LECTURES
ON THE
GROWTH OF CRIMINAL LAW
IN
ANCIENT COMMUNITIES

BY
RICHARD R. CHERRY, LL.D.
BARRISTER-AT-LAW;
NEW PROFESSOR OF CONSTITUTIONAL AND CRIMINAL LAW IN THE
UNIVERSITY OF DUBLIN.

Οἶνος ἐστὶν ὑδατος,
ὁ δὲ εἰσὶν ἀθάνατος.

LONDON
MACMILLAN AND CO.
AND NEW YORK
1890
[All rights reserved]
PREFACE.

In the six lectures contained in the present volume I have attempted, as briefly as possible, to compare the early ideas of several nations as to crimes and their punishment. I have selected legal systems as far apart from, and as much independent of, each other as possible, with a view to showing that identity of usage did not arise from the adoption by one nation of the laws or institutions of another, but rather from the inherent principles of human nature. The close similarity between the early institutions of very distant races as regards Penal Law is extremely remarkable. Nothing illustrates so much the complete contrast between modern and ancient ideas, on legal subjects, as the study of this branch of Law historically. The existence of Law, without any Sovereign authority—without any sanction, or recognized tribunal—seems to us almost a contradiction in terms. Yet, it was out of such a state of society that Law developed itself in all its branches, gradually and
slowly. In the study of Criminal Law, we really have a test of the validity of the historical method. We can easily understand how such matters as the laws of inheritance and contract arose from custom, for even to the present day we recognize, in some degree, the binding force of customs in those branches of Law; but it is difficult to believe that Criminal Law could have originated in the same manner. Criminal Law naturally seems, even in its earliest stage, to be a restriction upon custom—a system of commands, necessarily, we would suppose, imposed by some political superior, to restrain the practice of customs which were disapproved of, rather than to sanction those already observed.

It appears to have been from the Criminal Law that the Analytical School of Jurisprudence derived its very notion of Law. To show, therefore, that the origin of Criminal Law, as well as of other branches of Law, was in primeval custom, is extremely important. My object, in these lectures, has been to do so, and at the same time to point out the traces of primitive ideas which remain in later developments of Criminal Law. I am aware that I have only carried out this object in a very imperfect and "sketchy" manner, but I could do no more than this in the limited number of lectures which a Professor of Law may legitimately devote to such an abstract subject.

The substance of the second lecture on Ancient Irish Law is taken from an article which I wrote some time ago in the Law Magazine and Review. It was the study of the Irish Laws which completely satisfied Sir Henry Maine as to the validity of his historical method as applied to Civil Law. I do not think anyone who reads the Book of Aedhil, however cursorily, can doubt that his method applies equally well to Criminal or Penal Law. The same state of affairs, as the Book of Aedhil exhibits to us as existing in ancient Ireland, seems to have prevailed in all other nations at one period of their progress, though only traces of its existence remain elsewhere in the mature laws of a more settled state of society.

R. K. CHERRY.
CONTENTS.

LECTURE I.

INTRODUCTORY.

PRIMITIVE CUSTOM AS TO CRIMES.

Distinction between the terms Criminal and Penal Law—Advantages of historical study of Law—Illustrated by history of naval actions— Instances of confusion introduced into legal principles through ignorance of their history—Ancient Laws were not common, but customs sanctioned by usage—Private revenge, the earliest form of punishment recognized by all communities—Priorities of retaliation in various countries—Birth of system of pecuniary compensation instead—The Death-Suit in Greece—Ancient Germany—England—Ireland—Sweden—Turkey Empire—Traces of it in Roman Law—Partition by Divine Legislation—First form of a judicial proceeding—Tribal Assemblies fix the amount of fine and enforce payment of fines—Outlawry, the earliest sanction of Law—Transition from stage of Penal Law to Criminal Law.

LECTURE II.

ANCIENT IRISH LAW.

Values of Irish Laws in study of ancient criminal jurisprudence—Chief authorities—The Ussheen Manuscript—Account of its compilation—Illustrations of its very ancient character—Summary of principles of Irish Law as to capital—Kinsman—Slavery of the Childress of Taran—Illustrations of legal progress anterior to estatements—Inability of relatives to seem—Punishment for theft—Violation of the King’s person—Problem as to the existence of a sanction—Outlawry—Progress of primitive ideas on penal law.
Contents.

