

The Manufacture of Historical Material

An Elementary Study in the Sources of Story

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Two ideals float before the minds of men in our own day. The first ideal is the future of the human race in this world ; the second the future of the individual in another. The first is the more perfect realisation of our own present life ; the second the abnegation of it. Both of them have been and are powerful motives of action ; there are a few in whom they have taken the place of all earthly interest.

There is danger, which every compiler of historical material must recognise, that in recording events which have taken place in remote periods, the ideas and ideals of his own time may be imported into his account of the past ; the condition of a stationary society may be judged by the ideas of one which considers restless motion as progress: the morality of actions for which no motive is apparent on the surface may be condemned or approved according to a standard of moral sense which did not exist when the acts were committed : the society may even be falsely judged as backward for its neglect of precautions against physical disease which appeal to the compiler's age as a test of human advancement ; or its leaders may be condemned for leisurely movement and consequent failure to meet unforeseen contingencies if the compiler neglects to make sufficient allowances for the difference of mechanical appliances in the two periods.

These dangers are intensified when the compiler, as so often happens, relies for his facts, or even worse for the motives of action of the men of past ages, on writers not contemporary, living between his times and the times of which he treats. Here he is liable to a double danger ; he may not only misconceive the times of which he writes through judging them by the conditions of his own time, but he may gauge both facts and motives in a remote past by the habits of thought and possibly the differences of language of an intermediate age with which neither he nor the people of whom he writes may have any sympathy of historical view.

There is only one way in which this difficulty can be met and checked. The compiler will seek for original contemporary written records, and if they can be found he will try to put himself as far as possible, in respect of political, theological, social, and commercial conditions, and in respect of the moral and social ideals of the age, in the position of the men who related the events which occurred in their time.

It is very questionable if any such original contemporary written record exists. We have no originals of any of the great creative works of ancient times, of Homer or of Aristotle or of the book of Genesis, nor have we, with the rarest exceptions, original MSS. of the first-hand authorities for compiling historical facts. For instance, it is generally admitted that the MSS. which we possess of the Saxon Chronicle are copies, either wholly or in some instances not contemporary, of an original which has perished. Nevertheless, wherever it is possible the compiler should go back to the contemporary record. If he cannot find that, he should trace up the stream to the sometimes unsafe bog which may mark the source.

When this has been achieved he will inquire under what conditions the record was written ; what opportunities of first-hand knowledge of the events related or the characters

painted were open to the early historian ; how far he was, like all of us, liable to be carried away by violent prejudice or class animosity to distort, perhaps not intentionally, the facts of the story.

History, which is not partial, is impossible ; nay more, it is very dangerous. If a historian, ancient or modern, makes protest of impartiality, you will be wise to distrust his conclusions and statements of facts ; but where two accounts of the same matters are written by two men who do not disguise their opinions, such as Froude and Freeman, you may regard both as able advocates stating their case, and may pass judgment upon them without the bias of either.

The Value of Language.—Then the compiler will have to balance in his mind the language used by the writer, how far it expresses actual fact or genuine emotion and how far mere essence of exaggeration, waste of extravagant verbiage, just as now we look for some stronger and more meaningless phrase than awful, frightful, amazing, ghastly, astounding, impossible, sickening, or rotten, to express some very ordinary event, or epoch-making of some very dull and dubious speech. Even now probably a reporter might use the word extorsit if the Chancellor of the Exchequer required him to pay a heavy income tax.

Then the compiler will remember that the monk who wrote down the records (for they were all or nearly all written in the safety and retirement of the monastery) was writing, apart from those things which concerned his order, which were the most part of his history, of matters which were exceptional and out of the general order of things, that he was always on the look-out for such exceptional things, scenes of violence, acts of kings and rulers which were contrary to the Church's canon of morality or conflicted with her interests, miracles and any unusual occurrences which could give the interest of liveliness and reality to a dull and secluded world. And he was not above making them up if he did not find them.

Besides all this, the monk lived in a world of unreality, in which the first explanation of an unusual occurrence was that it was produced by the abnormal activities of an unseen world.

Unless the compiler takes count of all these matters to be weighed and considered before he accepts the statement of the monastery, he may describe for us a stationary society as being in a state almost of dissolution by not allowing for the licence of language or the prejudice of position of the early writer.

But when he has considered all these matters, if he should decide, as in almost all cases he will, that the man who wrote the matter down did not witness the acts he recorded, or wrote from an imperfect acquaintance with the characters he described, he will then ask himself, Where and from whom did the writer first hear the story? and he will ask with increased anxiety, if he can find out the verbal source, all the same questions as to prejudice and exaggeration and first-hand knowledge as have been indicated above as necessary to be asked of the MS. which appears to be the original source; and that brings me to the beginning of my book.

It is proposed here to trace, for a short period of British story only, some phases of the manufacture of the history both of law and politics and social life from our earliest means of knowledge to the finished work, through all the processes of the reduction of the first tale to writing, its editing and re-editing at various hands, its enlargement, translation, correction, critical commentary and revision, and its final appearance as the history.

