parallel in its jurisdiction. The demandant, when appearing in court, made a protestation to sue in the nature of a writ of mort d'ancestor or of dower[168] or the like, and the procedure varied accordingly, sometimes following very closely the lines of the procedure in the high courts, and sometimes exhibiting tenacious local usage or archaic arrangements[169].

Procedure of revision.

Actions as to personal estate could be pleaded without writ, and as for the crown pleas they were reserved to the high courts[170]. But even in actions regarding the soil a removal to these latter was not excluded[171]. Evocation to a higher court followed naturally if the manorial court refused justice and such removal made the land frank fee[172]. The proceedings in ancient demesne could be challenged, and thereupon a writ of false judgment brought the case under the cognizance of the courts of common law. If on examination an error was found, the sentence of the lower tribunal

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[165] Stoneleigh Register: 'Item anno regni Regis Eduardi filii Regis Henrici vij Ricardus Peyto tulit breue de recto versus abbatem de Stonle et alios de tenementis in Fynham in curia de Stonle.' There are several instances in the Court Rolls of King's Ripton, Hunts. See App. V.

[166] Bract. Note-book, 834: 'Preceptum est vicecomiti quod preciperet ballivis manerii Dom. Regis de Haueringes quod recordari facerent in Curia Dom. Regis de H. loquelam que fuit in eadem curia per breue Dom. Regis inter,' etc.: 652 is to the same point. I must say, however, that I do not agree with Mr. Maitland's explanation, vol. ii. p. 501, n. 4: 'John Fitz Geoffrey (the defendant pleading ancient demesne) cannot answer without the King. Tenet nomine alieno. Bract. f. 200. The privileges of tenants in ancient demesne are the King's privileges.' John Fitz Geoffrey is the King's *firmarius*, and the other defendants vouch him to warranty. After having pleaded to the jurisdiction of the Court he puts in a second plea, 'salvo predicto responso,' namely, that the tenement claimed is encumbered by other and greater services than paying 15 s. to hold freely. This is clearly the farmer's point of view, and as such, he cannot answer without the king. I lay stress on the point because a person pleading ancient demesne, although not holding *nomine proprio* in strict law, is compelled to answer without the King in the manorial court and by the manorial writ.

[167] I need not say that the 'little writ' did not lie against the King himself. No writs did. Cp. Fleta, p. 4.

[168] Y.B., 11/12 Edw. III, 325 (Rolls Ser.).

[169] I shall have to speak of the constitution and usages of the court in another chapter.

[170] Actions on statutes could not be pleaded in ancient demesne because, it was explained, the tenantry not being represented in parliament, were no parties in framing the statute; Viner, Abr. Anc. Dem. E. 19. Another explanation is given in Y.B., H. 8 Edw. II, p. 265.

[171] As a matter of course, any question as to whether a manor was ancient demesne, and whether a particular tenement was within the jurisdiction of it, could be decided only in the high courts.

[172] Viner, Abr., I. 21.

was quashed and the case had to proceed in the higher[173]. Instances of examination and revision are frequent in our records[174]. The examination of the proceedings by the justices was by no means an easy matter, because they were constantly confronted by appeals to the custom of the manor and counter appeals to the principles of the common law of England. It was very difficult to adjust these conflicting elements with nicety. As to the point of fact, whether an alleged custom was really in usage or not, the justices had a good standing ground for decision. They asked, as a rule, whether precedents could be adduced and proved as to the usage[175]; they allowed a great latitude for the peculiarities of customary law; but the difficulty was that a line had to be drawn somewhere[176]. This procedure of revision on the whole is quite as important a manifestation of the freehold qualities of privileged villainage as pleading by writ. Men holding in pure villainage also had a manorial court to go to and to plead in, but its judicial organisation proceeded entirely from the will and power of the lord, and it ended where his will and power ended; there was no higher court and no revision for such men. The writ of false judgment in respect of tenements in ancient demesne shows conclusively that the peculiar procedure provided for the privileged villains was only an instance and a variation of the general law of the land, maintaining actionable rights of free persons. And be it again noted, that there was no sort of difference as to revision between those manors which were in the actual possession of the crown and those which were out of it[177]. Revision and reversal were provided not as a complement to the legal protection of the tenant against the lord, but as a consequence of that independent position of the tenant as a person who has rights against all men which is manifested in the *parvum breve*[178]. It is not without interest to notice in this connexion that the *parvum breve* is sometimes introduced in the law books, not as a restriction put upon the tenant, nor as the outcome of villainage, but as a boon which provides the tenant with a plain form of procedure close at hand instead of the costly and intricate process before the justices[179].

Breve de 'Monstraverunt'.

If protection against the lord had been the only object of the procedure in cases of ancient demesne, one does not see why there should be a 'little writ' at all, as there was a remedy against the lord's encroachments in the writ of 'Monstraverunt,'[180] pleaded before the king's justices. As it is, the case of disseisin by the lord, to whom the manor had come from the crown, was treated simply as an instance of disseisin, and brought under the operation of the writ of right, while the 'Monstraverunt' was restricted to exaction of increased services and change of customs[181]. The latter writ was a very peculiar one, in fact quite unlike any other writ. The common-law rule that each tenant in severalty has

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[173] Y.B., H. 3 Edw. III, 29: '*Caunt*: Si le jugement soit une foitz revers, la court auncien demesne ad perdu conusance de ce ple a touts jours.'

[174] Stoneleigh Reg.: 'Item si contingat quod error sit in iudiciis eorum et pars ex eorum errore gravetur contra consuetudines, pars gravata habebit breve Regis, ad faciendum venire recordum et processum inter partes factos coram justiciariis domini Regis de Banco; qui justiciarii inspecto recordo et processu quod erratum est in processu iusto iudicio emendabunt et ipsos sokemannos propter errorem et falsum iudicium secundum quantitatem delicti ad multam condempnabunt.'

[175] Bract. Note-book, 834: 'Et illi de curia qui veniunt quesiti, si unquam tale factum fuit judicium in prefata curia, et quod ostendant exemplum, et nichil inde ostendere possunt, nec exemplum nec aliud.'

[176] Y.B., 11/12 Edw. III, p. 325 (Rolls Ser.): '*Stonore*: Dit qe toutz les excepcions poent estre salve par usage del manoir forspris un, cest a dire qe la ou il egarde seisine de terre par defalte apres defalte la ou le tenant avait attourne en court qe respoundi pur lui.' Cf. Y.B., H. 3 Edw. III, 29, and T. 3 Edw. III, 29.

[177] Bract. Note-book, pl. 834 and 1122 concern the royal manors of Havering and Kingston.

[178] I say against all men, because in the case of a stranger's interfering with the privileged villain's rights, it was for him to prove any exemption, e.g. conveyance by charter, which would take the matter out of the range of the manorial court.

[179] Britton, ii. 13: 'Et pur ceo qe nous voloms qe ils eyent tele quiete, est ordeyne le bref de droit clos pledable par baillif del maner de tort fet del un sokeman al autre, qe il tiegne les plaintifs a droit selom les usages del maner par simples enquestes.'

[180] Natura brevium, f. 4 b (ed. Pynson).

[181] Stoneleigh Reg.: 'Si dominus a sokemanis tenentibus suis exigat alias consuetudines quam facere consueuerunt quum manerium fuit in manibus progenitorum Regis eos super hoc fatigando et distringendo, prefati tenentes habent recuperare versus dominum et balliuos suos per breve Regis quod vocatur Monstraverunt nobis homines de soka de Stonle,' etc.

to plead for himself did not apply to it; all join for saving of charges, albeit they be several tenants[182]. What is more, one tenant could sue for the rest and his recovery profited them all; on the other hand, if many had joined in the writ and some died or withdrew, the writ did not abate for this reason, and even if but one remained able and willing to sue he could proceed with the writ[183]. These exceptional features were evidently meant to facilitate the action of humble people against a powerful magnate[184]. But it seems to me that the deviation from the rules governing writs at common law is to be explained not only by the general aim of the writ, but also by its origin.

Petition.

In form it was simply an injunction on a plaint. When for some reason right could not be obtained by the means afforded by the common law, the injured party had to apply to the king by petition. One of the most common cases was when redress was sought for some act of the king himself or of his officers, when the consequent injunction to the common law courts or to the Exchequer to examine the case invariably began with the identical formula which gave its name to the writ by which privileged villains complained of an increase of services; *monstravit* or *monstraverunt N.N.*; *ex parte N.N. ostensum est*:—these are the opening words of the king's injunctions consequent upon the humble remonstrations of his aggrieved subjects[185]. Again, we find that the application for the writ by privileged villains is actually described as a plaint[186]. In some cases it would be difficult to tell on the face of the initiatory document, whether we have to do with a '*breve de monstraverunt*' to coerce the manorial lord, or with an extraordinary measure taken by the king with a view to settling his own interests[187].

The 'Monstraverunt' on the king's own land.

And this brings me to the main point. Although the writ under discussion seems at first sight to meet the requirement of the special case of manors alienated from the crown, on closer inspection it turns out to be a variation of the peculiar process employed to insist upon a right against the crown. Parallel to the 'Monstraverunt' against a lord in the Common Pleas we have the 'Monstraverunt' against the king's bailiff in the Exchequer. The following mandate for instance is enrolled in the eventful year 1265: 'Monstraverunt Regi homines castri sui de Brambur et Schotone quod Henricus Spring constabularius castri de Brambur injuste distringit eos ad faciendum alia servicia et alias consuetudines quam facere consueverunt temporibus predecessorum Regis et tempore suo. Ideo mandatum est vicecomiti quod venire etc. predictum Henricum a die Pasche in xv dies ad respondendum Regi et predictis hominibus de predicta terra et breve etc.'[188] There is not much to

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[182] Viner, Abr. Anc. Dem. C^2, 3.

[183] Fitzherbert, Abr. Monstraverunt, 5 (P. 19, Edw. III): '*Seton*: Cest un cas a par luy en cest breue de Monstrauerunt qe un purra sue pur luy e tous les autres del ville tout ne soient pas nosmes en le breve e par la suite de un tous les autres auront auantage et cesty qe vient purra estre resceu e respondra par attourne pur touts les auters coment qe unque ne resceu lour attournement; issint qe cest suit ne breue nest semblable a auter.'

[184] As it was the peasants had the greatest difficulty in conducting these cases. In 1294 some Norfolk men tried to get justice against Roger Bigod, the celebrated defender of English liberties. They say that they have been pleading against him for twenty years, and give very definite references. The jury summoned declares in their favour. The earl opposes them by the astonishing answer that they are not his tenants at all. It all ends by the collapse of the plaintiffs for no apparent reason; they do not come into court ultimately, and the jurors plead guilty of having given a false verdict; see App. VII. In the case of the men of Wycle against Mauger le Vavasseur, to which I have referred several times, the trial dragged on for five years; the court adjourned the case over and over again; the defendant did not pay the slightest attention to prohibitions, but went on ill-treating the tenantry. At last he carried off a verdict in his favour; but the management of the trial certainly casts much suspicion on it. Cf. Placitorum Abbreviatio, 303.

[185] Madox, History of the Exch., i. 723, c, d; 724, e; 725, f.

[186] Bract. Note-book, pl. 1237: 'Homines prioris S^{ti} Swithini … questi fuerunt Dom. Regi.'

[187] Madox, Exch., i. 725, u; the 'Monstraverunt' of the men of King's Ripton quoted above on the question of tallage. This matter of tallage could certainly be treated as an alteration of services, and sent for trial to the Common Bench.

[188] Exch. Memoranda, Q.R. 48/49 Henry III, m. 11. The position of the castle of Bamborough was certainly a peculiar one at the time. Cf. Close Roll, 49 Henry III, m. 7, d.

choose between this and the enrolment of a 'breve de monstraverunt' in the usual sense beyond the fact that it is entered on a Roll of Exchequer Memoranda. In 1292 a mandate of King Edward I to the Barons of the Exchequer is entered in behalf of the men of Costeseye in Norfolk who complained of divers grievances against Athelwald of Crea, the bailiff of the manor. The petition itself is enrolled also, and it sets forth, that whereas the poor men of the king of the base tenure in the manor of Costeseye held by certain usages, from a time of which memory runs no higher, as well under the counts of Brittany as under the kings to whom the manor was forfeited, now bailiff Athelwald distrains them to do other services which ought to be performed by pure villains. They could sell and lease their lands in the fields at pleasure, and he seizes lands which have been sold in this way and amerces them for selling; besides this he makes them serve as reeves and collectors, and the bailiff of the late Queen Eleanor tallaged them from year to year to pay twenty marks, which they were not bound to do, because they are no villains to be tallaged high and low[189]. Such is the substance of this remarkable document, to which I shall have to refer again in other connexions. What I wish to establish now is, that we have on the king's own possessions the exact counterpart of the 'breve de monstraverunt.' The instances adduced are perhaps the more characteristic because the petitioners had not even the strict privilege of ancient demesne to lean upon, as one of the cases comes from Northumberland, which is not mentioned in Domesday, and the other concerns tenants of the honour of Richmond.

There can be no doubt that the tenantry on the ancient demesne had even better reasons for appealing to immemorial usage, and certainly they knew how to urge their grievances. We may take as an instance the notice of a trial consequent upon a complaint of the men of Bray against the Constable of Windsor. Bray was ancient demesne and the king's tenants complained that they were distrained to do other services than they were used to do. The judgment was in their favour[190].