LECTURE III.

LAW OF SEMITIC RACES.

I. HEBREW LAW.

Influence of Religion upon Law—Content of native and foreign religious in this respect—Tendancy of the Jews as to their legal and religious regulations—Halawa Law of Hebraica—Prohibition of the death fine—Initiation of Cities of Refuge—First trace of a judicial proceeding in Hebrew Law—The Les Testos as regards lesser injuries—Compensation allowed to be received for them—Law of private property and express—Punishment for theft—Recognition of paternal rights— 40

II. MUSLIM LAW.

Founded upon the Koran—Development of the law through theory of tradition—Principle of retaliation (Kebala), but debt and not fulfillment, as among the Jews—Practice in Persia and other Mohammedan countries as to murder— as to accidental homicide—Punishment for theft—The Turkish Penal Code of 1849— 51

LECTURE IV.

ROMAN PENAL LAW.

Slow development of the notion of a crime in the Roman system—Rapid development of legal ideas otherwise—Contrast of English and Roman Law in this respect—Non-religious character of Roman law—The XII. Tables—Their provisions as to offenses—Sketch of subsequent history of penal law in Rome—Nature of obligations ex dolo—The oculi Pudii—Comparison of Roman and English treatment of theft—How homicide was dealt with at Rome—The Quaestiones Privatae—Importance of their application in the history of criminal law—Legislation of Sabin—Deprivation of criminal trials in latter period of the Republic—Three causes retarded the growth of criminal law at Rome; (1) Republican form of government; (2) Irreligious character of the people; (3) Existence of slavery— 56

LECTURE V.

EARLY ENGLISH PENAL LAW.

History of English Criminal Law continuous from earliest Anglo-Saxon times to the present day—Anglo-Saxon Laws as in crimes—Private revenge recognized and allowed—Introduction of system of statutory fines—Legislation of Alfred to enforce fines and control revenge—Original position of the King as regards criminal matters—Threats fine for homicide—Acceptance of, discretion in certain cases—Final prohibition of revenge by statute of Merton—Outlawry, its origin and growth—Punishment of offenses of the decline of punishment by fine; (1) Influence of Religion; (2) System of Indemnity; (3) Growth of Royal Jurisdiction— 78

LECTURE VI.

EARLY ENGLISH CRIMINAL LAW.

Origin of proceeding by the Crown in criminal matters—Modern form of an indictment—Scope and tenor of its history—The King's Peace—Real breach of the peace formerly necessary in order to constitute a criminal offense—System of appeals or private prosecutions for offenses—Their origin and history—Influence of reign of Elizabeth and Charles I—Last instance of, in 1648—the power of battle being recognized by the Court of King's Bench as part of the law of the land—Conservative character of English Law—Historical explanation of many apparently anomalous rules of modern English Criminal Law— 93
LECTURE I.

INTRODUCTORY.

PRIMITIVE CUSTOM AS TO CRIMES.

My object, in the present Course of Lectures, is to trace historically the manner in which Criminal or Penal Law developed itself among ancient societies. The terms Criminal Law and Penal Law are by no means identical. Though with our modern notions we are apt to regard them as so, in the investigation of the laws of early communities the distinction between them must be clearly attended to. Penal Law is a term of wider signification than Criminal Law; it means that branch of law which deals with punishment, by whomsoever imposed and with whatever object. All Criminal Law is Penal in its nature, i.e. it affects its due by means of punishment, but all Penal Law is not Criminal. There are still existing in our own legal system many penal actions of a civil nature, such as what are called qui tam actions, where a private individual seeks to recover a penalty for the violation of some statutory duty by another; but such actions have become so rare and unimportant that it has become usual with us to understand the terms "penal" and "criminal" as identical. In other systems of law, however, and especially in ancient legal systems, the principle of punishment is the foundation of a considerable portion of law which cannot be called criminal. Even in modern English law a great part of the law of torts is penal
in its nature; and great confusion has been caused by the non-
recognition of this fact in the rules which have been laid down
at various times as to the measure of damages.