We live in a critical age when such a subject may not appeal to the learned professors of history. But if only the general casual reader of law and history could be roused to a sense of critical examination of the so-called authorities for history which are put before him, and could learn to use his common sense and powers of mental observation, it would be something gained. At present he is only too often like Charles Lamb's True Caledonian, "the twilight of dubiety never falls on him." Any absurd and apocryphal and improbable story told by an anonymous monk is sufficient to rouse him to a sense of most righteous historical indignation, if it has only been copied for a sufficient number of times from book to book, without any examination into the circumstances under which and the person by whom the story was first told.

If the student could only put before himself the many processes through which historical facts have to pass before they can be presented in the complete form of the history of Peter Parley or Edward Gibbon, he would surely take more pains to use his common sense for the examination of sources. At present the condition of historical science is a hindrance to educational methods and a danger to political life.

Oral Tradition

It is extremely unlikely that the earliest MS. to be found would be anything but a late copy. There is hardly a single monastic record of which we can say that the existing MS. is an original, and in many cases it is separated by centuries from the date of the supposed writer. But original or copy, when we have found the earliest written record, it behoves us to ask the further question. Where did the scribe hear the rumour which he put in writing? Who first told the story?

The Sources of Story.—All story, ancient, medieval, or modern, rests in the first instance on oral tradition. In dealing with early monastic records, written in many cases a long time after, by men sedentary and aloof from the action recorded, we are inclined to forget this undoubted fact, and in consequence to attribute far too great an authority to the writing.

We are in this respect at the present in a position very little removed from that of the recorders of events in times past. Every story, whether it is an account of rumours current of action on a long battle-line, collected by Eyewitness or other special correspondent at the Front from the men who saw and took part in the struggle, or from other men who saw other men who saw it, or the provisions of a treaty the final result of many verbal conferences liable to be upset by secret unwritten agreements, or the suggestion passed into law after long debate in Parliament, has in almost every instance a verbal origin.

Sometimes it is very difficult to trace it. The rumour, like the entries which the bishop of St Asaph wished Giraldus to accept as final authority because he, the bishop, had written them down in his own book, acquires a certain sanctity as undoubted fact from the reduction into writing, owing to our dependence on writing rather than on memory, and this though the written language may give no clue to the conditions attending the conflict, the minute causes which resulted in the written treaty, or the compromise which modified the law.

News Ancient and Modern.—The sources of story were the same then as now. Just as at the present day, the monk dealt with the actual undoubted fact, brought to him by a reliable informant and witness, or recorded in parchment by some former writer who had heard the story from the lips of some traveller—fact which eventually, so far as it is allowed to be told, will become history; he had secondly what is called news, the current rumour which is circulated from hour to hour only to be immediately contradicted.

But there are two points of difference. The first is a small one, the very limited area affected, and the very deliberate circulation of news in early days.

Owing to the mechanical appliances which have bound the world together, the slight rumours circulating many thousands of miles away may be repeated in these islands within a few hours of their first circulation, and may be re-repeated every few hours with some petty difference of words. We have a 2.30 and a 5.30 edition of the same facts.

The people of past times were not so idle-minded. Very few people indeed, and those for the most part hidden away in monasteries, were concerned to hear or read the monks' editions of things long past which happened in a confined, near-by district, the re-editing by Hoveden of Simeon of Durham, or by William of Malmesbury of the Saxon Chronicle—a fact which it is well to keep in mind when any of these secluded and partial chroniclers are spoken of as representing the “public opinion” of the age.

The second was a very large and most important difference affecting very essentially all historical proportion, that the interval of time between the circulation of the report and its reduction into writing might be of enormous length. This was due to a truth which it is hard for us, who have come to rely so entirely on the note-book, to realise, namely, the extraordinary powers of the trained memory to hand down through many generations with very great accuracy accounts of events long past or pedigrees showing the descent of eminent persons or declarations of customs made long ago.

Where a society was stationary, as all early European society continued to be until touched by Rome (it is one version of the story of the Sleeping Beauty), written records were unnecessary unless to record the exceptions to the general customs of society which were known to all and held in memory by all. As constitutional history had not been invented, there was no necessity for putting political glosses on past events ; the pedigree which decided a man's place in society could be as well held in the memory as reduced to writing.

Society based on Kinship.—All ancient society was based on kinship ; a man's title to the privileges common to the community, the use of the common land, and the protection against violence afforded by the money compensation to be paid by the group family, depended upon his being able to give proof by pedigree of his place as a member of the community.

These pedigrees were handed down from one generation to another, committed to memory by a privileged caste, who were poets, lawyers, and historians, and in the first instance priests. Holding in their memories the pedigrees tracing back through long ages the rights of the most prominent men to a place in the community, they early acquire an immense mysterious authority drawn from the use of technical and often unintelligible language.