The chief point is that the writ of 'Monstraverunt' appears to be connected with petitions to the king against the exactions of his officers, and may be said in its origin to be applicable as much to the actual possessions of the crown as to those which had been granted away from it. This explains a very remarkable omission in our best authorities. Although the writ played such an important part in the law of ancient demesne, and was so peculiar in its form and substance, neither Bracton nor his followers mention it directly. They set down 'the little writ of right close' as the only writ available for the villain socmen. As the protection in point of services is nevertheless distinctly affirmed by those writers, and as the 'Monstraverunt' appears in full working order in the time of Henry III and even of John[191], the obvious explanation seems to be that Bracton regarded the case as one not of writ but of petition, a matter, we might say, rather for royal equity than for strict law. Thus both the two modes of procedure which are distinctive of the ancient demesne, namely the 'parvum breve' and the 'Monstraverunt,' though they attain their full development on the manors that have been alienated, seem really to originate on manors which are in the actual possession of the crown.

Alienation of Royal Manors.

If we now examine the conditions under which the manors of the ancient demesne were alienated by the crown, we shall at once see that no very definite line could be drawn between those which had been given away and those which remained in the king's hand. The one class gradually shades off into the other. A very good example is afforded by the history of Stoneleigh Abbey. In 1154 King Henry II gave the Cistercian monks of Radmore in Staffordshire his manor of Stoneleigh

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[189] Exch. Memoranda, Q.R. Trin. 20 Edw. I, m. 21, d. I give the documents in full in App. VIII. The petitioners are not villains, but they are tenants of base tenure. They evidently belong to the class of villain socmen outside the ancient demesne, of which more hereafter.

[190] Placitorum Abbrev. 25: 'Consideratum est quod constabularius de Windesore de quo homines de Bray questi fuerunt quod ipse vexabat eos de serviciis et consuetudinibus indebitis et tallagia insueta ab eis exigebat accipiat ab eis tallagia consueta et ipsi homines alia servicia et consuetudines quas facere solent faciant.' (Pasch. et Trin., 1 John.)

[191] Madox, Exch. i. 411, u: 'Homines de Branton reddunt compotum de x libris, ut Robertus de Sachoill eis non distringat ad faciendum ei alias consuetudines quam Regi facere consueverunt dum fuerunt in manu sua.' (Pipe Roll 13 Jo., 7, 10 b, Devenesc).

in exchange for their possessions in Radmore. The charter as given in the Register of the Abbey seems to amount to a complete grant of the land and of the jurisdiction. Nevertheless, we find Henry II drawing all kinds of perquisites from the place all through his reign, and it is specially noticed that his writs were directed not to the Abbot or the Abbot's bailiffs, but to his own bailiffs in Stoneleigh[192]. In order to get rid of the inconveniences consequent upon such mixed ownership, Abbot William of Tyso bought a charter from King John, granting to the Abbey all the soke of Stoneleigh[193]. But all the same the royal rights did not yet disappear. There were tenants connected with the place who were immediately dependent on the king[194], and his bailiff continued to exercise functions by the side of, and in conjunction with, the officers of the Abbot[195]. In the 50th year of Henry III a remarkable case occurred:—a certain Alexander of Canle was tried for usurping the rights of the Abbot as to the tenantry in the hamlet of Canle, and it came out that one of his ancestors had succeeded in improving his position of collector of the revenue into the position of an owner of the rents. Although the rights which were vindicated against him were the rights of the Abbot, still the king entered into possession and afterwards transferred the possession to the Abbot[196]. In one word, the king is always considered as 'the senior lord' of Stoneleigh; his lordship is something more direct than a mere feudal over-lordship[197].

We find a similar state of things at King's Ripton. The manor had been let in fee farm to the Abbots of Ramsey. In case of a tenement lapsing into the lord's hands, it is seized sometimes by the bailiff of the king, sometimes by the bailiffs of the Abbot[198]. The royal writs again are directed not to the Abbot, but to his bailiff. The same was the case at Stoneleigh[199], and indeed this seems to have been the regular course on ancient demesne manors[200]. This curious way of ignoring the lord himself and addressing the writ directly to his officers seems an outcome of the fundamental assumption that of these manors there was no real lord but the king, and that the private lord's officers were acting as the king's bailiffs.

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[192] Dugdale, Monasticon. v. 443; Stonleigh Reg. f. 14 b. Cf. Court Rolls of Ledecumbe Regis (Chapter House, County Bags, Berks, A. 3): 'Anno domini MCCLXVIII, solverunt homines de Ledecumbe Regis C. sol. ad scaccarium domini Regis, pro redditu domini Regis et predicti homines habent residuum in custodia sua excepta porcione prioris Montis Acuti de tempore suo et porcione prioris de Bermundseye de tempore suo.' The manor had been let in fee farm to the monks of Cluny, who demised it to the Prior of Montacute, who in his turn let it to the Prior of Bermondsey.

[193] Stoneleigh Reg. f. 15 a: 'Totam sokam de Stonleya et omnes redditus et consuetudines et rectitudines quas Henricus rex pater noster ibi habuit salua regali justicia nostra. Uigore quarum chartarum prefatus Abbas et conventus habent et possident totam sokam de Stonle que quondam pertinuit ad le Bury (*sic*) in dicta soka existens edificatum, ubi quidam comes quondam de licencia Regis moram traxit. Qui locus nunc edificiis carens vocatur le Burystede iuxta Crulefeld prout fossatis includitur, et est locus nemorosus.'

[194] Stoneleigh Reg. f. 13 a: 'Isti duo tenent (burgagia in Warrwick) per seruicium sustinendi unum plumbum in manerio de Stonle competens monasterio Regis.'

[195] Placita de Quo Warranto, 778: 'Item clamat quod Ballivus dom. Regis in manerio de Stonleye nullam faciet districtionem seu attachiamenta sine presencia Ballivi Abbatis.'

[196] See App. VI.

[197] Stoneleigh Reg. 13 a: 'W.W. tenet unum burgagium per seruicium inveniendi domino regi seniori domino de Stonle quartam partem unius tripodis.'

[198] King's Ripton Court Rolls, Augment. Off. Rolls, xxiii. 94, m. 10: 'Dicta Matildis optulit se versus Margaretam Greylaund de placito dotis, que non venit. Ideo preceptum est capere in manum domini Regis medietatem mesuagii etc.—pro defectu ipsius Margarete. Eadem Matildis optulit se uersus Willelmum vicarium—qui non uenit. Ideo preceptum est capere in manum domini Regis medietatem quinque acrarum terre etc. (Curia de Riptone Regis die Lune in festo sanctorum Protessi et Marciniani anno [r. r. E. xxiv. et J. abb. x]); m. 10, d.—Qui venit et quantum ad aliam acram dicit, quod non est tenens set quod Abbas seysiuit illam in manum suam. (Curia—in festo Assumpcionis—anno supra dicto).' In the first case the seizure corresponds to the 'cape in manum' of a freehold. As there could be no such thing in the case of villainage, and the procedural seizure was resumption by the lord, the point is worth notice and may be explained by the King's private right still lingering about the manor. The last case is one of escheat or forfeiture.

[199] Stoneleigh Reg. 75 v: 'Item si aliquis deforciatur de tenemento suo et tulerit breve Regis clausum balliuis manerii versus deforciantes, dictum breve non debet frangi nisi in curia.'

[200] Natura brevium, 13: 'Balliuis suis.'

According to current notions the demesnes of the crown ought not to have been alienated at all. Although alienated by one king they were considered as liable to be resumed by his successors[201]. And as a matter of fact such resumptions were by no means unusual. Edward I gave an adequate expression to this doctrine when he ordered an inquisition into the state of the tenantry at Stoneleigh: —he did not wish any encroachment made on the old constitution of the manor, for he had always in mind the possibility that his royal rights would be resumed by himself or by one of his successors[202].

Services certain on Royal Manors.

If we turn to the court rolls of a manor which is actually in the king's hand and compare them with those of a manor which he has granted to some convent or some private lord, we see hardly any difference between them. The rolls of the manor of Havering at the Record Office, although comparatively late, afford a good insight into the constitution of a manor retained in the king's own hand. They contain a good many writs of right, and though, naturally enough, the tenants do not bring actions against the king, we find an instance in which the king brings an action against his tenant, and pleads before a court which is held in his own name[203]. This is good proof that the condition of the tenants was by no means dependent on the arbitrary action of the manorial officers. When King Henry II granted Stoneleigh to the Cistercians he displaced a number of 'rustics' from their holdings, and while doing this he recognised their right and enjoined the sheriff of Warwickshire to give them an equivalent for what they had lost in consequence of the grant[204]. The notion from which all inquiry consequent upon a 'Monstraverunt' starts is always this, that the tenants were holding by *certain* (i.e. by fixed) services at the time when the manor was in the king's own hand. The certainty is not created by the fact that the manor passes away from the king to some one else; it exists when the land is royal land and therefore cannot be destroyed on land that has been alienated. So true is this that Bracton and Britton give their often cited description of privileged villainage without alluding to the question whether or no the manor is still in the king's hand[205]; Britton even applies this description primarily to the king's own possessions by his way of stating the law as the direct utterance of the king's command. The well-known fact that the 'ferm' or rent of royal manors was not always fixed, that we constantly hear of an increased rental (*incrementum*) levied in addition to the old 'ferm' (*assisa*; *redditus antiquitus assisus*), can be easily reconciled with this doctrine[206]. The prosperity of the country was gradually rising; both in agricultural communities and in towns, new tenements and houses, new occupations and revenues were growing, and it was not the interest either of the communities or of the lord to compress this development within an unelastic bond. In principle the increased payments fell on this new growth on the demesne, although this may in some cases have been due to exactions against which the people could remonstrate only in the name of immemorial custom, and only by way of petition since nobody could judge the king. In principle, too, certainty of condition was admitted as to the privileged villains on the king's demesnes[207].

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[201] Britton, i. 221: 'Rois aussi ne porrount rien aliener les dreits de lour coroune ne de lour reaute, qe ne soit repellable par lour successours.'

[202] Stoneleigh Reg. 30: 'Nos attendentes, quod huiusmodi alienaciones et consuetudinum mutaciones eciam in nostri et heredum nostrorum preiudicium et exheredacionem cedere possent, si manerium illud in manus nostras aliquo casu deuenerit sustinere nolumus sicut nec debemus manerium illud aut ea que ad illud pertinent aliter immutari quam esse solebant temporibus predictis.'

[203] The writs are directed sometimes to the bailiffs of the Archbishop of Canterbury and of the Duke of Albemarle, who had the manor in custody for King Richard II, but in the twenty-third year they are inscribed to the King's bailiffs. (Augmentation Court Rolls, xiv. 38). As to the trial mentioned in the text see App. IX.

[204] Stoneleigh Reg. 11 a: 'Precipio tibi quod sine dilacione deliberes Abbati de Stonleia omnes terras et tenuras quas ego dedi et carta mea confirmaui. Et de terra quam rustici uersus calumpniantur et quam ego ei dedi et concessi, inquire si rectum in ea habuerunt et si rectum in ea habent, dona eis rusticis alibi in terra mea excambium ad valenciam.'

[205] Bracton, f. 209: 'Ad quemcumque manerium peruenerit.'

[206] Madox, Firma Burgi, 54; Pipe Rolls, passim. Cf. Rot. Cur. Regis Ric., p. 15: 'Homines de Kingestone—c. sol. … pro respectu tenendi villam suam ad eandem firmam quam reddere solebant tempore Henrici Regis.'

[207] Madox, Exch. 1437, z: 'Homines de Lechton x marcas pro habenda inquisicione per proxima halimota et per legales milites et

Trial of services in 'Monstraverunt'.

This serves to explain the procedure followed by the court when a question of services was raised by a writ of 'Monstraverunt.' The first thing, of course, was to ascertain whether the manor was ancient demesne or not, and for this purpose nothing short of a direct mention in Domesday was held to be sufficient[208]. When this question had been solved in the affirmative, a jury had to decide what the customs and duties were, by which the ancestors of the plaintiffs held at the time when the crown was possessed of the manor. In principle it was always considered that such had been the services at the time of the Conquest[209], but practically, of course, there could be no attempt to examine into such ancient history. The men of King's Ripton actually pleaded back to the time of King Cnut, and maintained that no prescription was available against their rights as no prescription could avail against the king[210]. The courts naturally declined to go higher than men could remember, but they laid down this limitation entirely as one of practice and not of principle[211]. Metingham demanded that the claimants should make good their contention even for a single day in Richard Cœur de Lion's time[212]. The men of Wycle combine both assertions in their contention against Mauger; they appeal to the age of the first Norman kings, but offer to prove the certainty of their services in the reigns of Richard and John[213].

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alios homines de visneto, quas consuetudines ipsi fecerunt tempore Henrici Regis Patris.' (Pipe Roll. 4 John.) Cf. 442, a: 'Homines de Stanleya reddunt compotum de uno palefrido, ut inquiratur per sacramentum legalium hominum, quas consuetudines et quae servitia homines de manerio de Stanleia facere consueverunt Regi Henrico patri Ricardi Regis dum essent in manu sua.' (Pipe Roll, 9 John.)