Criminal Law, as distinct from Penal Law, is difficult to
define. A good description of the subject-matter to which the
term is commonly applied will be found in Mr. Justice Stephen's
History of Criminal Law (vol. i., pp. 2-4). As distinct from
Penal Law, Criminal Law involves, I think, three elements:
firstly, that the proceedings is of a public nature, instituted, in
theory at least, by the State, or by some public authority repres-
enting the State, and not by the individual injured, in case any
one individual is so injured; secondly, that the act upon which
the proceedings are grounded, is, or is considered to be, a wrong
or injury to society in general, and not to one person only. This
is the characteristic most generally referred to as the distin-
guishing feature of Criminal Law; and, thirdly, as a logical
consequence of the two former, that the offence cannot be
punished by a subsequent compliance with the law violated, or
by arrangement with the person primarily injured; the object
of the punishment being, not to assist such person, but to
protect society, by deterring others from committing similar
offences. The public nature of the wrong which is punished,
the public nature of the proceeding by which it is punished,
and the public nature of the reasons for punishment will be
found, on examination, to be present in every case which is
considered in our law to be criminal in its character. The
matter is of great practical importance to the lawyer, as upon
the question, whether a proceeding is or is not of a criminal
nature, depends the important question, whether an appeal
lies under the Judicature Act from the decision of a Court of
first instance or not. Imprisonment for contempt of Court is
distinctly a proceeding of a punitive nature; still it is gener-
ally held to be a civil and not a criminal proceeding, for
the object of the imprisonment is not so much to punish as to
compel compliance with the law: and a person who has been
committed for contempt can generally procure his release by
during the act for the refusal to do which the imprisonment was
imposed. Thus, in a recent case where a witness was committed
for refusing to answer a question in a bankruptcy matter under
the 35th Section of the Bankruptcy (Ireland) Act, 1857, it
was held by the Court of Appeal, upon this ground, that the
proceeding was of a civil and not a criminal nature (In re
Keller, 22 L. R. Ir., 168). "The refusal of a witness to
answer a question may be a punishable contempt," says Fitz-
Gibbon, L. J., "but a proceeding taken, not to punish him,
but to compel him to give evidence is not an exercise of punitive
jurisdiction" (22 L. R. Ir., at p. 209). Similarly, imprison-
ment for debt under the old law was never considered to be
criminal in its nature.

This distinction, as I have said, between Criminal and Penal
Law is of the greatest importance in the study of primitive
jurisprudence. It is pointed out by Sir H. Maine, in the
19th chapter of Ancient Law, that in early times the most
important branch of the Law was Penal Law; but that, at the
same time, true Criminal Law was almost entirely unknown.(c)
The notion of an offence against the State is of entirely modern
growth; and the theory that punishment is imposed for the sake
of reforming the criminal and deterring others from following
his example is even still more modern. It is extremely inter-
esting to trace, historically, the growth of these ideas, and to
show how Penal Law, and afterwards Criminal Law, gradually
developed itself in different legal systems.

It is scarcely necessary, at the present day, to put forward
any defence for the historical treatment of a legal subject.
Still, I fear, the advantages of the historical method are more
recognised in theory than appreciated in practice. Practical
lawyers naturally confine their attention almost altogether to
the law as it is, and disregard, or treat with contempt, historical
dispositions upon its origin; and this naturally leads students,
who desire only to be practical lawyers, to follow their example.