In Rajputana, Sir Henry Maine tells us, “ literature still retains that which we may believe to have been its most ancient form—in the songs of the hereditary bard celebrating the exploits and above all the antiquity of the family of which he is the honoured retainer.” I can claim to be excused any unintentional irreverence for the Old Testament if I suggest that the first nine chapters of the first book of Chronicles were most certainly a reduction into writing of pedigrees handed down through long ages by oral tradition in this fashion.

As a single example of the history contained in oral pedigree in these islands : at the coronation of the child Alexander III., as he sat on the stone of Scone brought from Egypt by Scota, the daughter of Pharaoh, a Scoto-Irish skald from the West came forward and falling

on his knees before the boy recited, no doubt in rhythmic verse, the pedigree of the young king from his remotest ancestors, possibly to Scota herself.

It was a small matter that, as the king's pedigree peered back into antiquity, gods and heroes and ordinary men show beside each other ; its very portentous length gave it the greater power, and it was, in spite of the monastic advances in south-eastern Scotland, the king's title to his throne in the greater part of his dominions.

His title to be king and chief rested on his supposed kinship to the people he ruled, and not on any territorial requirements ; *teste* Bailie M'Whecble, that " from the maist ancient times of record, the lawless thieves, limmers and broken men of the Highlands [including no doubt many of Alexander's ancestors] had been in fellowship together by reason of their surnames, for the committing of divers thefts, reifs and herships upon the honest men of the low country — all which was directly prohibited in divers parts of the Statute Book."

All ancient society rested on such kinship ; the Roman missionary, a stranger, coming from a far country, and bringing with him a new religion founded on a written record, breaks through the foundations of kinsmanship ; at first the break is small, the little rift within the lute ; the written record, in the first instance a record only of matters of exception affecting the monk-missionary and his church, runs on for centuries side by side with the oral tradition which records the original customs. But they are written and told by different men, and are concerned with different aspects of society.

In treating both of oral tradition and of written record we shall have to keep two things separate, the records of the common customs which afterwards harden into law, and the records of events which become the tribal or national history. The monk who preached to the Saxons or the Irish or the Franks could not be expected to hold in mind their barbarous customs ; they are by mutual consent modified and reduced into writing. But the record of events, the subject not of law but of story, often the attractive story of adventure, the Iliad or the Odyssey of tribal history, follows no such rule of reduction ; it is written by the monk (very very occasionally by the layman) so far as it concerns the affairs of the church and, by implication, of those who may hurt or benefit the church, and at the same time it is told as a spoken tale generally in verse or rhythm by the man whose business it is to tell stories.

The Poet-Lawyer Historian

The Poet Historian.—The member of the caste, for it must very soon have become an hereditary caste, who carried down the oral tradition, who counted in his memory the successive steps of the pedigree from the god-like hero, mending as he went up the broken rungs of the ladder, who stamped by his authority of recollection the character of sacred inspiration on the customs whose origin was lost in antiquity, who dwelt with the fire of poetic imagination, his eye with the fine frenzzy rolling, on the great deeds of his patron's kinsmen in the past, was in the first place a poet.

Long study no doubt, and the influence of hereditary taste and training, would strengthen the memory of the Brehon. But beyond this the help of rhythm, of musical sound, of polished verse, was called in, in all the literatures of all the nations of which we have knowledge, to make endure in the mind of the bard the doubtful wanderings of the law, the uncertain event of the battle, the remote birth and origin of the race.

For the British islands our chief source of this exemplar of history and law is to be found in the poetry of the Celtic or Scandinavian bard. It had nothing whatever in common with the

doggerel, whose hall-mark is false quantity, which comes from the Roman monastery. The skald spoke in a poetic form which has been practically lost to us by non-user, poetry full of metaphor, of recondite fancies, fancies which might break through language and escape, metaphors of men who lived among the elements and likened hand-made things to the created things of the air and sea, a poetry which called for close collaboration of mind and ear.

The monastic verse was satisfied if the two lines ended with a similar sound to the ear though foreign to the eye ; the skald's rhythms were governed by the most complicated abstruse rules of alliteration, of accent, of syllabic length, of repetition of letters, besides the endless figurative metaphor of not calling a spade a spade, tedious no doubt to us lazy moderns, but highly strengthening both to the mind and memory and ear of men of past times. We have so attuned our ears to the safe splicing of similar sounds that all power of making poetry by a conjunction of ear and brain has nearly passed from us. Rhyme has destroyed rhythm.

Wherever we find, and we find in all ancient records, verse embodied in the monastic prose, we may be quite sure that for a very long time before the monastic record was reduced to writing, the event or the custom had been recorded and handed down in the rhythmic verse of the bard. It is a sign of age or of editing by one acquainted with the old oral record to find such poetry. For example, ask yourselves by whom and when the battle of Brunanburg (Saxon Chron. 987) was sung, and how long it would be before the account revised and re-edited was incorporated in the form in which it now comes down to us in the annals of several monasteries under the same date in the same words.

In Scandinavia.—The Scandinavian Sagas give us a succession of stories of adventure and social life, framed admittedly on the songs of skalds who lived and took part in the events recorded, skalds, generally very prominent fighters, whose names are given by the men who wrote down the compilations.