[208] Y.B., Trin., 49 E. III, pl. 8 (Fitzherbert, Abr. Monstrav. 4): '*Han.* mist auant record de Domesday qui parla *ut supra*:—*Terra sancti Stephani* en le title qui parla de ceo maner que il fuit en sa maine. Et auxi il mist auant chartre le Roy que ore est, par quel le roy reherse quil ave viewe la chartre le roy Henri le primer, et reherce tout le chartre, et ceo chartre voilet que Henri aue viewe par ceo parolle *inspeximus* la chartre le roy William Conquerour qui aue done graunte e confirme mesme le manor a un Henri Butle, a luy, et a ces heirs a ceo iour, quel chartre issint volent *inspeximus cartam domini Edwardi Regis Anglie* issint par le recorde et par les chartres est expressement reherce par le roy qui ore est, que William Conquerour fuit en possession de ceo maner, Seinct Edward auxint, en quel cas ceo serra aiudge auncient demesne tantamont come si la terre ust estre en la main Seint Edward par expresse parolx en le Domesday. *Belknap*: Le comen fesance de chartres est de faire parolle en le chartre *dedimus concessimus et confirmauimus* et uncore le chartre est bon assets al part, mesque le roy nauer riens a ceo temps, issint que riens passe par ceo paroll *dedimus* mes il auer par parole de confermement, issint que il nest my proue par ce chartre que ils auoient la possession, pur ceo que les chartres poient estre effectuels a auter entent, scilicet, en nature de confermement, et auxi ces chartres fait par Seint E. et W. Conquerour ne sont my monstres a ore pur record, issint que mesque il furent monstre, et auxi purroit estre proue que le maner fuit en lour possession, nous ne puissomus pas aiudger la terre auncien demesne, pur ceo que auncien demesne sera aiudge par le liuer de domesday qui est de record, et nemy en autre maner. Et puis les plaintifs fuerent nonsues.'

[209] Fitzherbert, Abr. Cause de remover ple, 18 (Y.B., M., 21 Edw. III): '*Wilby*: Il conuient que il count en le *monstrauerunt* que il luy distreint pur auters customes que ses auncestres ne fecerunt en temps W. Conquerour, cas le *monstrauerunt* ne gist pas forsque en cas ou plusiours services sont demandez que ces auncestres ne solent faire en cel temps.'

[210] Coram Rege, Tr. 3 Edw. I, m. 14, d: 'Et unde predicti homines (de Kyngesripton) queruntur quod temporibus Cnout regis quo manerium illud fuit in manu dicti antecessoris sui tenuerunt tenementa sua per seruicia subscripta, videlicet reddendi pro qualibet virgata terre 5 solidos, etc. Et omnes antecessores sui tenuissent tenementa sua per predicta seruicia usque ad conquestum Anglie, et a conquestu usque ad tempus regis Henrici aui regis Johannis aui domini regis nunc, usque ad tempus cuiusdam Abbatis de Rameseye Roberti Dogge nomine qui tempore Henrici Regis distrinxit antecessores suos ad dandum relevium pro voluntate sua, etc. Et Abbas dicit quod non debet eis ad hoc breue respondere, quia desicut in narracione sua non faciunt mencionem quod ipsi extitissent in tali statu in quo fuerunt tempore regis Knout, quem statum ipsi clamant habere, tempore aliorum regum de quo memoria haberi possit nec de quo breue de recto currit nec aliqua verificacio per patriam fieri possit.... Et Reginaldus et alii bene cognoscunt quod ipse Abbas et predecessores sui exstiterunt in seysina percipiendi ab ipsis et antecessoribus suis predicta seruicia indebita a tempore predicti Henrici regis. Set desicut istud breue quod conceditur in fauorem dominicorum domini Regis non habet prescriptionem temporis, petunt judicium si [racione?] alicujus longiqui termini debeant ab actione excludi sua.'

[211] Y.B., M., 15 Edw. II, p. 455: '*Bereford*: Coment puit cest brief vous servir la ou il (the defendant) dist qe luy et ces predecessors ont este de vous et de vos auncestres (seisi) de tout temps come, etc., et vos ont taille, etc. Devoms nous enguerre (enquerre *corr.*) si vos feistes touz services en temps le Roy S^{t}. Edward, ou non de temps que vos avez pris title? *Devon*: Sir navyl (nanyl *corr.*), mais nous disons qe touz les tenants qui tindrent en temps S^{t}. Edward tinderent, etc. (par certains services) … tanqe a ore xv ans devant le brief purchace etc. e ceo puit home enquere.'

[212] Y.B., 21/22 Edw. I, 499 et sqq.

[213] Coram Rege, Pasch. 1 Edw. II, m. 26: 'Postquam idem manerium ad manus antecessorum predicti Maugeri deuenit usque ad tempus memorie, videlicet temporibus regum Ricardi, Johannis et statum illum toto tempore predicto pacifice continuaverunt et habuerunt.' Coram Rege, M. 5 Edw. II, m. 77: 'Unde queruntur quod cum ipsi homines et eorum antecessores tempore Regum Anglie

Nature of tenancy in ancient demesne.

Now all that has been said hitherto applied to 'the tenants in ancient demesne' indiscriminately, without regard to any diversity of classes among them. Hitherto I have not noticed any such diversity, and in so doing I am warranted by the authorities. Those authorities commonly speak of 'men' or 'tenants in ancient demesne' without any further qualification[214]. Sometimes the expression 'condition of ancient demesne' also is used. But closer examination shows a variety of classes on the privileged soil, and leads to a number of difficult and interesting problems.

To begin with, the nature of the tenancy in general has been much contested. As to the law of later times Mr. Elton puts the case in this way: 'There is great confusion in the law books respecting this tenure. The copyholders of these manors are sometimes called tenants in ancient demesne, and land held in this tenure is said to pass by surrender and admittance. This appears to be inaccurate. It is only the freeholders who are tenants in ancient demesne, and their land passes by common law conveyances without the instrumentality of the lord. Even Sir W. Blackstone seems to have been misled upon this point. There are however, as a rule, in manors of ancient demesne, customary freeholders and sometimes copyholders at the will of the lord, as well as the true tenants in ancient demesne[215].' Now such a description seems strangely out of keeping with the history of the tenure. Blackstone speaks of privileged copyhold as descended from privileged villainage[216]; and as to the condition in the thirteenth century of those 'men' or 'tenants in ancient demesne' of whom we have been speaking, there can be no doubt. Bracton and his followers lay down quite distinctly that their tenure is villainage though privileged villainage. The men of ancient demesne are men of free blood holding in villainage[217]. And to take up the special point mentioned by Mr. Elton—conveyance by surrender and admittance is a quite necessary feature of the tenure[218]: conveyance by charter makes the land freehold and destroys its ancient demesne condition[219]. But although this is so clear in the authorities of the thirteenth century, there is undoubtedly a great deal of confusion in later law books, and reasons are not wanting which may account for this fact and for the doctrine propounded by Mr. Elton in conformity with certain modern treatises and decisions.

Classes of tenantry.

We may start with the observation, that privileged villains or villain socmen are not the only people to be found on the soil of the ancient demesne. There are free tenants there and pure villains too[220]. Free socage is often mentioned in these manors, and it is frequently pleaded in order to get a trial transferred to the Common Law Courts. When the question is raised whether a tenement is free or villain socage, the fact that it has been conveyed by feoffment and charter is treated, as has just been pointed out, as establishing its freehold character and subjecting it to the ordinary common law

progenitorum domini Regis nunc, videlicet tempore Regis Willelmi Conquestoris et Willelmi Regis filii sui et eciam tempore Regis Henrici primi solebant tenere terras suas per quaedam certa seruicia videlicet,' etc.

[214] I will here cite Bract. Note-book, pl. 1237, as an instance, although there is hardly any call for quotation on this point.

[215] Law of Copyhold, 8. Cf. the same author's Tenures in Kent, 182.

[216] Blackstone, Law Tracts, ii., especially pp. 128, 129.

[217] Bracton: 'liberi de condicione … tenentes villenagium.' Britton: 'hommes de franc saunc.'

[218] Stoneleigh Reg., 75: 'Item si quis de voluntate et assensu domini facto fine cum domino voluerit dare tenementum suum ad opus alicuius, ueniet in curia cum virga et sursum reddet huiusmodi tenementum ad manum domini sine carta ad opus ementis vel cui datur et ballivus domini habitis prius herietis et aliis de iure domino debitis dictum tenementum emptori seu cui dabitur et heredibus suis secundum consuetudinem manerii habendum et tenendum liberabit in (cum *corr.*?) virga. Et dictus recipiens tunc faciet finem cum domino prout possunt conuenire.... Item extraneus non debet vocari ad warantum in placito terre in curia de Stonle quia sokemanni non possunt feoffare alios per cartas cum ipsi nullas habeant de rege. Set si quos feoffauerint de licencia domini sine carta, ipsos feoffant secundum consuetudinem manerii prout continetur in rotulo curie de anno xx Regis Edwardi filii Regis Edwardi in placito terre inter,' etc.

[219] Placitorum Abbrev. 233, Berks. Cf. Britton, i. 287, note c.

[220] Bracton, f. 7.

procedure[221]. On the other hand, registers and extents of ancient demesne manors sometimes treat separately of 'nativi' or 'villani' as distinguished from the regular customary tenants, and describe their services as being particularly base[222]. In trials it is quite a common thing for a lord, when accused of having altered the services, to plead that the plaintiffs were his villains to be treated at will. Attempts were made in such cases to take advantage of the general term 'men of ancient demesne,' and to argue that all the population on the crown manors must be of the same condition, the difference of rank applying only to the amount and the kind of services, but not to their certainty, which ought to be taken for granted[223]. But strictly and legally the lord's plea was undoubtedly good: the courts admitted it, and when it was put forward proceeded to examine the question of fact whether the lord had been actually seised of certain or of uncertain services[224]. It is of considerable importance to note that the difference between villains pure and villains privileged was sometimes connected with the distinction between the lord's demesne and the tenant's land in the manor[225]. The demesne proper was frank fee in the hands of the lord, and could be used by him at his pleasure. If he chose to grant it away to villains in pure villainage, the holdings thus formed could have no claim to rank as privileged land. It was assumed that some such holdings had been formed at the very beginning, as it were, that is at a time beyond memory of man, but tenements at will could be created at a later time on approved waste or on soil that had escheated to the lord and in this way passed through his demesne[226]. One of the reasons of later confusion must be looked for in the fact that the pure villain holdings gradually got to be recognised at law as copyhold or base customary tenures. They were thus brought dangerously near to ancient demesne socage, which was originally nothing but base customary tenure. The very fact of copyhold thus gaining on villain socage may have pushed this last on towards freehold. Already the Old Natura Brevium does not know exactly how to make distinctions. It speaks of three species

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[221] Jurate et Assise, 45 Henry III, Placitorum Abbr., p. 150: 'Et Galfridus de Praule bene cognoscit quod predictum manerium est antiquum dominicum Dom. Regis set dicit quod predictum tenementum est liberum tenementum ita quod assisa debet inde fieri.... Dicit enim quod ipse feofatus est de predicto tenemento de quodam Willelmo Harold per cartam suam quam profert.... Et juratores quesiti si antecessores ejusdem Willelmi feofati fuerunt per cartam vel si aliquis de tenura illa unquam placitaverunt per diversa brevia vel non, dicunt quod non recolunt.'

[222] Stoneleigh Reg., 12: 'Fuerunt eciam tunc quatuor natiui siue serui in le lone quorum quilibet nouum mesuagium et unum quartronum terre cum pertinenciis per seruicia subscripta videlicet leuando furcas, etc. … et debebant … redimere sanguinem suum et dare auxilium domino ad festum S^{ti}. Michaelis scilicet ayde et facere braseum Domini et alia seruicia seruilia.' As to some details, see Dugdale, Antiquities of Warwickshire, i. 176.

[223] Coram Rege, Pasch. 1 Edw. II, m. 26: '(Maugerus) defendit vim et injuriam quando, etc. Et dicit quod qualitercunque iidem homines asserant se et antecessores suos tenentes, etc. certa seruicia dominis de Wycle antecessoribus ipsius Maugeri et sibi fecisse et facere debere, quod omnes antecessores sui domini de eodem manerio extiterunt seisiti de predictis hominibus et eorum antecessoribus tenentibus tenementa quae ipsi modo tenent ibidem ut de uillanis suis taillabilibus alto et basso ad voluntatem ipsorum dominorum et redempcionem sanguinis et alia villana seruicia et incerta et villanas consuetudines faciendo a tempore quo non extat memoria.... Et predicti homines dicunt quod ipsi sunt tenentes de antiquo dominico, etc., prout curie satis liquet et quod omnes tenentes in dominico Regis per certa seruicia et certas consuetudines tenent et tenere debent, quidam per maiora et quidam per minora secundum consuetudinem, set semper per certa,' etc. Coram Rege, Mich. 5 Edw. II, m. 77, v: 'Nec dedici potest quia tenentes de antiquo dominico certa seruicia et certas consuetudines tenentur facere et non ad voluntatem dominorum.'

[224] Y.B., M., 15 Edw. II, p. 455: '*Bouser*: Auxint bien sont tenans en auncien demesne ascuns vileins et ascuns autres come ailleurs et les sokemans plederent par le petit brief de droit et les vileyns nient. *Herle*: Il semble que assets est il traverse de votre brief, car vous dites que vous tenez par certeyn service … et il dit que vous estes son vilein et que il et ses predecessors ont este seisiz de tailler vous et vos auncestres haut et bas, etc. Et stetit verificare.' Cf. Bract. Note-book, pl. 1230.