Lect. 1. Prinifici Custom as to Crimes. 3

(c) Ancient Law, pp. 295-297.
The analytical method of study, as it is called, has many grave defects, and one who pursues it alone will seldom or never become a really sound lawyer; for law is an art rather than a science, and a lawyer needs much more a knowledge of how to apply his principles than a mere verbal acquaintance with those principles themselves. The study of law in ordinary text-books, without acquaintance with its history, is apt to encourage in the student one of the greatest faults in practice, namely, rash generalisation. A student who pursues the method of Austin and Bentham alone is not to suppose that law is like mathematics, certain and definite, and that its principles are applied, like the axioms of Euclid, with rigour and strictness to each case without variation. Every trained lawyer knows what immense difficulty there is in applying legal principles, and what caution and care are necessary in ascertaining the ratio decidendi of one case, and in applying it to another. A knowledge of the history of the branch of law with which any principle is connected is indeed absolutely necessary before its true bearings and the limits of its application can be fully understood. Principles are frequently applied quite illogically to different cases; and sometimes, in the course of the development of law, the true principle is forgotten, and an entirely wrong principle is invented to explain rules of law which are well established. The result is that the law is regulated, partly in accordance with one, and partly in accordance with another principle, and the application of each leads to entirely different results. In dealing with cases such as these, the abstract method of the analytical school of jurisprudence breaks down completely. A knowledge of the history of the law is necessary before one can at all understand the course of its development. Take, for instance, the well-established principle of the liability of a master for the wrongful acts of his servant when engaged in doing his master's business. We are all familiar with the rule that if a grocer's cart is driven carelessly by its driver, and in consequence of the driver's negligence any person is injured, the grocer is liable to an action. Here it is said that the principle of the master's liability is his negligence in employing an unskilful servant. If this were really so, the logical result would be, that if the master were guilty of no negligence in employing the servant, he would not be liable, or in other words, that a truancy of the master's personal negligence would be a good defence to the action. This is, however, not the case. It is no defence that the master used the greatest care in employing his servants. The real fact here is, that the theory of negligence is an after-thought, invented when the true principle of the action had been forgotten. The liability of the master is in reality a survival of the principle of the liability of an owner for the act of his slave, and is based on the same principle as his liability for injuries committed by animals in his possession. The historical investigation of the matter proves to us that the real basis of this liability is not any theory of negligence on the part of the master, but an entirely different one. In the Roman Law a class of actions existed called noctis actions, which provided for this case of vicarious liability. The defendant had the option of surrendering the delinquent instead of paying the damages. This right of avoiding liability by a surrender of the slave or animal has much puzzled lawyers, and the conjecture is probably true that the real origin of this feature of noctis actions was the right of private vengeance, which was recognized extensively in all bodies of ancient law. The origin of the liability appears to have been this—if an injury were done by a slave, the person injured had the right to exact vengeance against the slave personally, thus injuring the master's property; and the master or owner was consequently allowed to prevent this vengeance by making compensation for the injury done. The origin of the liability had, if this theory be true, nothing whatever to do with negligence on the part of the master, and, consequently, absence of negligence on his part was no defence to the action.

The noctis actions occupied a prominent position in Roman jurisprudence, but the later Roman jurists were as ignorant of their true origin as English lawyers formerly were, and dealt
with the right of surrender (morro de letra) as if it were a limitation of liability, instead of being the original basis of the action (a). The duty of surrendering the criminal was the earliest obligation. As a substitute for this the master was allowed to pay damages.

There is very little doubt that the origin of the master's liability in our own law was exactly the same. The same right of surrender is mentioned in some of the older authorities as an alternative to liability in the case of injuries done by animals. In Fletcher's "Abelgia" it is stated to be law, that if a dog kill sheep, the owner of the dog can free himself from liability by giving up the dog to the owner of the sheep. This exactly corresponds with the morro de letra of the Roman Law; and when we go back still further, we find the duty of surrender stated to be the primary liability. By the laws of Iran, it is provided that "if a Wazir may slay an Englishman, then shall he who owns him deliver him up to the lord of the hundred, or give him shillings for his life." How the principle came to be extended to the case of a hired servant is difficult now to ascertain, but in all probability the origin of the liability was forgotten before slavery ceased to exist. This was undoubtedly so in the Roman Law.

The main defect of the analytical method is not, however, in the application of principles. It lies deeper, in that this method completely misinterprets the facts of ancient law. A law, according to the theory of Austin, consists of a command by a political superior to his subjects, the obedience to which is enforced by a punishment or penalty. As a matter of historical fact, however, ancient laws were not commands. They were not issued by political superiors, nor were they enforced by punishment or otherwise. They were merely customs, sanctioned by usage, voluntarily observed, with that strong devotion to usage which always characterizes uncivilized nations. "It is


the Anglo-Saxon and Early English Laws. These different systems, representing, as they do, the different branches of the Aryan race, and also the two most important of the Semitic, exhibit, as a matter of fact, upon investigation, a striking similarity in the manner in which the rules upon the subject of crimes and punishments developed themselves in each.