Throughout the Heimskringla the skald sings and records the events of the battle as he draws his bowstring ; in the Icelandic Sagas the heroes declare the events in verse ; the bard sang of what he saw. The bards and skalds neither considered nor treated of moral issues ; the monk wrote from the moral standpoint.

A good example of such a fighting skald is Egil Skallagrimmson, [1] a reckless, unprincipled, unattached fighter, ready to shed anyone's blood for an employer who would pay, but a man who praised in verse the prowess of his enemy when he split his skull. From him can be learnt, amid his diffuse praise of the men who hit hard and often, some very interesting particulars of the British history of his time.

In England and Wales.—It is not Scandinavia alone by any means which gives us these examples of the poet. The events of the Saxon Chronicle under the years 937 (just before which it appears to have fallen under Scandinavian influence), 941, 958, 978-5. 979, 1011, 1086, 1057, 1065, and probably in passages in 1067 and 1087, are expressed in this skaldic verse. How long was it before the oral tradition found its way into the imperfect MSS. from which our history is constructed ? Take any one of these poetical rhapsodies and ask yourselves how long a time must be allowed before the skald's song in the heat of battle has travelled so far from the spot and has been so reduced by editing and re-editing that it can be deposited as part of an identical MS. in different monasteries in which we find it as copies of a lost original. We find such a skald, one Gunlaug Ormstunge, staying with Ethelred and singing his praises after the so-called massacre of St Brice.

The Welsh Laws (*A.L.W.*, Anom. XIII. ii. 60, 61) relating the three privileged sessions according to the privilege of the country and kindred of the Cymry say that the session of the bards is the most ancient in its origin from which all sciences emanate. It claims that the session of the bards of the Isle of Britain rests upon reason, nature and cogency, or circumstance. After enumerating at some length the various offices of the bards as poets, as lawyers, and as historians, "to preserve memorial and record of everything commendable respecting individuals and kindred," etc., the law concludes: "therefore the bards are authorised teachers of the country and kindred of the Cymry." (Also *A.L.W.*, Dim. I. xxvi. 24, and *Gwent* I. xix. X-2.)

Not is it in the islands only that we find the poet-lawyer historian. The British Islands were so overwhelmed at the end of the tenth century by the Scandinavian that it would not be fair to take British examples only as examples of the skaldic poetry. France and Aquitaine were equally the homes of the bard. Taillefer rides in the van at Hastings, juggling with his sword and singing the song of Roland, one of the great epics of the Charlemagne cycle of Northern France.

Southern France, where the transition literature from the decay of Latin was earliest and most splendid, was the especial home of the poet historian. Eleanor, the great queen, the wife first of Louis of France and then of Henry of England, coming from a race of poetic rulers, presided in her youth over the courts in which the Trouvères or Troubadours of the South competed in song.

Here every great noble excelled in verse as much as in arms. To be a poet, to sing of love or war, was simply the attribute of a gentleman. Richard, Eleanor's son, was a noted troubadour, as her grandfather William had been. The nobles of Aquitaine carried their poems and their sarcasms into politics; Bertrand de Born, a powerful noble and noted poet, lord of a castle and district in Perigord, plays a most conspicuous part in the quarrels between Henry II, and his sons, fomenting by his satire the disputes between them. Dante puts him in Hell (canto 28) and makes him compare his political infamy to that of Ahithophel making mischief between David and Absalom.

When the infamy of the Albigensian persecution destroyed the nobles, the great literature died.

If there were really any hope of the British Government encouraging the study of history, a grant in aid of the study of the literature of Southern France in the twelfth century might reveal many valuable passages of English history.

In Ireland.—The verses of the skald very soon disappear in England under Roman monastic influence, and poetry, with the exception of Chaucer, is absent until the great outburst of Elizabeth's time. But the poet-lawyer historian has a long and most eventful history in Ireland from the earliest times. The *Crithgabhlach* (*A.L. Irel*, iv. 857) enumerates seven degrees of poets.

The amount of Irish literary matter in antique poetical form available in MS. untranslated and unedited in the libraries of Dublin and elsewhere for political and legal history is, I understand, very great. Burke long ago saw the necessity of making use of this material, and in a letter in 1788 to General Vallancey, quoted in the Preface to the Book of Leinster, urges the translation of the ancient Chronicles in verse and prose upon which the Irish histories which precede official records are founded. "I do not see," he says, "why the Psalter of Cashel should not be printed as well as Robert of Gloster" (R.S. No. 86).

In the early times the caste are said to have claimed so much free billeting in return for their poetry and their assertion of supremacy in law and history that it was proposed to abolish them. But St Columba, who was more or less of a bard himself, and a good fighting man, arranged a compromise of rights between the poets and the Feini.

But it is not as literary creator or as fighting man that we see the bard or skald in Ireland. He becomes, perhaps unfortunately for Ireland, merged in the lawyer, the Brehon, and the Brehon law became opposed to and irreconcilable with the English feudal law, so that instead of dying out as in Scandinavia, or becoming that ridiculous survival the Poet Laureate as in England, he remained a prominent political figure, carrying down archaic and adverse customs into an unsympathetic age, banned by the Anglo-Scottish Government.

