

# **THE SOURCES OF ENGLISH LAW**

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649266241

The Sources of English law by Heinrich Brunner

Except for use in any review, the reproduction or utilisation of this work in whole or in part in any form by any electronic, mechanical or other means, now known or hereafter invented, including xerography, photocopying and recording, or in any information storage or retrieval system, is forbidden without the permission of the publisher, Trieste Publishing Pty Ltd, PO Box 1576 Collingwood, Victoria 3066 Australia.

All rights reserved.

Edited by Trieste Publishing Pty Ltd.  
Cover @ 2017

This book is sold subject to the condition that it shall not, by way of trade or otherwise, be lent, re-sold, hired out, or otherwise circulated without the publisher's prior consent in any form or binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

[www.triestepublishing.com](http://www.triestepublishing.com)

**HEINRICH BRUNNER**

**THE SOURCES OF  
ENGLISH LAW**



112

# THE SOURCES OF ENGLISH LAW

BY

DR. HEINRICH BRUNNER

PROFESSOR OF LEGAL HISTORY IN THE UNIVERSITY OF BERLIN

TRANSLATED BY ERNST FREUND

REPRINTED FROM SELECT ESSAYS IN ANGLO-AMERICAN LEGAL  
HISTORY, VOLUME TWO, COMPILED AND EDITED BY A  
COMMITTEE OF THE ASSOCIATION OF  
AMERICAN LAW SCHOOLS

BOSTON

LITTLE, BROWN, AND COMPANY

1908

14  
BEG 7s  
amed

Copyright, 1908,  
BY LITTLE, BROWN, AND COMPANY.

All rights reserved

Published October, 1908

MAY 12 1921

COLONIAL PRESS  
Electrotyped and Printed by C. H. Simonds & Co.  
Boston, U. S. A.

SELECT ESSAYS  
IN  
ANGLO-AMERICAN LEGAL HISTORY

---

22. THE SOURCES OF ENGLISH LAW<sup>1</sup>

By HEINRICH BRUNNER<sup>2</sup>

A. THE ANGLO-SAXON SOURCES

IN the history of the English law the Anglo-Saxon sources occupy about the same relative position as the so-called "folk laws" and the other legal monuments of the Frankish period do in the history of the other Western Teutonic

<sup>1</sup>This essay appeared under the title "Ueberblick über die Geschichte der französischen, normannischen, und englischen Rechtsquellen," in Prof. Dr. Franz von Holtzendorff's "Encyclopädie der Rechtswissenschaft," 3d ed., 1877, pp. 239-267, Part II., § 4 (Leipzig: Duncker & Humblot); in the 4th edition (1882, pp. 277-317) and the 5th edition (1890, pp. 309-347) the article was reprinted, but in the 6th edition (1904), it was omitted. The author has revised, enlarged, and recast it for the present volume of Essays, omitting the portions dealing with French and Norman sources.

The translation is by Professor EARNE FEENEU, of the Editorial Committee for these Essays.

An English translation by W. Hastie was published at Edinburgh in 1888, under the title "The Sources of the Law of England," without indication of the precise edition on which it was founded.

<sup>2</sup>Professor of Legal History in the University of Berlin, since 1873. Privatdozent in the University of Lemberg (Lvov), 1865; assistant professor in the same, 1866; professor in the same, 1868; professor in the University of Prague, 1870; in the University of Strassburg, 1872; member of the Prussian Royal Academy of Sciences; one of the Editorial Commission for the Monumenta Germaniae Historica.

*Other Publications:* Zeugen und Inquisitionsbeweis der Karolingischen Zeit, 1866; Das Anglo-normannische Erbschaftssystem, 1869; Die Entstehung der Schwurgerichte, 1872; Zur Rechtsgeschichte der Römischen und Germanischen Urkunde, 1880; Deutsche Rechtsgeschichte, 1887-92, 2d ed. of Vol. I., 1906; Grundsätze der Deutschen Rechtsgeschichte, 1901, 3d ed. 1908; and many separate articles, most of which are collected in Forschungen zur Geschichte des Deutschen und Französischen Rechts, 1894.

nations.<sup>1</sup> It is true, the independent development of Anglo-Saxon law was stopped by the Norman Conquest, its operation being superseded by the rule of the Anglo-Norman law. But Anglo-Saxon legal ideas have at least in part survived amidst Norman innovations and shared with them the formation of the historical foundations of the English legal and political constitution.