[225] Bracton, 209: 'Item est manerium domini regis et dominicum in manerio, et sic plura genera hominum in manerio, vel quia ab initio vel quia mutato villenagio.' The meaning of this badly worded passage is made clearer by a comparison with f. 7: 'In dominico domini regis plura sunt genera hominum; sunt enim ibi servi sive nativi ante conquestum, in conquestu, et post, et tenent villenagia et per villana servitia et incerta qui usque in hodiernum diem villanas faciunt consuetudines et incertas et quicquid eis preceptum fuerit (dum tamen licitum et honestum).... Est etiam aliud genus hominum in maneriis domini regis, et tenent de dominico et per easdem consuetudines et servitia villana, per quae supradicti (villani socmanni) et non in villenagio, nec sunt servi nec fuerunt in conquestu, ut primi, sed per quandam conventionem quam cum dominis fecerunt.' Cf. Elton, Tenures of Kent, 180.

[226] Fitzherbert, Abr. Monstrav. 3 (Pasch. 41 Edw. III). '*Kirt*: Les tenements queux ils teignent fuerent en auncien temps entre les maines les villeins queux deuirrent sans heire perque les tenements fuerent seisies en maine le seigneur et puis le senescal le seigneur lessa mesme ceux terres par rolle a mesme ceux ore tenants a tener a volunte del seigneur fesaunt certain services; issint ne sont ils forsque tenants a volunte le seigneur.'

of socage—free, ancient demesne, and base. The line is soon drawn between the first two, but the third kind is said to be held by uncertain services, and sued by writ of 'Monstraverunt' instead of having the writs of right and 'Monstraverunt' of ancient demesne socage[227]. Probably what is meant is a species of copyhold which is not socage, and the writ of 'Monstraverunt' attributed to it may perhaps be the plaint or petition which is the initial move in a suit for the protection of copyhold in the manorial court.

Villain socage.

In the time of Henry III and of the Edwards the nature of ancient demesne tenure was better understood. At the close of the thirteenth century the lawyers distinguish three kinds of men—free, villains, and socmen[228]. In order to be quite accurate people spoke of *villain socmen* or *little socage*[229] in opposition to free. But even at that time there were several confusing features about the case. The certainty of condition made the tenure of the villain socmen so like a freehold that it was often treated as such in the manorial documents. In the Stoneleigh Register the peculiar nature of socage in ancient demesne is described fully and clearly. It is distinguished in so many words from tenancy at will, and a detailed description of conveyance by surrender in contrast with conveyance by charter seems to give the necessary material for the distinction between it and freehold[230]. But still the fundamental notion of free men holding in villainage gets lost sight of. Only some of the cottiers are said to hold in villainage. The more important tenants, the socmen holding virgates and half-virgates, are not only currently described as freeholders in the Register, but they are entered as such on the Warwickshire Hundred Roll[231]. The term 'parva sokemanria' is applied in the Stoneleigh Register only to a few subordinate holdings which are undoubtedly above the level of pure villainage, but cannot be definitely distinguished from the other kinds of socage in the Register. This may serve as an indication of the tendency of manorial communities to consider privileged villainage as a free tenure, but legal pleadings and decisions were also creating confusion for another reason, because they tended, as has been said, to consider the whole body of men on the ancient demesne in one lump as it were. The courts very often applied as the one test of tenure and service the question whether a person was a descendant by blood of men of ancient demesne or a stranger[232]. In connexion with this the court rolls testify to the particular care taken to control any intrusion of strangers into the boundaries of a privileged manor[233]. This was done primarily in the interests of the lord, but the tenantry also

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[227] Natura Brevium, f. 105. Cf. 16.

[228] Y.B., 21/22 Edw. I, p. 499: 'Treis maners de gents.'

[229] Bracton, f. 209: Fitzherbert, Monstrav. 3 (Pasch. 41 Edw. III): '*Belknap*: Mesmes les tenementz en auncien temps fuerent en mains le petit sokmans, et eux fierent teux services comme gents de petits sokemans fierent en auncien temps et eux les teignent comme gents de petit sokmans.'

[230] Stoneleigh Reg., 32: 'Et quod in eodem manerio sunt diuerse tenure secundum consuetudinem manerii illius totis temporibus retroactis usitatam, videlicet quidam tenentes eiusdem manerii tenent terras et tenementa sua in sokemanria de feodo et hereditate de qua quidem tenura talis habetur et omni tempore habebatur consuetudo, videlicet quod quando aliquis tenens eiusdem tenure terram suam alicui alienare uoluerit, veniet in curiam coram ipso Abbate vel eius senescallo et per uirgam sursum reddat in manum domini terram sic alienandam.... Et si aliquis terram aliquam huiusmodi tenure infra manerium predictum per cartam uel sine carta absque licentia dicti Abbatis alienauerit aliter quam per sursum reddicionem in curia in forma predicta, quod terra sic extra curiam alienata domino dicti manerii erit forisfacta in perpetuum. Dicunt eciam quod quidam sunt tenentes eiusdem manerii ad voluntatem eiusdem Abbatis. Et si quis eorundem tenencium terram sic ad voluntatem tentam alienauerit in feodo, quod liceat dicto Abbati terram illam intrare et illam tanquam sibi forisfactam sibi in perpetuum retinere.'

[231] A comparison of the data in the Stoneleigh Register and in the Roll is given in App. VI. Cf. Bract. Note-book, pl. 834: 'Legales homines de manerio de Havering.'

[232] Coram Rege, Mich. 5 Edw. I, m. 77: '(Juratores) quesiti si predicti Margeria et alii et omnes antecessores a tempore quo non extat memoria terras suas successiue de heredibus in heredes tenuerint uel ipsi aut aliquis antecessorum suorum sunt vel fuerint aduenticii, dicunt quod ignorant.'

[233] Court Rolls of King's Ripton, Augment. Off. xxiii. 94, m. 7: 'Memorandum quod concessum est Rogero de Kenlowe habendum introitum ad Caterinam filiam Thome prepositi cum uno quarterio terre in villa de Ryptone Regis pro duabus solidis in gersuma, ita tamen quod mortua dicta Katerina ille qui propinquior est heres de sanguine predicte Katerine gersumabit dictum quarterium terre secundum consuetudinem manerii et ville.' A. r. r. Edw. xxiii, m. 8, v: 'Nicholaus de Aula reddit sursum unam dimidiam acram terre ad

seem to have sometimes been jealous of their prerogatives[234], and it is only in the course of the fourteenth century that they begin to open their gates to strangers, 'adventicii[235].' However this may be, the practice of drawing the line between native stock and strangers undoubtedly countenanced the idea that all the tenants of native stock were alike, and in this way tended to confuse the distinction between freeholders, pure villains, and villain socmen.

The courts made several attempts to insist on a firm classification, but some of these were conceived in such an unhappy spirit that they actually embroiled matters. The conduct of the king's judges was especially misdirected in one famous case which came up several times before the courts during the thirteenth century. The tenants of Tavistock in Devonshire were seeking protection against their lords, and appealing to the right of ancient demesne. The case was debated two or three times during Henry III's reign, and in 1279 judgment was given against the plaintiffs by an imposing quorum, as many as eight judges with the Chief Justice Ralph Hengham at their head. It was conceded that Tavistock was ancient demesne, but the claimants were held to be villains and not villain socmen, and this on the ground that the Domesday description did not mention socmen, but only villains[236]. It seems strange to dispute a decision given with such solemnity by men who were much better placed to know about these things than we are, but there does not seem to be any possible doubt that Hengham and his companions were entirely wrong. Their decision is in contradiction with almost all the recorded cases; it was always assumed that the stiff Domesday terminology was quite insufficient to show whether a man was a pure villain or a free man holding in villainage, which last would be the villain socman in ancient demesne. If Hengham's doctrine had been taken as a basis for decision in these cases, no ancient demesne tenancy would have been recognised at all out of the Danelaw counties, that is in far the greater part of England, as Domesday never mentions socmen there at all. In the Danelaw counties, on the other hand, the privilege would have been of no use, as those who were called socmen there were freeholders protected without any reference to ancient demesne. Altogether the attempt to make Domesday serve the purpose of establishing the mode of tenure for the thirteenth century must be called a misdirected one. It was quite singular, as the courts generally went back upon Domesday only with the object of finding out whether a particular manor had been vested in the crown at the time of the Conquest or not. It should be noted that Bracton considered the case from a very different point of view, as one may judge by the note he jotted down on the margin of his Note-book against a trial of 1237-8. He says: 'Nota de villanis Henrici de Tracy de

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opus Willelmi ad portam de Broucton.... Et preceptum preposito respondere de exitibus eiusdem terre quia est extraneus.... Johannes Arnold reddit sursum duas rodas terre ad opus Hugonis Palmeri.... Et preceptum est quod ponatur in seysinam, quia est de sanguine de Riptone Regis.'

[234] Court Rolls of King's Ripton, Augment. Off. xxiii. 94, m. 15: 'Curia de Kingsripton tenta die Jovis proxima post translacionem S^{ti}. Benedicti anno r. r. E. xxix^{n} et dom. Joh. [abb. xv. Venit] Willelmus fil. Thome Unfroy de Kingesripton et reddidit sursum in manibus senescalli totum jus quod [habuit] in illis tribus acris terre in campis de Kingesriptone quondam Willelmi capellani de eadem [villa ad opus filiorum] Rogeri de Kellawe *extranei* legitime procreatorum de Katerina filia Thome prepositi que est de con[dicione sokemannorum?] *bondorum* de Kingesripton.... Rogerus de Kellawe extraneus qui se maritauit cuidam Katerine filie Thome prepositi de Kingesripton que est de nacione et condicione eiusdem ville venit et petiit in curia nomine filiorum suorum ex legitimo matrimonio exeuntium de corpore prefate Katerine illas vi acras terre.... (Juratores dicunt) quod nichil inde sciunt nec aliquid super isto articulo presentare volunt ad presens. Et sic infecto negocio maximo contemptu domini et balliuorum suorum extra curiam recesserunt. Et ideo preceptum est balliuis quod die in … faciant de eisdem juratis xl solidos ad opus domini.'

[235] Stoneleigh Reg., 30 (Edward II injunction): 'Et quidam forinseci qui sokemanni non sunt auctoritate sua propria et per negligenciam dicti Abbatis et conuentus, ut dicitur, a quibusdam sokemannorum illorum quasdam terras et tenementa alienaverunt. Nos igitur super premissis plenius certiorari uolentes assignavimus vos una cum his, quos vobis associaveritis, ad inquirendum qui sokemanni huiusmodi terras et tenementa ibidem alienauerunt huiusmodi forinsecis aut extrinsecis et quibus,' etc. Cf. the Statute of 1 Richard II, Stat. 1. cap. 6. It was altogether a dangerous transaction for the socmen, because they were risking their privileges thereby. It must have been lucrative.

[236] Placitorum Abbrev., p. 270 (Coram Rege, Mich. 7/8 Edw. I): 'Et eciam comperto in libro de Domesday quod non fit aliqua mencio de sokemannis set tantummodo de villanis et servis et eciam comperto per inquisicionem quod multi eorum sunt adventicii quibus tenementa sua tradita fuerunt ad voluntatem dominorum suorum … consideraverunt quod predictus Galfridus eat inde sine die et quod predicti homines teneant tenementa predicta in predicto manerio per servilia servicia si voluerint, salvo statu corporum suorum, et quod de cetero non possunt clamare aliquod certum statum et sint in misericordia pro falso clameo.'

Tawystoke qui nunquam fuerunt in manu Domini Regis nec antecessorum suorum et loquebantur de tempore Regis Edwardi coram W. de Wiltona[237].' Wilton's decision must have been grounded on the assumption that the ancestors of the claimants were strangers to the manor, or else that the manor had never formed part of the ancient demesne. This would, of course, be in direct contradiction to the opinion that the Tavistock tenants were descended from the king's born villains.

I cannot help thinking that Hengham's decision may have been prompted either by partiality towards the lord of the manor or by an ill-considered wish to compress the right of ancient demesne within the narrowest bounds possible. In any case this trial deserves attention by reason of the eminent authorities engaged in drawing up the judgment, and as illustrating the difficulties which surround the points at issue and lead to confusion both in the decisions and in the treatment of them by law writers. In order to gain firm ground we must certainly go back again to the fundamental propositions laid down with great clearness by Bracton. It was not all the tenants on ancient demesne soil that had a right to appeal to its peculiar privileges—some had protection at Common Law and some had no protection at all. But the great majority of the tenants enjoyed special rights, and these men of ancient demesne were considered to be free by blood and holding in villainage. If the books had not noticed their personal freedom in so many words, it would have been proved by the fact that they were always capable of leaving their tenements and going away at pleasure.

Bracton's historical explanation.

Bracton does not restrict himself to this statement of the case; he adds a few lines to give a historical explanation of it. 'At the time of the Conquest,' says he, 'there were free men holding their lands freely, and by free services or free customs. When they were ejected by stronger people, they came back and received the same lands to be held in villainage and by villain services, which were specified and certain[238].'