The Statutes of Kilkenny tried ineffectually to sweep him away, declaring penalties by chapter 15 against pipers, story-tellers, babblers, rimers, mowers, or any other Irish agent. But he still remained.

Spenser, who sees in them a great power of offence against the feudal innovations, speaks of them as “ a certain kind of people called bards, which are to them instead of poets, whose profession is to set forth the praises or dispraises of men in their poems or rhymes.” (Not knowing the Irish language, he assumed that they depended on rhymes.) “ The which are had in so high regard and estimation amongst them that none dare displease them for fear to run into reproach through their offence, and to be made infamous in the mouths of all men.” He has caused some of these poems to be translated for him : “ and surely they savoured of sweet wit and good invention, but skilled not of the goodly ornaments of poetry ; yet were they sprinkled with some pretty flowers of their natural device which gave good grace and comeliness unto them,” for which in those days of artificial verse we ought to be truly thankful. [2]

The criticism of the bards as makers of satire is fully borne out by the MSS. of the Irish Laws. It is much more likely that their powers of satire led to the revolt against their predominance in Columba’s time than any excess of billeting. Ancient society did not mind providing the poet with beer or onions, but it was remarkably thin-skinned about slander, as personal defects were a most serious danger in the social life, and an unhappy nickname might lead to a chief having to go to a monastery. [3]

The poet-lawyer historian as historian has an equally long descent in all parts not dominated by the Roman monastery. Though by the end of the twelfth century the subjects of song, both historical and social, on which the bard had exercised his memory and genius, were being written down in the form of Sagas and Annals, such writings and their readers were almost entirely confined to the monastery, and the poet-lawyer historian still continued to be the recorder of events for the very large majority who did not read, carrying down his history in song from generation to generation, until it is merged in the slowness of our ballad literature. For the men who made the Sagas and Annals, the men who sang, continued to provide the oral material, until the mass of written matter enabled the writer to copy from a former written record. Even then in places more remote poetry played a considerable part.

The ballad literature containing much history which we owe to the northern skalds, in itself no mean thing, is small by the side of the great epics from which it is descended ; like every form of literary work in turn “ on meurt épiciier” ; but in it is contained the origins not only of our literary and historical records, but of our laws.

There is much truth in the famous saying of Fletcher of Saltoun that he “knew a very wise man who believed that if a man were permitted to make all the ballads, he need not care who should make the laws of a nation.”

The ballads, though the age of Fletcher had completely lost sight of it, were the origin and epitome not only of history but of the laws themselves.

The Poet-Lawyer Historian

The Poet Lawyer.—At the present day, in spite of the continued outpouring of acts, by-laws, regulations, and rules by all sorts of authorities set over the people, the law thus made being sometimes only for temporary use, sometimes inoperative, and not infrequently foolish, sometimes only operative by reference to legislation of times long gone by and conditions which no longer exist (as when a London magistrate felt himself lately compelled to fine a man at the instance of a policeman for crying muffins in the street on Sunday)—in spite of all this we are all supposed to know our liabilities under the law, even under police regulations which for the most part are unwritten law. Much more was this the case when there were few laws, and those unwritten, and made not by a variety of officials or official bodies, but publicly declared by the general consent of the people who were to be bound by them.

But it could not be supposed that the interpretation of the laws would be left in early times to the people concerned, as our laws, especially police regulations, are left to be construed by the police at the present day. From the earliest times of historical knowledge there is a caste of men whose business it is to store up the laws in their memory, and to interpret them, and to apply them to the given case.

As I have pointed out, the poet-lawyer historian is the creator and preserver of a vast mass of poetical literature, whether in the Orkneys, in Ireland, in England, or in Aquitaine; he is the original authority for the Chronicles and the Annals, and the Sagas and Master Wace's *Roman de Rou*; but beyond this and above all he is especially the lawyer who declares the customs under which the people live, develops them in his memory and interprets them. The caste meets us everywhere and at every time in story, from the men who declared the customs in India hundreds or possibly thousands of years before the laws of Manu were compiled, to the days when Deborah sat under a palm tree in Mount Ephraim, or when the deemster declared the laws of Man in the assembly of the Tynwald.

The Use of Technical Language.—All men in those days had long memories. The Brehon, as the poet-lawyer historian was called in Ireland, did not trust to memory alone, but strengthened it, and with it his influence with the unlearned, by the use of obscure technical terms not generally intelligible to the common man.

Just as the physician of to-day, not being paid by the length, writes his prescription shortly in a dead language and puts, or did put until recently, the sign of the planet Jupiter at the head of it in order that you may not know how much *aqua distillata* he is giving you, so the Brehon of times past, who might also be the physician as well as the parson and lawyer, not only declared the law as its authorised exponent, but declared it in technical expressions of which he only fully understood the meaning. As the years passed on, as the customs became archaic, their use and origin forgotten, the terms which had been used to describe them a strained philological hand-clasp across the centuries, the Brehon “put a fine thread of poetry about them” (*A.L. Irel.*, iii 89), enhancing their professional secrecy, and often ending, if we may judge by the commentary in the Brehon laws, by himself forgetting the meaning of the expressions in which they were wrapped.