The importance of the study of the Anglo-Saxon sources is moreover not confined to English legal history, but extends to the legal history of all Teutonic nations. While the Western Teutons of the Continent used the Latin tongue for committing their legal monuments to writing, and while in Germany in statutes and documents German began to replace Latin only in the thirteenth century, the Anglo-Saxon like the North Teutonic sources were written in the vernacular. The insight thus gained into national legal terminology, the wealth of Anglo-Saxon legislation during the five centuries from Aethelberht to William the Conqueror, the purely Teutonic character of the law, uninfluenced by the Roman, and only slightly influenced by the Canon law, and finally the uninterrupted sequence of sources, which elsewhere, between the ninth and thirteenth centuries, reveal gaps that can be supplied only with difficulty, — all these conditions place the Anglo-Saxon legal monuments in the front rank of the sources of information of Teutonic law.

Among the sources of the Anglo-Saxon law we distinguish statutes, — the laws of the Anglo-Saxon kings being the most important of these, — legal formularies, treatises, and documents.

General statutes were enacted in the national assemblies,<sup>2</sup> in which the king consulted with the great men of the country (*witan*), especially with the secular and ecclesiastical

<sup>1</sup> Linguistic and legal history distinguish East and West Teutons. The former include the Gothic-Vandal nations and the Scandinavian (North Teutonic) peoples. West Teutons are the Germans including the Frisians and the emigrated tribes out of which the Anglo-Saxon people arose (Ingvaconian Saxons, Angles, and the West Teutonic Jutes who are regarded as the ancestors of the Kentians).

<sup>2</sup> In legal historical writings the word *witenagemot* (*concilium sapientum*) has become the technical term for these assemblies. It is found in the Saxon chronicle, but nowhere in the Anglo-Saxon laws.



dignitaries, regarding the maintenance and strengthening of the peace, and regarding innovations in the laws.

Like the German "folk laws," the laws of the Anglo-Saxons (*dómas*, *gerædnessa*, *ásetnysse*) have partly created new law, and partly enacted existing customary law. The oldest statutes were occasioned by the conversion of the Anglo-Saxons to Christianity.

The Anglo-Saxon legal monuments may be grouped as follows:

1. The statutes of the *Kentians*, whose state at the time of Christianization was the leading Anglo-Saxon power. They begin with the *domas* of King Aethelberht, ninety brief chapters, in part of striking originality, concerning penalties especially for infliction of wounds, wergilds,<sup>1</sup> and the law of marital property rights. They date from the time when Augustinus was active in England, more particularly the years from 601 to 604.

Then follow the laws of Hlothære and Eadric (685-6), containing mainly criminal and procedural law, and the laws promulgated by King Wihtræd, 695, at a diet at Berstead, concerning ecclesiastical relations, purgatory oath, and larceny; Wihtræd's laws utilized the resolutions of a church synod of Hertford of 678; among other matters they contain penalties against idolatry and breach of fast, which presumably go back to the legislation of Earconberht (640-664) which has not come down to us, but is mentioned by Beda.

All Kentish laws have come down to us only in a more recent West Saxon transcript,<sup>2</sup> which has not entirely obliterated the traces of the Kentish dialect of the original text.

2. The *code of Ine*, king of the West Saxons, of the period from 688 to 695. According to the prologue Ine's code is the result of deliberations had by the king with the witan of his people concerning the salvation of souls and the condition

<sup>1</sup> Wergild is a sum of money payable as penalty for homicide.