The passage is a most interesting one, but it calls for some comment. How is it that the special case of ancient demesne gets widened into a general description of the perturbations consequent upon the Conquest? For a general description it is; by the 'stronger folk,' the 'potentiores,' are certainly not meant the king and his officers only. On the other hand, how can it be said of any but the ancient demesne tenants that they resumed their holdings by certain though base services? The wording is undoubtedly and unfortunately rather careless in this most important passage, still the main positions which Bracton intended to convey are not affected by his rather clumsy way of stating them. Ancient demesne tenure, notwithstanding its peculiarities, is one species of a mode of holding which was largely represented everywhere, namely of the status of free men holding in villainage; this condition had been strongly affected if not actually produced by the Conquest. It is interesting to compare the description of the Conquest, as given at greater length but in a looser way, in the Dialogus de Scaccario. It is stated there that those who had actually fought against the Conqueror were deprived of their lands for ever after. Those who for some reason had not actually joined in the contest were suffered to hold their lands under Norman lords, but with no claim to hereditary succession. Their occupation being uncertain, their lords very often deprived them of their lands and they had no means to procure restitution. Their complaints gave rise to a discussion of the matter before the king, and it was held that nothing could be claimed by these people by way of succession from the time preceding the Conquest, and that actionable rights could originate only in deeds granted by the Norman lords[239].

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[237] Bract. Note-book, pl. 1237.

[238] Bracton, f. 7.

[239] Dialogus de Scaccario, i. 10: 'Post regni conquisitionem, post justam rebellium subversionem, cum rex ipse regisque proceres loca nova perlustrarent, facta est inquisitio diligens, qui fuerint qui contra regem in bello dimicantes per fugam se salvaverint. His omnibus et item haeredibus eorum qui in bello occubuerunt, spes omnis terrarum et fundorum atque redituum, quos ante possederant, praeclusa est; magnum namque reputabant frui vitae beneficio sub inimicis. Verum qui vocati ad bellum nec dum convenerant, vel familiaribus vel quibuslibet necessariis occupati negotiis non interfuerant, cum tractu temporis devotis obsequiis gratiam dominorum possedissent, sine spe successionis, sibi tantum pro voluptate (voluntate?) tamen dominorum possidere coeperunt. Succedente vero

The Dialogus as compared with Bracton lays most stress on the opposite side of the picture; the disabilities of persons holding at will are set forth not only as a consequence of the state of things following conquest *de facto*, but as the result of a legal reconsideration of the facts. As a classification of tenures the passage would not be complete, of course, since neither the important species of free socage recognised by Domesday nor the ancient demesne tenure appears. It is only the contrast between villainage and holding by charter that comes out strongly. But in one way the Dialogus reinforces Bracton, if I may be allowed to use the expression: for it traces back the formation of a very important kind of villainage to the Conquest, and connects the attempts of persons entangled into it to obtain protection with their original rights before the Conquest.

Saxon origin of ancient demesne tenure.

Reverting now to the question of ancient demesne, we shall have to consider what light these statements throw on the origin of the tenure. I have noticed several times that ancient demesne socage was connected in principle with the condition of things in Saxon times, immediately before the Conquest. The courts had to impose limitations in order to control evidence; the whole institution was in a way created by limitation, because it restricted itself to the T.R.E. of Domesday as the only acceptable test of Saxon condition. But, notwithstanding all these features imposed by the requirements of procedure, ancient demesne drew its origin distinctly from pre-Conquest conditions. The manors forming it are taken as the manors of St. Edward[240]; the tenants, whenever they want to make a solemn claim, set forth their rights from the time of St. Edward[241], or even Cnut[242]. But does this mean that the actual privileges of the tenure were extant in Saxon times? Surely not. Such things as freedom from common taxation, exemption from toll, separate jurisdiction, certainly existed in behalf of the king's demesnes before the Conquest, but there is no intimation whatever that the king's tenants enjoyed any peculiar right or protection as to their holdings and services. The 'little writ of right' and the 'Monstraverunt' are as Norman, in a wide sense of the word, as the freedom from serving on assizes or sending representatives to parliament. But although there is no doubt that this tenure grew up and developed several of its peculiarities after the Conquest, it had to fall back on Saxon times for its substance[243], which may be described in few words—legal protection of the peasantry. The influence of Norman lawyers was exercised in shaping out certain actionable rights, the effect of conquest was to narrow to a particular class a protection originally conferred broadly, and the action of Saxon tradition was to supply a general stock of freedom and independent right, from which the privileged condition of Norman times could draw its nourishment, if I may put it in that way. It would be idle now to discuss in what proportion the Saxon influence on the side of freedom has to be explained by the influx of men who had been originally owners of their lands, and what may be assigned to the contractual character of Saxon tenant-right. This subject must be left till we come to examine the evidence supplied by Saxon sources of information. My present point is that the ancient demesne tenure of the Conquest is a remnant of the condition of things before the Conquest[244].

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tempore cum dominis suis odiosi passim a possessionibus pellerentur, nec esset qui ablata restitueret, communis indigenarum ad regem pervenit querimonia, quasi sic omnibus exosi et rebus spoliati ad alienigenas transire cogerentur. Communicato tandem super his consilio, decretum est, ut quod a dominis suis exigentibus meritis interveniente pactione legitima poterant obtinere, illis inviolabili jure concederentur; ceterum autem nomine successionis a temporibus subactae gentis nihil sibi vendicarent.'

[240] Stoneleigh Reg., 4 a: 'Que quidem maneria existencia in possessione et manu domini regis Edwardi per universum regnum vocantur antiquum dominicum corone regis Anglie prout in libro de Domesday continetur.'

[241] 'Loquebantur de tempore S^{ti} Edwardi Regis coram W. de Wilton.'

[242] The men of King's Ripton.

[243] I do not think there is any ground for the suggestion thrown out by M. Kovalevsky in the Law Quarterly, iv. p. 271, namely, that the law of ancient demesne was imported from Normandy. Whatever the position of the villains was in the Duchy, Norman influence in England made for subjection, because it was the influence of conquest. It must be remembered that in a sense the feudal law of England was the hardest of all in Western Europe, and this on account of the invasion.

[244] Stubbs, Const. Hist. i. 454: 'In those estates, which, when they had been held by the crown since the reign of Edward the Confessor, bore the title of manors in ancient demesne, very much of the ancient popular process had been preserved without any

It may well be asked why the destructive effects of Norman victory were arrested on ancient demesne soil? Was not the king as likely to exercise his discretion in respect of the peasantry as any feudal lord, and is it likely that he would have let himself be fettered by considerations and obligations which did not bind his subjects? In view of such questions one is tempted to treat the protection of the tenants on the ancient demesne merely as a peculiar boon granted to the people whom the king had to give away. I need not say that such an interpretation would be entirely wrong. I hope I have been able to make out convincingly that legal protection given against private lords on manors which had been alienated was only an outgrowth from that certainty of condition which was allowed on the king's own lands. I will just add now that one very striking fact ought to be noticed in this connexion; certainty of tenure and service is limited to one particular class in the manor, although that class is the most numerous one. If this privilege came into being merely by the fixation of status at the time when a manor passed from the crown, the state of the villain pure would have got fixed in the same way as that of the villain socman. But it did not, and so one cannot shirk the difficult question, What gave rise to the peculiar protection against the lord when the lord happened to be king?

I think that three considerations open the way out of the difficulty. To begin with, the king was decidedly considered as the one great safeguard of Saxon tradition and the one defender against Norman encroachments. He had constantly to hear the cry about 'the laws of Edward the Confessor,' and although the claim may be considered as a very vague one in general matters, it became substantiated in this case of tenure and services by the Domesday record. Then again, the proportion of free owners who had lapsed into territorial dependence must have been much greater on the king's land than anywhere else; it was quite usual to describe an allodial owner from the feudal point of view as holding under the king in a particular way, and villain socage was only one of several kinds of socage after all. Last, but not least, the protection against exactions was in reality directed not against the king personally but against his officers, and the king personally was quite likely to benefit by it almost as much as his men. It amounted after all only to a recognition of definite customs in general, to a special judicial organisation of the manor which made it less dependent upon the steward, and to the facilities afforded for complaint and revision of judgments. As to this last it must be noted that the king's men were naturally enough in a better position than the rest of the English peasantry; the curse of villainage was that manorial courts were independent of superior organisation as far as the lower tenants were concerned. But courts in royal manors were the king's courts after all, and as such they could hardly be severed from the higher tribunals held in the king's name.

I may be allowed to sum up the conclusions of this chapter under the following heads:—

1. The law of ancient demesne is primarily developed in regard to the manors in the king's own hand.

2. The special protection granted to villain socmen in ancient demesne is a consequence of a certainty of condition as much recognised in manors which the king still holds as in those which he has alienated.

3. This certainty of condition is derived from the Conquest as the connecting link between the Norman and the Saxon periods.

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change, and to the present day some customs are maintained in them which recall the most primitive institutions.' I shall have to speak about the mode of holding the courts in another chapter.

CHAPTER IV.
LEGAL ASPECT OF VILLAINAGE. CONCLUSIONS

Method of investigation.

I have been trying to make out what the theories of the lawyers were with regard to villainage in its divers ramifications. Were we to consider this legal part of the subject merely as a sort of crust superposed artificially over the reality of social facts, we should have to break through the crust in order to get at the reality. But, of course, the law regulating social conditions is not merely an external superstructure, but as to social facts is both an influence and a consequence. In one sense it is a most valuable product of the forces at play in the history of society, most valuable just by reason of the requirements of its formalism and of those theoretical tendencies which give a very definite even if a somewhat distorted shape to the social processes which come within its sphere of action.

The formal character of legal theory is not only important because it puts things into order and shape; it suggests a peculiar and efficient method of treating the historical questions connected with law. The legal intellect is by its calling and nature always engaged in analysing complex cases into constitutive elements, and bringing these elements under the direction of principles. It is constantly struggling with the confusing variety of life, and from the historian's point of view it is most interesting when it succumbs in the struggle. There is no law, however subtle and comprehensive, which does not exhibit on its logical surface seams and scars, testifying to the incomplete fusing together of doctrines that cannot be brought under the cover of one principle. And so a dialectic examination of legal forms which makes manifest the contradictions and confused notions they contain actually helps us to an insight into the historical stratification of ideas and facts, a stratification which cannot be abolished however much lawyers may crave for unity and logic.

Uncertainty and contradictions of legal theory.

In the particular case under discussion medieval law is especially rich in such historical clues. The law writers are trying hard to give a construction of villainage on the basis of the Roman doctrine of slavery, but their fabric gives way at every point. It would be hardly a fair description to say that we find many survivals of an older state of things and many indications of a new development. Everything seems in a state of vacillation and fermentation during the thirteenth century. As to the origin of the servile status the law of bastards gets inverted; in the case of matrimony the father-rule is driving the mother-rule from the ground; the influence of prescription is admitted by some lawyers and rejected by others. As to the means whereby persons may issue out of that condition, the views of Glanville and Bracton are diametrically opposed, and there are still traces in practice of the notion that a villain cannot buy his freedom and that he cannot be manumitted by the lord himself in regard to third persons. In their treatment of services in their reference to status the courts apply the two different tests of certainty and of kind. In their treatment of tenure they still hesitate between a complete denial of protection to villainage and the recognition of it as a mode of holding which is protected by legal remedies. And even when the chief lines are definitely drawn they only disclose fundamental contradictions in all their crudeness.

In civil law, villains are disabled against their lords but evenly matched against strangers; even against a lord legal protection is lingering in the form of an action upon covenant and in the notion that the villain's wainage should be secure. In criminal and in police law villains are treated substantially as free persons: they have even a share, although a subordinate one, in the organisation of justice. The procedure in questions of status is characterised by outrageous privileges given to the lord against a man in 'a villain nest,' and by distinct favour shown to those out of the immediate range of action of the lord. The law is quite as much against giving facilities to prove a man's servitude as it is against

granting that man any rights when once his servitude has been established. The reconciliation of all these contradictions and anomalies cannot be attempted on dogmatic grounds. The law of villainage must not be constructed either on the assumption of slavery, or on that of liberty, or on that of *colonatus* or ascription. It contains elements from each of these three conditions, and it must be explained historically.

Influence of lawyers.

The material hitherto collected and discussed enables us to distinguish different layers in its formation. To begin with, the influence of lawyers must be taken into account. This is at once to be seen in the treatment of distinctions and divisions. The Common Law, as it was forming itself in the King's Court, certainly went far to smoothe down the peculiarities of local custom. Even when such peculiarities were legally recognised, as in the case of ancient demesne, the control and still more the example of the Common Law Courts was making for simplification and reducing them more or less to a generally accepted standard. The influence of the lawyers was exactly similar in regard to subdivisions on the vertical plane (if I may use the expression): for these varieties of dependence get fused into general servitude, and in this way classes widely different in their historical development are brought together under the same name. The other side of this process of simplification is shown where legal theory hardens and deepens the divisions it acknowledges. In this way the chasm between liberty and servitude increases as the notion of servitude gets broader. In order to get sharp boundaries and clear definitions to go by, the lawyers are actually driven to drop such traits of legal relations as are difficult to manage with precision, however great their material importance, and to give their whole attention to facts capable of being treated clearly. This tendency may account for the ultimate victory of the quantitative test of servitude over the qualitative one, or to put it more plainly, of the test of certainty of services over the discussion of kind of services. Altogether the tendency towards an artificial crystallisation of the law cannot be overlooked.

Roman law, Norman law, and royal jurisdiction.