A fine example of the refinements to which the early unwritten law had attained in the hands of the Brehon in the communal society, and of the jealousy with which the lawyer regarded his official secrets, an example also of the change coming over a community when land as the basis of society took the place of cattle, occurs in the famous account of the great lawsuit at the Thing in the Nial's Saga (p. 280, edition 1900).

The defendant takes exception to the men of the inquest that they were not house-holders. The answer is given that they have dairy stock to the value of the qualification in land, which is the same thing. The defendants appeal to Skapti, the speaker of the law, and he sends back word that it was surely good law though few knew it. The defendants then take another objection that four of the inquest were wrongly summoned ; " for those sit now at home who were nearer neighbours to the spot." To this the plaintiffs reply that the greater part of the inquest was rightly summoned, which was sufficient. Appeal is again made to the lawman Skapti, who evidently does not at all like this growing knowledge of the secrets of the law. " More men are great lawyers now," he said, "than I thought. I must tell thee then that this is such good law in all points that there is not a word to be said against it ; but still I thought that I alone would know this now that Nial was dead, for he was the only man I ever knew who knew it."

Bereford, when a somewhat similar objection as to a majority of jurors being insufficient is urged before him in a case in *Y.B. Edw. II.*, remarks sarcastically, " Much good would it do you if they were all here." Trial by jury had not then hardened into its present form of absolute unity.

A further technical defence, which was more effective, is met with a charge by the plaintiffs that the defendants were guilty of contempt of the Thing by feeing a neighbour for his legal assistance. The other side had apparently done the same thing, but had not brought their legal adviser into court, carrying news of the objections to him and acting on his advice on their return.

It would appear that only the lawman could take a fee for his advice on points of law and practice, all other advice given to litigants being summed up in the old proverb that a man who is his own lawyer has a fool for his client. The crowd at the Law Hill give their advice and applaud each technical point raised and parried, as they would applaud a happy blow which cut off a man's leg in the fight which was often the end of the law proceedings.

Skapti's dislike of the *amicus curiæ* is only part of the great dispute which always goes on between the expert lawyer, whose power rests on his knowledge of the effect which a rash decision on rules of procedure will have on the general principles which he has carefully considered, and the general assembly of laymen who like to make their law as they go, not by laying down technical rules, which will govern a class of cases, but by judging each case on its apparent and generally deceptive merits, with the aid of a little knowledge, which is such a dangerous thing in law.

The same conflict goes on at the present day, to our sorrow, in Parliament between the Parliamentary draughtsman who considers a proposed measure in all its relations not only to possible future use but to the provisions which have been incorporated in it from past legislation or may be affected by it, and the energetic politician who makes nonsense of the Act by amendments, not considering either past or future, on the assumption that he is benefiting the people. In his ignorance he increases greatly the power of the lawyer caste.

Changes of Language.—Another cause acted to increase the power of the poet lawyer—the more rapid changes which took place in language before written documents had set up a standard of values. As a result, aphorisms or poetic metaphor in which the law is embedded, either acquire a private meaning only known to the lawyer, or become to him unintelligible words only, which he can juggle with, engrafting on them his private interpretation.

Many instances of this occur in the Irish laws, where the commentator either admits that he does not know the meaning of the ancient text, or gives several alternative renderings of an obscure passage, showing either that it had not been acted on for a long time or that poets of a former generation had used the words with different meanings.

The same difficulty of language meets one in all collections of laws. There are scarcely any charters in Northumbria in very early times, probably because the oral traditions away from Rome lasted longer than in the Saxon south. But in the south and west of England the early Norman charters used words of which, says Kemble (*Codex Diplom.*, Introd., p. xliii), while they confirm the privileges, the transcribing monks admit that they do not know the meaning. [4] Some of these, such as “toll and team” and “sac and soc,” which, though generally found in the charters of the first Norman kings, do not appear at all in the charters immediately preceding the introduction of feudal Norman law by the half-Norman Edward, were words belonging to the Saxon customs and unknown to the Norman law, the Norman copyists probably writing from oral dictation privileges and immunities which had formerly passed by word of mouth only. All early charters were very short, the communal rights which accompanied the gift of a certain piece of land passing without any pertinents.

Very likely the Norman grantee was not particularly anxious to know the meaning of the words which gave him vague and unlimited powers, so long as, like the cabalistic pertinents of the Baron of Bradwardine’s charter, they might be used to imply “upon the whole that the Baron of Bradwardine might, in case of delinquency, imprison, try, and execute his vassals at his pleasure.” The meaning of many legal words in common use in early Norman times seems to have been so uncertain to the writers of a later generation as never to have been fully recovered. There are, says Kemble, many small glossaries of obsolete words in various MSS. of the twelfth century. The variations of phonetic spelling in those times were so many and so grotesque that a word could soon be spelt out of all recognition of its original technical meaning.