<sup>2</sup> The *Textus Roffensis*, written about 1120, and going back for Kentish sources to an edition originating about 1020. See Liebermann, *Notes on the Textus Roffensis*, 1898 (reprinted from "Archæologia Cantiana").

of the kingdom, in order that right law (*aéw*) and right statutes (*cynedómas*) might be established and assured. The ecclesiastical enactments precede. Ine's laws surpass the Kentish in ease of diction, wealth of vocabulary and content as well as in bulk. The fact that Wessex became subsequently *caput regni et legum*<sup>1</sup> explains the regard paid to Ine's laws by the more recent legislation. They have come down to us not in their original form, but abridged, and in more modern language, as an appendix to the laws of Alfred.

3. *From the period of the union of the Anglo-Saxon kingdoms* we have:

a. The code of Alfred (871-900), probably from the closing period of his reign, when after many years' struggles with the Danes, he was able to think again of reconstructing the disintegrated law. The code proper is preceded by an introduction of forty-nine chapters, borrowed from the Bible (*Exodus* and *Actus Apostolorum*) and supplemented by some additions by Alfred. In the last chapter of the introduction Alfred declares that he has compiled in his code the laws of Ine, of Offa of Mercia,<sup>2</sup> and of Aethelberht of Kent, so far as the same seemed right to him, omitting those that did not commend themselves to him.

Alfred's code proposes to create a common law of his kingdom. As an appendix for Wessex the code of Ine (mentioned above under 2) was published, the provisions of which partly conflict with Alfred's own laws. In more recent laws the Alfred-Ine code is often cited simply as *dómbók*. The rubrical index dates from about 940 at the latest.

b. Alfred's treaties with the Danes of East Anglia. A treaty of Alfred with King Guthrum of East Anglia (of the years from 880 to 890) contains provisions regarding *wergild*, oath, guaranty, and trade. A second convention of Alfred with Guthrum, chiefly concerning ecclesiastical relations and precepts, has not come down in the original form, but in an altered version in which it was confirmed or re-

<sup>1</sup> *Leges Henrici*, c. 70, 1.

<sup>2</sup> It is unfortunately impossible to extricate them as such from Alfred's laws.

newed by Edward I after the acquisition of Guthrum's territory in 921 or somewhat later.

c. Two laws of Edward I; the older one, from the period between 900 and 924, deals with purchase, anefang, real actions, and perjury; the later one was enacted in 924-5 in Exeter for the advancement of public security.

d. From the time of Aethelstan (925 to 940) date: the ordinance of that king regarding tithes; the one regarding alms; the enactments of the diet of Greatley (the most important of Aethelstan's laws), and the resolutions of Exeter (927 to 937); further, an enunciation of the ecclesiastical and secular notables and of the people of Kent "de pace observanda" (928 to about 938), and the so-called *Judicia civitatis Lundoniae* (of about 930 to 940), an autonomous statute of the bishops and the gerefas, who through their tenants belonged to the jurisdiction of London, significant chiefly by the fact that they contain the by-laws of the London peace gilds (the oldest Teutonic gild statutes).

e. Edmund's laws from the years 940 to 946, comprising (a) the resolutions of a London synod convened by him, and (β) a law regarding expiation of homicide and composition of feuds, and (γ) the resolutions of "Culinton" regarding measures against thieves.

f. Edgar's laws, among which we may probably count an ordinance (946 to about 961) concerning the hundred court (Hundredgemót) and may count with certainty the resolutions of Andover (959 to about 962), and of Wihthordesstan (962-3).

g. Aethelred's laws, closing the series of statutes enacted by native kings. We note among them particularly the diet resolutions of Woodstock (980 to 1013), of Wantage (981 to 1012), and of London (991 to 1002), a comprehensive law of 1008 presumably enacted at "Eanham," the contents being chiefly ecclesiastical and religious; a diet resolution of Bath (992 to 1011) and a constitution of 1014 concerning the particular peace of the churches and the legal status of the clergy, and finally a peace treaty of 991 with Olaf Tryggvason, concerning the peace purchased of the Northmen.