In the work of simplifying conditions artificially the lawyers had several strong reagents at their disposal. The mighty influence of Roman law has been often noticed, and there can be no doubt that it was brought to bear on our subject to the prejudice of the peasantry and to the extinction of their independent rights. It would not have been so strong if many features of the vernacular law had not been brought half way to meet it. Norman rules, it is well known, exercised a very potent action on the forms of procedure[245]; but the substantive law of status was treated very differently in Normandy and in England, and it is not the influx of Norman notions which is important in our case, but the impetus given by them to the development of the King's Courts. This development, though connected with the practice of the Duchy, cannot be described simply or primarily as Norman. Once the leaven had been communicated, English lawyers did their own work with great independence as well as ingenuity of thought, and the decision of the King's Court was certainly a great force. I need not point out again to what extent the law was fashioned by the writ procedure, but I would here recall to attention the main fact, that the opposition between 'free' and 'unfree' rested chiefly on the point of being protected or not being protected by the jurisdiction of the King's Court.

Social bias of legal theories.

If we examine the action of lawyers as a whole, in order to trace out, as it were, its social bias, we must come to the conclusion that it was exercised first in one direction and then in the opposite one. The refusal of jurisdiction may stand as the central fact in the movement in favour of servitude, although that movement may be illustrated almost in every department, even if one omits to take into account what may be mere instances of bad temper or gross partiality. But the wave begins to rise

[245] Brunner, Entstehung der Schwurgerichte, has made an epoch in the discussion of this phenomenon.

high in favour of liberty even in the thirteenth century. It does not need great perspicuity to notice that, apart from any progress in morals or ideas, apart from any growth of humanitarian notions, the law was carried in this direction by that development of the State which lays a claim to and upon its citizens, and by that development of social intercourse which substitutes agreement for bondage. Is it strange that the social evolution, as observed in this particular curve, does not appear as a continuous *crescendo*, but as a wavy motion? I do not think it can be strange, if one reflects that the period under discussion embraces both the growth and the decay of feudalism, embraces, that is, the growth of the principle of territorial power on the ruins of the tribal system and also the disappearance of that principle before the growing influence of the State.

Influence of conquest.

Indirectly we have had to consider the influence of feudalism, as it was transmitted through the action of its lawyers. But it may be viewed in its direct consequences, which are as manifest as they are important. In England, feudalism in its definite shape is bound up with conquest[246], and it is well known that, though very much hampered on the political side by the royal power, it was exceptionally complete on the side of private law by reason of its sudden, artificial, and enforced introduction. One of the most important results of conquest from this point of view was certainly the systematic way in which the subjection of the peasantry was worked out. If we look for comparison to France as the next neighbour of England and a country which has influenced England, we shall find the same elements at work, but they combine in a variety of modes according to provincial and local peculiarities. Although the political power of the French baron is so much greater than that of an English lord, the *roturier* often keeps his distance from the serf better than was the case in England. In France everything depends upon the changing equilibrium of local forces and circumstances. In England the Norman Conquest produced a compact estate of aristocracy instead of the magnates of the continent, each of whom was strong or weak according to the circumstances of his own particular case; it produced Common Law and the King's Courts of Common Law; and it reduced the peasantry to something like uniform condition by surrounding the *liberi et legales homines* with every kind of privilege. The national colouring given by the *Dialogus de Scaccario* to the social question of the time is not without meaning in this light:—the peasants may be regarded as the remnant of a conquered race, or as the issue of rebels who have forfeited their rights.

English feudalism.

The feudal system once established produced certain effects quite apart from the Conquest, effects which flowed from its own inherent properties. The Conquest had cast free and unfree peasantry together into the one mould of villainage; feudalism prevented villainage from lapsing into slavery. I have shown in detail how the manor gives a peculiar turn to personal subjection. Its action is perceivable in the treatment of the origin of the servile status. The villain, however near being a chattel, cannot be devised by will because he is considered as an annex to the free tenement of the lord. The connexion with a manor becomes the chief means of establishing and proving seisin of the villain. On the other hand, in the trial of *status*, manorial organisation led to the sharp distinction between persons in the power of the lord and out of it. This fact touches the very essence of the case. The more powerful the manor became, the less possible was it to work out subjection on the lines of personal slavery. Without entering into the economic part of the question for the present, merely from the legal point of view it was a necessary consequence of the rise of a local and territorial power that the working people under its sway were subjected by means of its territorial organisation and within its limited sphere of local action. Of course, the State upheld some of the lord's rights even outside the limits of the manor, but these were only a pale reflection of what took place within the manor, and they were more difficult to enforce in proportion as the barriers between the manors rose

[246] I shall treat at length of the Norman Conquest in my third essay.

higher; it became very difficult for one lord to reclaim runaways who were lying within the manor of another lord.

Survivals of pre-feudal condition.

If we remove those strata of the law of villainage which owe their origin to the action of the feudal system and to the action of the State, which rises on the ruins of the feudal system, we come upon remnants of the pre-feudal condition. They are by no means few or unimportant, and it is rather a wonder that so much should be preserved notwithstanding the systematic work of conquest, feudalism, and State. When I speak of pre-feudal condition I do not mean to say, of course, that feudalism had not been in the course of formation before the Norman Conquest. I merely wish to oppose a social order grounded on feudalism to a social order which was only preparing for it and developing on a different basis. The Conquest brought together the free and unfree. Our survivals of the state of things before the Conquest group themselves naturally in one direction, they are manifestations of the free element which went into the constitution of villainage. It is not strange that it should be so, because the servile element predominated in those parts of the law which had got the upper hand and the official recognition. A trait which goes further than the accepted law in the direction of slavery is the difficulties which are put by Glanville in the way of manumission. His statement practically amounts to a denial of the possibility of manumission, and such a denial we cannot accept. His way of treating the question may possibly be explained by old notions as to the inability of a master to put a slave by a mere act of his will on the same level with free men.

Elements of freedom.

However this may be, our survivals arrange themselves with this single possible exception in the direction of freedom. Perhaps such facts as the villain's capacity to take legal action against third persons, and his position in the criminal and police law, ought not to be called survivals. They are certain sides of the subject. They are indissolubly allied to such features of the civil law as the occasional recognition of villainage as a protected tenure, and the villain's admitted standing against the lord when the lord had bound himself by covenant. In the light of these facts villainage assumes an entirely different aspect from that which legal theory tries to give it. Procedural disability comes to the fore instead of personal debasement. A villain is to a great extent in the power of his lord, not because he is his chattel, but because the courts refuse him an action against the lord. He may have rights recognised by morality and by custom, but he has no means to enforce them; and he has no means to enforce them because feudalism disables the State and prevents it from interfering. The political root of the whole growth becomes apparent, and it is quite clear, on the one hand, that liberation will depend to a great extent on the strengthening of the State; and, on the other hand, that one must look for the origins of enslavement to the political conditions before and after the Conquest.

One undoubtedly encounters difficulties in tracing and grouping facts with regard to those elements of freedom which appear in the law of villainage. Sometimes it may not be easy to ascertain whether a particular trait must be connected with legal progress making towards modern times, or with the remnants of archaic institutions. As a matter of fact, however, it will be found that, save in very few cases, we possess indications to show us which way we ought to look.

Another difficulty arises from the fact that the law of this period was fashioned by kings of French origin and lawyers of Norman training. What share is to be assigned to their formal influence? and what share comes from that old stock of ideas and facts which they could not or would not destroy? We may hesitate as to details in this respect. It is possible that the famous paragraph of the so-called Laws of William the Conqueror, prescribing in general terms that peasants ought not to be taken from the land or subjected to exactions[247], is an insertion of the Norman period, although the great majority of these Laws are Saxon gleanings. It is likely that the notion of *wainage* was worked

[247] Leg. Will. Conq. i. 29 (Schmid, p. 340).

out under the influence of Norman ideas; the name seems to show it, and perhaps yet more the fact that the plough was specially privileged in the duchy. It is to be assumed that the king, not because he was a Norman but because he was a king, was interested in the welfare of subjects on whose back the whole structure of his realm was resting. But the influence of the strangers went broadly against the peasantry, and it has been repeatedly shown that Norman lawyers were prompted by anything but a mild spirit towards them. The *Dialogus de Scaccario* is very instructive on this point, because it was written by a royal officer who was likely to be more impartial than the feudatories or any one who wrote in their interest would be, and yet it makes out that villains are mere chattels of their lord, and treats them throughout with the greatest contempt. And so, speaking generally, it is to the times before the Conquest that the stock of liberty and legal independence inherent in villainage must be traced, even if we draw inferences merely on the strength of the material found on this side of the Conquest. And when we come to Saxon evidence, we shall see how intimately the condition of the ceorl connects itself with the state of the villain along the main lines and in detail.

Ancient demesne.

The case of ancient demesne is especially interesting in this light. It presents, as it were, an earlier and less perfect crystallisation of society on a feudal basis than the manorial system of Common Law. It steps in between the Saxon *soc* and *tun* on the one hand, and the manor on the other. It owes to the king's privilege its existence as an exception. The procedure of its court is organised entirely on the old pattern and quite out of keeping with feudal ideas, as will be shown by-and-by. Treating of it only in so far as it illustrates the law of status, it presents in separate existence the two classes which were fused in the system of the Common Law; villain socmen are carefully distinguished from the villains, and the two groups are treated differently in every way. A most interesting fact, and one to be taken up hereafter, is the way of treating the privileged group as the normal one. Villain socmen are *the* men of ancient demesne; villains are the exception, they appear only on the lord's demesne, and seem very few, so far as we can make a calculation of numbers. Villain socmen enjoy a certainty of condition which becomes actual tenant-right when the manor passes from the crown into a private lord's hand. As to its origin there can be no doubt—ancient demesne is traced back to Saxon times in as many words and by all our authorities.

Clues as to the condition of Saxon peasantry.

A careful analysis of the law of ancient demesne may even give us valuable clues to the condition of the Saxon peasantry. The point just noticed, namely, that the number of villain socmen is exceedingly large and quite out of proportion to that of other tenants, gives indirect testimony that the legal protection of the tenure was not due merely to an influx of free owners deprived of their lands by conquest. This is the explanation given by Bracton, but it is not sufficient to account for the privileged position of almost all the tenants within the manor. A considerable part of them surely held before the Conquest not as owners and not freely, but as tenants by base services, and their fixity of tenure is as important in the constitution of ancient demesne as is the influx of free owners. If this latter cause contributed to keep up the standard of this status, the former cause supplied that tradition of certainty to which ancient demesne right constantly appeals.

Another point to be kept firmly in view is that the careful distinction kept up on the ancient demesne between villain socmen and villains, proves the law on this subject to have originated in the general distribution of classes and rights during the Saxon period, and not in the exceptional royal privilege which preserved it in later days; I mean, that if certainty of condition had been granted to the tenantry merely because it was royal tenantry, which is unlikely enough in itself, the certainty would have extended to tenants of all sorts and kinds. It did not, because it was derived from a general right of one class of peasants to be protected at law, a right which did not in the least preclude the lord from using his slaves as mere chattels.

And so I may conclude: an investigation into the legal aspect of villainage discloses three elements in its complex structure. Legal theory and political disabilities would fain make it all but slavery; the manorial system ensures it something of the character of the Roman *colonatus*; there is a stock of freedom in it which speaks of Saxon tradition.

CHAPTER V.
THE SERVILE PEASANTRY OF MANORIAL RECORDS

Manorial documents.

It would be as wrong to restrict the study of villainage to legal documents as to disregard them. The jurisprudence and practice of the king's courts present a one-sided, though a very important view of the subject, but it must be supplemented and verified by an investigation of manorial records. With one class of such documents we have had already to deal, namely with the rolls of manorial courts, which form as it were the stepping-stone between local arrangements and the general theories of Common Law. So-called manorial 'extents' and royal inquisitions based on them lead us one step further; they were intended to describe the matter-of-fact conditions of actual life, the distribution of holdings, the amount and nature of services, the personal divisions of the peasantry; their evidence is not open to the objection of having been artificially treated for legal purposes. Treatises on farming and instructions to manorial officers reflect the economic side of the system, and an enormous number of accounts of expenditure and receipts would enable the modern searcher, if so minded, to enter even into the detail of agricultural management[248]. We need not undertake this last inquiry, but some comparison between the views of lawyers and the actual facts of manorial administration must be attempted. Writers on Common Law invite one to the task by recognising a great variety of local customs; Bracton, for instance, mentioning two notable deviations from general rules in the department of law under discussion. In Cornwall the children of a villain and of a free woman were not all unfree, but some followed the father and others the mother[249]. In Herefordshire the master was not bound to produce his serfs to answer criminal charges[250]. If such customs were sufficiently strong to counteract the influence of general rules of Common Law, the vitality of local distinctions was even more felt in those cases where they had no rules to break through. It may be even asked at the very outset of the inquiry whether there is not a danger of our being distracted by endless details. I hope that the following pages will show how the varieties naturally fall into certain classes and converge towards a few definite positions, which appear the more important as they were not produced by artificial arrangement from above. We must be careful however, and distinguish between isolated facts and widely-spread conditions. Another possible objection to the method of our study may be also noticed here, as it is connected with the same difficulty. Suppose we get in one case the explanation of a custom or institution which recurs in many other cases; are we entitled to generalise our explanation? This seems methodically sound as long as the contrary cannot be established, for the plain reason that the variety of local facts is a variety of combinations and of effects, not of constitutive elements and of causes. The agents of development are not many, though their joint work shades off into a great number of variations. We may be pretty sure that a result repeated several times has been effected by the same factors in the same way; and if in some instances these factors appear manifestly, there is every reason to suppose them to have existed in all the cases. Such reflections are never convincing by themselves, however, and the best thing to test them will be to proceed from these broad statements to an inquiry into the particulars of the case.