The Normans could not even spell the Saxon words which they included in their charters. Kemble gives instances.

The Use of Catchwords.—One great aid to memory, which meets us in all times and in all bodies of law, is the use of a short and concise cue of a few words or a sentence which serves to bring to the memory a mass of arranged matter. According to Max Müller, books of aphorism are older than books of verse. “The great body of Hindu philosophy is based upon six sets of very concise aphorisms. Without a commentary the aphorisms are scarcely intelligible” (A. R. Ballantyne, Preface to *Sankhya Aphorisms of Kapila*, 1885),

All through the *Senchus Mor* occur short enigmatical phrases, a few words, not even a complete sentence, the first words of a traditional rule, cues which had often become meaningless to the commentator of a later age. Sometimes they are evidently proverbial, e.g. “Fools make illegitimate impoundings” (*A.L. Irel.*, ii. 97); sometimes only a reference to some former commentator, “Another version” (*ibid.*, 209); sometimes evidently to the aphorism which had been declared by a former Brehon, “The right of each is according to his strength” (iii. 87), “The five crimes of man no cause of happiness” (*ibid.*, 95).

The practice is universal. The terms of the writs, “Utrum, quare impedit,” etc., etc., are instances of a usage to which every system of law could contribute a quota.

Verse in the Records of Law.—There is no doubt whatever that in the early history of all customary laws there is a time when they are committed to the memory in skaldic verse. The inquiries made by Sir William Jones in the eighteenth century into the Hindu law had taught him, says Sir Henry Maine, that in their ancient languages there existed “a series of poems which might not unjustly be compared to the Homeric epics and the Attic drama, and laws twice as old as the legislation of Solon and the XII. Tables of Rome.” The chief of these for him was the Law Book of Manu, which was in verse.

By the assistance of these and other like aids to memory the poet-lawyer historian was enabled to hand down to succeeding generations an immense and varied mass of law and history and general literature, a literature which only decays when it is confined to writing.

To come back to our islands, each of the collections of law preserved to us shows us either actual poems or indications of verse embedded in the prose of the laws. In the *Senchus Mor* various bits of verse from older books or sayings can from time to time be found embodying legal maxims, e.g. *A.L. Irel*, ii. 814, iii. 534-7, iv. 341 ; and in the collection of Welsh laws, the fifteenth book of the Anomalous or Welsh laws, containing the privileges of the men of Powys, is in verse.

We need not expect to find much verse embedded in the collections of Saxon laws written down under the Roman monastic influence, but even here we find traces of an ancient poetical rendering. Speaking of the forms of oaths which follow the laws of Alfred in Thorpe, the editor says (p. 76) : “It is impossible to read the oaths without perceiving at every turn their rhythmical quantity and alliteration. An ear any way accustomed to Anglo-Saxon poetry will easily detect the disjointed members of their poetic formulæ, . . . The use of this kind of alliteration in early laws and judicial documents, as well as of final rime, was common to all the Germanic and Scandinavian nations.” Apart from these forms, though we hear of Cædmon and of Aldhelm and Alfred singing as skalds, we find no trace of poetry in the Saxon laws. They were then what they remained in the twelfth century, a bare tariff for torts, such as was in use by all the communal societies, written down in the first instance under the influence of Augustine and his successors.

Saxon and other Tribal Law contrasted.—The laws collected in Thorpe show no sense of any attempt to think out a legal system either in principle or in mode of procedure. They are almost entirely bald lists of money payments for injury, e.g. a front tooth eight shillings, a canine tooth four shillings, a grinder fifteen shillings, and so on. The fines for rape and the many provisions for criminal assault on women do not give one any high idea of Saxon morality. If a man draw his weapon before an archbishop, he pays twenty shillings ; if he rape a ceorl’s female slave, five shillings. What are not money payments are Church regulations, which indeed govern the whole. They are the elementary provisions for regulating the disorder of a savage people too much under the overpowering influence of Rome to do any original thinking for themselves. There is not the slightest trace in any even the latest of them of the exercise of the mind in problems of constructive law, or any glimmerings of the equitable doctrines, both civil and criminal, which we find in the work of the undoubtedly at that time more civilised Irishman.

Here the English records of customary law, and the Irish and other tribal records, and with them to a great extent the records of history, part company.

The English collections from Ethelbert to Henry I., as we have received them in MS., assume that the tariffs for tort have their origin in the commands of the lord the king, the anointed of the Church, whose commands were the law of the society—a wholly Roman conception.

The laws of Ethelbert, Augustine's convert, as we have them from the *Textus Roffensis*, a late twelfth-century MS., in which only they are found, are headed: "These are the dooms which King Æthelbirht established in the days of Augustine"; and the first paragraph runs: "The property of God and of the Church twelffold; a bishop's property eleven-fold; a priest's property ninefold; a deacon's property sixfold; a clerk's property threefold; Church frith twofold; m . . . frith [uncertain apparently] twofold." It is as we have it a series of dooms made by the king with the help of the Roman monk. It is more than likely that these tariffs of tort, written down in the twelfth century, were written not as they existed in Ethelbert's time but as the monk of the twelfth century thought that they ought to have existed. We have no evidence of any description of their forms, when and if they were declared.