The earliest view which we obtain of political society shows us in each case the same system prevailing for the redress of wrongs and punishment of offenses, namely, a system of private revenge and personal redress of injuries. Each person avenged, in whatever manner he thought right, a wrong done him by another, and the customs of the tribe sanctioned his doing so with impunity. The idea of retaliation is one deeply rooted in man's nature. A savage or a child naturally avenges an injury by inflicting a similar one on the aggressor. Retribution in kind is viewed, even in civilized societies, with satisfaction. An eye for an eye, a tooth for a tooth; whose shedding a man's blood, by men shall his blood be shed—such is the rule in all early societies. As Mr. Moyle, in speaking of the Roman Law, well says: "A system of self-redress, in the form of private vengeance, prevailed everywhere the establishment of a regular judiciary; the injured person, with his kinsmen or dependents, made a levy against the wrongdoer, and swept away his cattle, and with them perhaps his wife and children, or he threatened him with supernatural penalties by "fasing" upon him, as in the East even at the present day; or, finally, he reduced his adversary to servitude, or took his life."(a) There are only slight traces of this system of self-redress in the Roman Law of the time of Gaius and Justinian. Still there are sufficient to prove, conclusively, that the early history of Law was the same in Rome as elsewhere. When we apply ourselves to other systems of Law which, from various causes, did not develop in the same manner as the Roman Law did—such, for instance, as the Breton Laws of Ireland, and the legal systems of Semi-tic nations—we find the system of private retaliation in full vigour, even in the most highly developed stages to which the law ever attained. There can be no doubt, also, that the primitive history of English Criminal Law was in this respect exactly the same. "The fact," says Mr. Justice Stephen, "that private vengeance of the person wronged by a crime was the principal source to which men trusted for the administration of criminal justice in early times, is one of the most characteristic circumstances connected with English Criminal Law, and has had much to do with the development of what may, perhaps, be regarded as its principal distinctive peculiarity, namely, the degree to which a criminal trial resembles a private litigation. (Hist. of Criminal Law, i. 245). The development of both the English and Roman systems has, in a great measure, obliterated the traces of this system of primitive retaliation; and it is difficult to trace in them the various steps of the progress to a mature system of law. It is here that we invoke the aid of the other systems of Law which I have mentioned. The Breton Laws, arrested in their growth, at an early stage of legal development, by the unfortunate history of Ireland, threw a flood of light upon the early history of Penal Law, and supplied us with the missing link of legal history. They exhibit to us, flourishing in full vigour, institutions and methods of procedure, of which only very slight traces remain in the Roman Law, and the very remembrance of which has been almost entirely lost in our own more perfect system of Criminal Law.

The primitive method for the redress of wrongs was, as I have said, simple retaliation upon the person of the wrongdoer. At this stage of human progress, Law, in any sense in which we use the term, cannot be said to have existed. It would be absurd to call savage retaliation Law; still this system of retaliation is the germ from which Penal Law has gradually developed itself; and we can, by comparing the laws of different nations at different periods of their development, actually trace the stages by which the practice of retaliation became trans-

formed into a regular system of Criminal Law. The first stage in this progress was the growth of a custom for the injured person to accept some pecuniary satisfaction in lieu of his right of vengeance. The wrongdoer might thus buy off the revenge which he dreaded, if he chose to do so. This was, at first, a purely voluntary matter on both sides. There was no compulsion whatsoever. It lay entirely in the discretion of the injured person whether he would accept pecuniary satisfaction or wreak his vengeance on the wrongdoer. And the latter, if he were strong enough, could safely defy his enemy, and refuse to give any satisfaction. It was altogether a matter of private bargaining; the injured man, according to his power, and according to the fearlessness of his aggressor, extorted whatever sum he could from the wrongdoer. Gradually, however, a regular scale of payment was established—first, for slight injuries, and then, afterwards, for more serious offences. Custom has enormous force among uncivilised nations. Man, naturally, and without any constraint, was satisfied to accept the same compensation as others in similar positions had been content with. Still there was no compulsion—no constraint whatever—and no intervention of any judicial authority.