Terminological classification.

The study of manorial evidence must start from a discussion as to terminology. The names of the peasantry will show the natural subdivisions of the class. If we look only to the unfree villagers,

[248] Thorold Rogers has made great use of this last class of manorial documents in his well-known books.

[249] Bracton, 271 b.

[250] Bracton, 124.

we shall notice that all the varieties of denomination can easily be arranged into four classes: one of these classes has in view social standing, another economic condition, a third starts from a difference of services, and a fourth from a difference of holdings. The line may not be drawn sharply between the several divisions, but the general contrast cannot be mistaken.

Terms to indicate social standing.

The term of most common occurrence is, of course, *villanus*. Although its etymology points primarily to the place of dwelling, and indirectly to specific occupations, it is chiefly used during the feudal period to denote servitude. It takes in both the man who is personally unfree and stands in complete subjection to the lord, and the free person settled on servile land. Both classes mentioned and distinguished by Bracton are covered by it. The common opposition is between *villanus* and *libere tenens*, not between *villanus* and *liber homo*. It is not difficult to explain such a phraseology in books compiled either in the immediate interest of the lords or under their indirect influence, but it must have necessarily led to encroachments and disputes: it has even become a snare for later investigators, who have sometimes been led to consider as one compact mass a population consisting of two different classes, each with a separate history of its own. The Latin 'rusticus' is applied in the same general way. It is less technical however, and occurs chiefly in annals and other literary productions, for which it was better suited by its classical derivation. But when it is used in opposition to other terms, it stands exactly as *villanus*, that is to say, it is contrasted with *libere tenens*[251].

Villains personally unfree.

The fundamental distinction of personal status has left some traces in terminology. The Hundred Rolls, especially the Warwickshire one[252], mention *servi* very often. Sometimes the word is used exactly as *villanus* would be[253]. *Tenere in servitute* and *tenere in villenagio* are equivalent[254]. But other instances show that *servus* has also a special meaning. Cases where it occurs in an 'extent' immediately after *villanus*, and possibly in opposition to it, are not decisive[255]. They may be explained by the fact that the persons engaged in drawing up a custumal, jotted down denominations of the peasantry without comparing them carefully with what preceded. A marginal note *servi* would not be necessarily opposed to a *villani* following it; it may only be a different name for the same thing. And it may be noted that in the Hundred Rolls these names very often stand in the margin, and not in the text. But such an explanation would be out of place when both expressions are used in the same sentence. The description of Ipsden in Oxfordshire has the following passage: *item dictus R. de N. habet de proparte sua septem servos villanos*. (Rot. Hundr. ii. 781, b: cf. 775, b, *Servi Custumarii*.) It is clear that it was intended, not only to describe the general condition of the peasantry, but to define more particularly their status. This observation and the general meaning of the word will lead us to believe that in many cases when it is used by itself, it implies personal subjection.

The term *nativus* has a similar sense. But the relation between it and *villanus* is not constant; sometimes this latter marks the genus, while the former applies to a species; but sometimes they are used interchangeably[256], and the feminine for villain is *nieve* (*nativa*). But while *villanus* is

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[251] Cartulary of Malmesbury (Rolls Series), ii. 186: 'Videlicet quod prefatus Ricardus concessit praedictis abbati et conventui et eorum tenentibus, tam rusticis, quam liberis—quod ipsi terras suas libere pro voluntate sua excolant.'

[252] As to the Warwickshire Hundred Roll in the Record Office, see my letter in the Athenæum, 1883, December 22.

[253] Rot. Hundred. ii. 471, a: '*Libere tenentes* prioris de Swaveseia.... Henricus Palmer—1 mesuagium et 3 rodas terre reddens 12 d. et 2 precarias. *Servi* Adam scot tenet 10 acras reddens 4 s. et 6 precarias.... *Cotarii*....'

[254] Rot. Hundred. ii. 715, a: 'In *servitute* tenentes. Assunt et ibidem 10 tenentes qui tenent 10 virgatas terre in *villenagio* et operantur ad voluntatem domini et reddunt per annum 25 s.'

[255] Rot. Hundred. ii. 690, 691: 'Villani—servi—custumarii. Et tenent ut villani, ut servi, ut libere tenentes.' Rot. Hundred. ii. 544, b: 'De custumariis Johannes Samar tenet 1 mesuagium et 1 croft … per servicium 3 sol. 2 d. et secabit 2 acras et dim., falcabit per 1 diem. De servis. Nicholaus Dilkes tenet 15 acras—et faciet per annum 144 opera et metet 2 acras. De aliis servis … De cotariis … De aliis cotariis.'

[256] Rot. Hundred. ii. 528, a: 'Henr. de Walpol habet latinos (*corr. nativos*), qui tenent 180 acras terre et redd. 10 libr. et 8 sol.

made to appear both in a wide and in a restricted sense, and for this reason cannot be used as a special qualification, *nativus* has only the restricted sense suggesting status[257]. In connection with other denominations *nativus* is used for the personally unfree[258]. When we find *nativus domini*, the personal relation to the lord is especially noticed[259]. The sense being such, no wonder that the nature of the tenure is sometimes described in addition[260]. Of course, the primary meaning is, that a person has been born in the power of the lord, and in this sense it is opposed to the stranger —*forinsecus*, *extraneus*[261]. In this sense again the Domesday of St. Paul's speaks of 'nativi a principio' in Navestock[262]. But the fact of being born to the condition supposes personal subjection, and this explains why *nativi* are sometimes mentioned in contrast with freemen[263], without any regard being paid to the question of tenure. Natives, or villains born, had their pedigrees as well as the most noble among the peers. Such pedigrees were drawn up to prevent any fraudulent assertion as to freedom, and to guide the lord in case he wanted to use the native's kin in prosecution of an action *de nativo habendo*. One such pedigree preserved in the Record Office is especially interesting, because it starts from some stranger, *extraneus*[264], who came into the manor as a freeman, and whose progeny lapses into personal villainage; apparently it is a case of villainage by prescription.

Free men holding villain land.

The other subdivision of the class—freemen holding unfree land[265]—has no special denomination. This deprives us of a very important clue as to the composition of the peasantry, but we may gather from the fact how very near both divisions must have stood to each other in actual life. The free man holding in villainage had the right to go away, while the native was legally bound to the lord; but it was difficult for the one to leave land and homestead, and it was not impossible for the other to fly from them, if he were ill-treated by his lord or the steward. Even the fundamental distinction could not be drawn very sharply in the practice of daily life, and in every other respect, as to services, mode of holding, etc., there was no distinction. No wonder that the common term *villanus* is used quite broadly, and aims at the tenure more than at personal status.

Terms to indicate economic condition.

Terms which have in view the general economic condition of the peasant, vary a good deal according to localities. Even in private documents they are on the whole less frequent than the terms of the first class, and the Hundred Rolls use them but very rarely. It would be very wrong to imply

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et 4 d. et ob. Nomina eorum qui tenent de Henrico de Walpol in *villenagio*.' Chapter House, County Boxes, Salop. 14, c: 'Libere tenentes … Coterelli … Nativi.'

[257] Hale, in his Introduction to the Domesday of St. Paul's, xxiv, speaks of the 'nativi a principio' of Navestock, and distinguishes them from the villains. 'The ordinary praedial services due from the tenentes or villani were not required to be performed in person, and whether in the manor or out of it the villanus was not in legal language "sub potestate domini." Not so the nativus.' Hale's explanation is not correct, but the twofold division is noticed by him.

[258] Domesday of St. Paul's, 157 (Articuli visitationis): 'An villani sive custumarii vendant terras. Item, an *nativi custumarii* maritaverunt filias—vel vendiderint vitulum—vel arbores—succidant.' A Suffolk case is even more clear. Registrum cellararii of Bury St. Edmunds, Cambridge University Gg. iv. 4, f. 30, b: 'Gersumarius vel custumarius qui *nativus* est.... Antecessor recognovit se nativum domini abbatis in curia domini regis.'

[259] Cartulary of Eynsham in Oxfordshire, MS. of the Chapter of Christ Church in Oxford, N. 27, p. 25, a: 'In primis Willelmus le Brewester *nativus domini* tenet de dictis prato et terris…'

[260] Eynsham Cartulary, 49. b: 'Johannes Kolyns nativus domini tenet 1 virgatam terre cum pertinenciis in bondagio.'

[261] Cartulary of St. Mary of Worcester (Camden Series), 15. a: 'Nativi, cum ad aetatem pervenerint nisi immediate serviant patri —faciant 4 benripas et forinsici similiter.' Survey of Okeburn, Q.R. Anc. Miscell. Alien Priories, 2/2: 'Aliquis nativus non potest recedere sine licencia neque catalla amovere nec extraneus libertatem dominorum ad commorandum ingrediat sine licentia.'

[262] Domesday of St. Paul's, 80: 'Nativi a principio. Isti tenent terras operarias.'

[263] Queen's Remembrancer's Miscellanies, 902-62: 'Rotuli de libertate de Tynemouth, de liberis hominibus, non de nativis.'

[264] Queen's Remembrancer's Miscellanies, 902-77: 'Nativi de Sebrighteworth (Proavus extraneus).' See App. X.

[265] Warwickshire Hundr. Roll, Queen's Remembrancer's Miscellaneous Books, 29, 19, b: 'Johannes le Clerc tenet 1 virg. terre pro eodem sed est libere condicionis.' Augment. Off., Duchy of Lancaster, Court Rolls, Bundle 32, 283: 'Unum mesuagium et 19 acre terre in Holand que sunt in manu domini per mortem W. qui eas tenuit in bondagio. Ipse fuit liber, quia natus fuit extra libertatem domini.'

that they were not widely spread in practice. On the contrary, their vernacular forms vouch for their vitality and their use in common speech. But being vernacular and popular in origin, these terms cannot obtain the uniformity and currency of literary names employed and recognised by official authority. The vernacular equivalent for *villanus* seems to have been *niet* or *neat*[266]. It points to the regular cultivators of the arable, possessed of holdings of normal size and performing the typical services of the manor[267]. The peasant's condition is here regarded from the economical side, in the mutual relation of tenure and work, not in the strictly legal sense, and men of this category form the main stock of the manorial population. The Rochester Custumal says[268] that neats are more free than cottagers, and that they hold virgates. The superior degree of freedom thus ascribed to them is certainly not to be taken in the legal sense, but is merely a superiority in material condition. The contrast with cottagers is a standing one[269], and, being the main population of the village, *neats* are treated sometimes as if they were the only people there[270]. The name may be explained etymologically by the Anglo-Saxon *geneat*, which in documents of the tenth and eleventh century means a man using another person's land. The differences in application may be discussed when we come to examine the Saxon evidence.

Another Saxon term—*gebúr*—has left its trace in the *burus* and *buriman* of Norman records. The word does not occur very often, and seems to have been applied in two different ways—to the chief villains of the township in some places, and to the smaller tenantry, apparently in confusion with the Norman *bordarius*, in some other[271]. The very possibility of such a confusion shows that it was going out of common use. On the other hand, the Danish equivalent *bondus* is widely spread. It is to be found constantly in the Danish counties[272]. The original meaning is that of cultivator or 'husband'—the same in fact as that of *gebúr* and boor. Feudal records give curious testimony of the way in which the word slid down into the 'bondage' of the present day. We see it wavering, as it were, sometimes exchanging with *servus* and *villanus*, and sometimes opposed to them[273]. Another word of kindred meaning, chiefly found in eastern districts, is *landsettus*, with the corresponding term for the tenure[274]; this of course according to its etymology simply means an occupier, a man sitting on land.

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[266] Glastonbury Inquisitions of 1189 (Roxburghe Series), 48: 'Radulfus niet tenet dimidiam virgatam.'

[267] Glastonbury Inquis. (Roxburghe Series), 26: 'Rogerus P. tenet virg. terre: pro una medietate dat. xxx d. et pro alia medietate operatur sicut neth et seminat dimidiam acram pro churset et dat hueortselver.' Ibid. 22: 'Osbertus tenet 1 virgatam terre medietatem pro ii sol. et dono et pro alia medietate operatur quecumque jussus fuerit sicut neth.' Cartulary of Abingdon (Rolls Series), ii. 304: 'Illi sunt neti de villa. Aldredus de Brueria 5 sol. pro dimidia hida et arat et varectat et seminat acram suo semine et trahit foenum et bladum.' Ibid. ii. 302: 'Bernerius et filius suus tenent unam cotsetland unde reddunt cellario monachorum 6 sestaria mellis et camerae 31 d.'—'*De netis.* Robertus tenet dimidiam hidam unde reddit 5 sol. et 3 den. et arabit acram et seminabit semine suo et trahet foenum et bladum. Hoc de netis.'

[268] Black Book of Rochester Cathedral (ed. Thorpe), 10, a: 'Consuetudines de Hedenham et de Cudintone. Dominus potest ponere ad opera quemcumque voluerit de netis suis in die St. Martini. Et sciendum quod neti idem sunt quod Neiatmen qui aliquantulum liberiores sunt quam cotmen, qui omnes habent virgatas ad minus.'