The tribal collections presume, though we may be quite content to believe that the practice did not always keep pace with the theory, that all the orders of society, the tribal Church, the freeman, the poet-lawyer historian, the king, the judges or professors of law, had a hand in altering or amplifying the unwritten custom declared and administered by the lawyer caste of each separate district. The law which is to be obeyed is made (as the regulations of the birleymen of Sutherland were made before the eighteenth century devastations) by the society as a whole through its accredited agents, and they were willingly obeyed because they were so made.

The laws of distress of the Feini, the Irish freemen, were, the Irish laws tell us, declared, "by the advice of the Church, from the customs of the laity, from the true laws of the poets (the Brehon or poet-lawyer caste), from the current opinions of the kings, from the advice of the judges, except what conscience and nature adds from true judgments according to analogy" (*A.L. Irel.*, i. 209). All this is referred by the commentator back to the time of Patrick.

How far the Roman law of the time of Patrick or of Henry II. affected the written tribal codes, as we have them in the Brehon laws and elsewhere, is a very large question for which there is very little assistance. But whether we regard the Irish laws as reduced to writing by Patrick or some later missionary or in Henry's time, there is no trace in them or in any of the tribal codes of the imperial and ecclesiastical view of law which rested on the Roman *dominium*, a view which coloured all English ideas of law from the twelfth century onwards.

The history of the two parts of the islands henceforward took a separate course, the laws civil and criminal, the tenure of land, all the political features which depended on either were influenced in England by the Roman doctrine; the two opposed systems of life, the communal and feudal societies, "dwell apart like two particular stars" until Henry's expeditions into Ireland and Wales, and the relations of Edward I. with Wales and Scotland, bring them into conflict—a conflict which goes on through the ages, a conflict which can only be understood by the Englishman and Lowland Scot if he will take the pains to search for and examine the roots, deep in the past, on which the ruins of the one system stand.

The change in the society in England, which only came to full fruition in the time of Henry II. and John, was the result of the rediscovery of the Roman law, and its study at Bologna and elsewhere in the twelfth century.

The change was not at first at all appreciated by the ecclesiastics, who feared not only the use of the science for political purposes, but its effect on the study of the Fathers and other paths of literature, if it was too much encouraged by those in authority. Giraldus (*Gemm. Eccles.*, R.S. No. 21, toI. ii., Dist. ii., c. 37), discoursing on the increasing ignorance of the clergy, the “superficiales . . . cujusmodi hodie multos novimus propter leges Justinianas,” quotes Mainier, under whom he had studied at the University of Paris, as prophesying, “Venient dies et vae illis quibus leges obliterabunt scientiam litterarum” ; and St Bernard a little earlier complained, “Quando meditatur in lege? Et quidem quotidie perstrepunt in palatio leges, sed Justiniani, non domini . . . Hac autem non tam leges quam lites sunt et cavillationes, subvertentes iudicium” (*de Consideratione*, lib. i. c. 4). But in spite of their opposition the Roman law spread over Europe, to the detriment of other literary pursuits, carrying with it the Roman ideas which had been already adopted in the military feudal custom. Very gradually these conceptions were extended to all those matters of landholding, treatment of law cases, and satisfaction of offences which in the earlier communal society had rested on kinship.

[1] Saga translated by Rev. W. C. Green. Elliot Stock, 1893.

[2] “Who ever gave more honourable prize
To the sweet Muse than did the martial crew,
That their brave deeds she might immortalize
In her shrill tromp and sound their praises dew ?

Sith then each where thou hast dispredd thy fame
Love him that hath eternized your name.”

A hasty critic might assume that this was an effiision by one of the “certain kind of people called bards.” But it is a sonnet by Spenser to Sir John Norris, Lord President of Munster.

[3] Among the stays on proceedings in distress the law (*A.L. Irel.*, i. 157) enumerates distress “for the crime of thy tongue,” glossed as satire, slander or betrayal or false evidence or false witness ; 175, 185, for satirising after death ; 187, for satire unascertained as to kind, for a nick-name ; iii. 93 classifies the forms of satire as “speckled eitged” ; v. 299 (The Heptads) enumerates seven degrees of satire, beginning with “a nickname which clings,” and ending with “a satire which is written by a bard who is far away and which is recited.” William de Braose in 9 John paid 300 cows, 30 bulls and 10 mares *pro habenda loquela*.

[4] I once got a scolding in chambers for leaving out the words *et cetera* after “and your Petitioners will ever pray.” But when I asked what *et cetera* in that connection meant, I was told, “I don’t know, but you must put it in.” I wonder if anyone does know.

The manufacture of historical material ; an elementary study in the sources of story (1916)

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