It must not be forgotten that the right of personal revenge was also in many cases a duty. A man was bound by all the force of religion and custom to avenge the death of his kinsman. This duty was by universal practice imposed upon the nearest male relative—the avenger of blood, as he is called in the Scripture accounts. Among most nations, murder, like any other offence, could be compounded for between the wrongdoer and the nearest relative of the slain. We never hear of the death fine in historical times in Greece, but in Homer it is referred to more than once. Thus, in the 9th Book of the Iliad, Ajax, in reproaching Achilles for not accepting the offer of reparation made to him by Agamemnon, reminds him that even a brother’s death may be avenged by a pecuniary fine, and that the murderer, having paid the fine, may remain at home among his own people free. One of the scenes said to

have been depicted on the shield of Achilles is a dispute about a death fine. Among the ancient Germans the custom prevailed universally. Tacitus tells us that punishment was made for homicide by a certain number of cattle, and that this was the whole family was oppressed. By the Lex Salica the fine was paid in money, and varied according to the rank, sex, and age of the murdered person. (a) The early English laws were based on the same principle: the fine for homicide is constantly referred to in the Laws of Edgar and Athelstan. In Sweden the death fine was also recognized by the name kruth, as a compensation for homicide. In the Roman Law there is no trace of it, so far as I am aware; but the provision of the Twelve Tables regarding homicide has not been preserved to us; and it is only from an incidental reference, many centuries later, that we learn that death was the penalty imposed for the crime. It is possible that, as in the case of lesser injuries, primitive Roman Law allowed a murderer to compensate for his offence by a money payment; but it is more probable, I think, that the law regarded the life of a Roman citizen as too sacred to be atoned for by money payment. Among Semitic nations the death fine was very general, and it continued to prevail in the Turkish Empire down to our own day; but the acceptance of a death penalty was distinctly forbidden to the Jews by the Mosaic legislation. The life of a man was considered too sacred to be atoned for by money payment. (b) Religious influences had much to do everywhere, as we shall see, with the development of Criminal Law.

Diath. I.] Primitive Custom as to Crimes.

The death fine was, of course, a most important matter in cases where it was permitted to be paid and received; and it is in reference to it that a dispute would naturally arise: first, because its amount would necessarily be larger than that for lesser injuries; and, secondly, because the acceptance of too small a fine would naturally be looked upon as an evasion of his duty by the avenger of blood. The latter might accept a

(a) See Lex Salica, edited by Horsell & Xerx. Tolsa 14, 28, 56, 41-43.
(b) See Nummber XXXI. 31.
Introductory. [LECT. 1.]

The first form of any judicial proceeding is to be found in the settlement of the amount of fines by the tribal assembly, which was held periodically among most primitive nations. Each party would naturally appeal to it, and probably in early times its principal work was the settlement of such disputes. At first the settlement was only suggested, neither party being bound by the decision; and it was not, apparently, for a very long period that any attempt was made to enforce decree as to the amount of the fine. Where both parties were willing to refer the matter to the assembly, the decision of the latter was of course binding, and gradually it came to be usual and customary to do so.

We have, in English Law, very little trace of such a system as that which I have endeavoured to describe, but the Brach Laws give us an exact picture of this state of society; and there can be little doubt that it preceded, everywhere, the establishment of a regular judicial system.