[269] Cartulary of Shaftesbury, Harl. MSS. 61, f. 60: 'Et habebit unum animal quietum in pastura, si est net, et de aliis herbagium. Et si idem fuerit cotsetle debet operari 2 diebus.' Ibid. 59: 'Tempore Henrici Regis fuerunt in T. 18 Neti sed modo non sunt nisi 11 et ex 7 qui [non] sunt Nicholaus tenet terram [trium] et 4 sunt in dominico; et 7 cotmanni fuerunt tempore Henrici Regis qui non sunt modo, quorum trium tenet terram Nicholaus et 4 sunt in dominico.' Ibid. 65: 'Cotsetle … debet metere quantum unus nieth … et debet collocare messem vel … aliud facere … dum Neth messem attrahat … pannagium sicut Neth.' Ibid. 89: 'Si moriatur cotsetle pro diviso dabit 12 d. et vidua tenebit pro illo id divisum tota vita sua. Si moriatur neatus dabit melius catellum et pro hoc tenebit quietus.'

[270] Glastonbury Inquis. 51: 'Et nieti tenent 9 acras unde reddunt 3 s.' Ibid. 47: 'Nieti habent unum pratum pro 5 s.'

[271] Glastonbury Inquis. 105: 'Ernaldus buriman dimidiam virgatam, Iohannes burimannus dimidiam virgatam.' Cf. Custumal of Bleadon, p. 189; Cartulary of Shaftesbury, Harl. MSS. 61, f. 45.

[272] It is to be found sometimes out of the Danish shires, e.g. in Oxfordshire. Rot. Hundred. ii. 842, b: 'Bondagium: Johannes Bonefaunt tenet unam virgatam terre de eodem Roberto … reddit … 11 sol. pro omni servicio et scutagium quando currit 20 d.' Of course there were isolated Danish settlements outside the Denelaw.

[273] Rot. Hundred. ii. 486, a: 'Tenentes Alicie la Blunde. *Bondi*, A. habet in eadem villa 2 villanos, quorum quilibet tenet mesuagium cum 30 a. Id. Al. hab. 1 bondum qui ten. 20 a. *Custumarii*, Id. Al. habet 1 villanum, qui tenet 1 mes. cum 44 a.' Rot. Hundred. ii. 486, a: 'De W. le Blunde. *Villani*, R. de Badburnham. *Bondi cotarii.*' Cf. Ibid. 422, b; 423, a: 'Libere tenentes … Custumarii … Bondi.'

[274] Ramsey Inquisitions, Galba, E. x. 34: 'W.L. tenet in landsetagio 12 a. pro 9 den. et ob. R. 24 a. de landsetagio et 12 a. de

Terms to indicate the nature of services.

Several terms are found which have regard to the nature of services. Agricultural work was the most common and burdensome expression of economical subjection. Peasants who have to perform such services in kind instead of paying rents for them are called *operarii*[275]. Another designation which may be found everywhere is *consuetudinarii* or *custumarii*[276]. It points to customary services, which the people were bound to perform. When such tenants are opposed to the villains, they are probably free men holding in villainage by customary work[277]. As the name does not give any indication as to the importance of the holding a qualification is sometimes added to it, which determines the size of the tenement[278].

In many manors we find a group of tenants, possessed of small plots of land for the service of following the demesne ploughs. These are called *akermanni* or *carucarii*[279], are mostly selected among the customary holders, and enjoy an immunity from ordinary work as long as they have to perform their special duty[280]. On some occasions the records mention *gersumarii*, that is peasants who pay a *gersuma*, a fine for marrying their daughters[281]. This payment being considered as the badge of personal serfdom, the class must have consisted of men personally unfree.

Terms to indicate the size of the holding.

Those names remain to be noticed which reflect the size of the holding. In one of the manors belonging to St. Paul's Cathedral in London we find *hidarii*[282]. This does not mean that every tenant held a whole hide. On the contrary, they have each only a part of the hide, but their plots are reckoned up into hides, and the services due from the whole hide are stated. *Virgatarius*[283] is of very common occurrence, because the virgate was considered as the normal holding of a peasant. It is curious that in consequence the virgate is sometimes called simply *terra*, and holders of virgates—*yerdlings*[284].

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novo.' Cartulary of Ramsey (Rolls Series), i. 426: 'G.C. dat dim. marcam ut K. filius suus fiat heusebonde de 6 a. terrae de lancetagio.' Registr. Cellararii of Bury St. Edmund's, Cambridge University, Gg. iv. 4, f. 400, b: '9 acre unde 4 a. fuerunt libere et 5 lancettagii.' Cartulary of Ramsey (Rolls Series), i. 425: 'S. Cl. recognovit, quod 24 a., quas tenet, sunt in lanceagio dom. Abbatis *salvo corpore suo* et quod faciet omnes consuetudines serviles … *lancectus nacione*.'

[275] Domesday of St. Paul's, 17: 'Item omnes operarii dimidiae virgatae debent invenire vasa et utensilia ter in anno ad braciandum.' Cf. 28.

[276] Rot. Hundred. ii. 422, 423. Cf. 507, a: 'Libere tenentes … Nicholaus Trumpe 3 a. terre cum mesuagio et red. per ann. 20 d. Custumarii … Nicholaus Trumpe ten. 1 a. terre et redd. 2 sol.'

[277] Exch. Q.R. Misc. Alien Priories, 2/2. (Chilteham): '… Redditus villanorum de 126 villanis 41 libre, 14 s. 11 d. Item sunt 70 custumarii qui debent arare bis per annum cum 17 carucis.... Item sunt 25 villani qui debent herciare quilibet eorum per 2 dies,' etc.

[278] Cartulary of St. Peter of Gloucester (Rolls Series), iii. 203: 'Omnes consuetudinarii majores habebunt tempore falcationis prati unum multonem, farinam, et salem ad potagium. Et minores consuetudinarii habebunt quilibet eorum 1 panem et omnes 1 caseum in communi, unam acr. frumenti pejoris campi de dominico et unum carcasium multonis, et unum panem ad Natale.'

[279] Cartulary of Malmesbury (Rolls Series), i. 154, 155. Cf. i. 186, 187. Cartulary of St. Mary of Worcester (Camden Society), 43, b; Rot. Hundred. ii. 775, b.

[280] Rot. Hundred ii. 602, a. Cf. Exch. Q.R. Alien Priories, 2/2: 'Item sunt in eadem villata de Wardeboys 6 dimidias virgatas—que vocantur Akermannelondes, quorum W.L. tenet ½ virgatam pro qua ibit ad carucam Abbatis si placeat abbati vel dabit sicut illi qui tenent 6 Maltlondes preter 15 d.' Rot. Hundred, i. 208: 'Utrum akermanni debent servicium suum vel servicii redempcionem.'

[281] Registr. Cellararii of Bury St. Edmund's, Cambridge University, Gg. iv. 4, f. 26: 'Gersumarii (Custumarii).... Gersuma pro filia sua maritanda.' Ibid. 108, b: 'Tenentes 15 acrarum custumarii—omnes sunt gersumarii ad voluntatem domini.' Cartulary of Bury St. Edmund's, Harl. MSS. 3977, f. 87, d: 'Nichol. G gersumarius tenet 30 a. pro 8 sol. que solent esse custumarie.' I may add on the authority of Mr. F. York Powell that *landsettus* (land-seti), as well as *akermannus* (aker-maðr) and *gersuma* (görsemi), are certainly Danish loan-words, which accounts for their occurrence in Danish districts.

[282] Hale, Introduction to the Domesday of St. Paul's, xxv: 'If we compare the services due from the Hidarii with those of the libere tenentes on other manors, it will be evident, that the Hidarii of Adulvesnasa belonged to the ordinary class of villani, their distinction being probably only this, that they were jointly, as well as severally, bound to perform the services due from the hide of which they held part.'

[283] Eynsham Inquest, 49, a: 'Summa (prati) xvi a. et iv perticas que dimidebantur xi virgatariis et rectori ut uni eorum et quia jam supersunt tantummodo 4 virgatarii et rector, dominus habet in manu sua 7 porciones dicti prati.'

[284] Cartulary of Battle, Augmentation Office, Miscell. Books, 57, f. 35, s: 'Yherdlinges … custumarii.' Ibid. 42, b: 'Majores Erdlinges scil. virgarii. Halferdlinges (majores cottarii) Minores cottarii.'

Peasants possessed of half virgates are *halfyerdlings* accordingly. The expressions 'a full villain[285]' and 'half a villain' must be understood in the same sense. They have nothing to do with rank, but aim merely at the size of the farm and the quantity of services and rents. *Ferlingseti* are to be met with now and then in connexion with the *ferling* or *ferdel*, the fourth part of a virgate[286].

The constant denomination for those who have no part in the common arable fields, but hold only crofts or small plots with their homesteads, is 'cotters' (*cotsetle*, *cottagiarii*, *cottarii*[287], etc.). They get opposed to villains as to owners of normal holdings[288]. Exceptionally the term is used for those who have very small holdings in the open fields. In this case the authorities distinguish between greater and lesser cotters[289], between the owners of a 'full cote' and of 'half a cote[290].' The *bordarii*, so conspicuous in Domesday, and evidently representing small tenants of the same kind as the cottagers, disappear almost entirely in later times[291].

Results as to terminology.

We may start from this last observation in our general estimate of the terminology. One might expect to find traces of very strong French influence in this respect, if in any. Even if the tradition of facts had not been interrupted by the Conquest, names were likely to be altered for the convenience of the new upper class. And the Domesday Survey really begins a new epoch in terminology by its use of *villani* and *bordarii*. But, curiously enough, only the first of these terms takes root on English soil. Now it is not a word transplanted by the Conquest; it was in use before the Conquest as the Latin equivalent of *ceorl*, *geneat*, and probably *gebúr*. Its success in the thirteenth and fourteenth centuries is a success of Latin, and not of French, of the half-literary record language over conversational idioms, and not of foreign over vernacular notions. The peculiarly French '*bordier*,' on the other hand, gets misunderstood and eliminated. Looking to Saxon and Danish terms, we find that they hold their ground tenaciously enough; but still the one most prevalent before the Conquest—*ceorl*—disappears entirely, and all the others taken together cannot balance the diffusion of the 'villains.' The disappearance of *ceorl* may be accounted for by the important fact that it was primarily the designation of a free man, and had not quite lost this sense even in the time immediately before the Conquest. The spread of the Latin term is characteristic enough in any case. It is well in keeping with a historical development which, though it cannot be reduced to an importation of foreign manners, was by no means a mere sequel to Saxon history[292]. A new turn had been given towards centralisation and

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[285] Black Book of Peterborough, 164: 'In Scotere et in Scaletorp—24 plenarii villani et 2 dimidii villani—Plenarii villani operantur 2 diebus in ebdomada.'

[286] Glastonbury Inqu. (Roxburghe Series), 23: 'Operatur ut alii ferlingseti.'

[287] Glastonbury Inqu. (Roxburghe Series), 137: 'Cotsetle debent faldiare ab Hoccade usque ad festum S. Michaelis.' Cartulary of St. Peter of Gloucester (Rolls Series), iii. 71: 'Burgenses Gloucestriae reddunt una cum aliis tenentibus ad manerium Berthonae praedictae per annum de coteriis cum curtillagiis in suburbio Gloucestriae quorum nomina non recolunt 29 solidos 7 d. de redditu assiso.' Ibid. iii. 116: 'Cotlandarii: Johannes le Waleys tenet unum mesuagium cum curtillagio et faciet 8 bederipas et 3 dies ad fenum levandum, et valent 13½ d.'

[288] Norfolk Feodary, Additional MSS. 2, a: 'Et idem Thomas tenet de predicto Roberto de supradicto feodo per predictum servicium sexaginta mesuagia; 21 villani de eodem Thoma tenent. Item idem Thomas tenet de predicto Roberto 9 cotarios, qui de eo tenent in villenagio,' Cf. Rot. Hundred, ii. 440, a.

[289] Cartulary of Battle, Augment. Office, Misc. Books, 57, f. 37, b: 'Virgarii … Cotarii, qui tenent dimid. virgatam.' Ibid. 36, b: 'Cottarii majores et minores.'

[290] Glastonbury Inquis. (Roxburghe Series), 114: 'Rad. Forest. ½ cotsetland pro 18 d. et operatur sicut dimidius cotarius sed non falcat.'

[291] Glastonbury Inquis. (Roxburghe Series), 14: 'Predictus W. habet tres bordarios in auxilium officii sui. Illi tres bord. habent corredium suum in aula abbatis, in qua laborant.' Terrae Templariorum, Queen's Rem. Misc. Books, 16, f. 27: 'Unusquisque bordarius debet operari una die in ebdomada.' Cf. 27, b.

[292] The history of the terms in Saxon times and the terminology of the Domesday Survey will be discussed in the second volume. My present object is to establish the connexion between feudal facts and such precedents as are generally accepted by the students of Saxon and early Norman evidence.

organisation from above, and *villanus*, the Latin record term, illustrates very aptly the remodelling of the lower stratum of society by the influence of the curiously centralised English feudalism.

The position of the peasantry gets considered chiefly from the point of view of the lord's interests, and the classification on the basis of services comes naturally to the fore. The distribution of holdings is also noticed, because services and rents are arranged according to them. But the most important fact remains, that the whole system, though admitting theoretically the difference between personal freedom and personal subjection, works itself out into uniformity on the ground of unfree tenure. Freemen holding in villainage and born villains get mixed up under the same names. The fact has its two sides. On the one hand it detracts from the original rights of free origin, on the other it strengthens the element of order and legality in the relations between lord and peasant. The peasants are *custumarii*

Конец ознакомительного фрагмента.