In fixing the amount of the fine to be paid, the Tribal Assembly would naturally pay attention to the likelihood of the injured person being satisfied with its decision. Thus the feeling of the aggrieved party, rather than the moral guilt of the offender, or even the amount of damage inflicted, was the primary matter which regulated the amount of the fine. At a later period, when law was fully developed, and the decisions of courts of justice regularly enforced, traces of this system remained in the rules regarding the penalty for different offences. The various rules by which, according to Roman Law, a theft detected in the act was punished by a fine of twice the amount of that inflicted for a theft not so detected, is undoubtedly to be traced to this source. "The reason," says Mr. Pocock, "why fortuita manifesta was subjected to a heavier penalty than fortuita nec manifesta, was not because the barbarous legislator supposed that detection in the act was an aggravation of the offence, but because he wished, by the

amplitude of the legal remedy offered, to induce the aggrieved party not to take the law into his own hands and inflict summary vengeance on the offender." (c)

The Roman Law only exhibits, incidentally as it were, traces of the existence of such customs; but the Brach Laws exhibit the system in full operation. The Book of Akkot mentions with great detail the various circumstances which are to be taken into account in fixing the amount of fines; and instances are recorded where injured persons refused, for various reasons, to accept the amount fixed.

How then did this purely voluntary system become transformed into a regularly enforced code of Penal Law? There can be little doubt that the enforced payment of the fines was a matter of gradual development. The Brach Law treated, for instance, contain no provision whatever for the enforcement of the fine, so that we are much puzzled to know what obligation there was on anyone to pay. We may conjecture that when first tribal assemblies or kings began to decide disputes authoritatively, they gave (if the wrongdoer were present) such assistance as was necessary to the complainant in excusing the punishment imposed. If the wrongdoer did not attend, there was, so far as we can learn, no means of compelling him to do so; but the principle of retaliation was again invoked here. He who refused to obey the law was deprived of its benefits. If any man refused to pay the fine imposed upon him by law for any offence, he was declared henceforth incapable of recovering fines for offences against himself. In other words, he was outlawed. There can be little doubt that outlawry was the first punishment imposed by society. The mere threat of a body of law is the more minute are its provisions regarding outlawry. Such is the conclusion at which Sir H. Maine arrives:—"The earliest penalty for disobedience to the court was probably outlawry. The man who would not abide by its sentence went out of the law. If he were killed,
his kinsmen were forbidden, or were deferred by all the force of primitive opinion, from taking that vengeance which otherwise would have been their duty and their right." (c) The introduction of the system of outlawry is extremely important in that it marks the real origin of Criminal Law. In ancient law there is no such thing as a crime. The word crimen (connected with the Greek enephe) is of comparatively modern origin in Roman Law, and necessarily implies a judicial proceeding of some kind.

Criminal Law, as distinct from Penal Law, involves some element of public condemnation—such was a sentence of outlawry. The right of vengeance, or the penalty paid and accepted in lieu of it, is a matter more of private than of public law. The term "passa" does not, like "crimen," involve anything of a public nature. "There can be little doubt that the term 'passa' originally meant not so much penalty as composition for injury; the earliest passa were sums in consideration of which the injured person consented to forgive his customary right of self-redress, and the penal sums recovered by the plaintiff in a Roman action on delict usually indicate the nature of the practice, though in them the 'penalty' is usually fixed by the State, and not by the parties." (d)

The prototype of a modern criminal trial appears in the solemn proclamation at the tribal meeting, after full inquiry of the sentence of outlawry. In Ireland the sentence was pronounced at the Aihing by the Law man. In the Saga of Gishli the outlaw, (c) we have an account of the manner in which sentence of outlawry was passed in that country. Gish in a quarrel had slain his opponent. He flees, and is pursued by Bork the Stout, brother of the slain man. "The next thing that happens is that Gish sends word to his brothers-in-law, Helgi, and Sigurd, and Vestager, to go to the Thing (c) See his chapter on "The King in his relation to early civil justice," in Early Law and Customs, pp. 170-174.
(c) "The Story of Gish the Outlaw," Ed. by Sir O. Dunb.
LECTURE II.

ANCIENT IRISH LAW.

The most instructive source which we possess for the study of ancient criminal jurisprudence is the Brehon Law of Ancient Ireland. "The very causes," as Sir Henry Maine says, "which have denied a modern history to the Brehon Law have given it a special interest of its own in our day through the arrest of its development." (c) The various compilations of Law are also valuable as the best source for the study of the early history of Ireland. Ireland, however, almost alone of all nations of the earth, consider their national history unworthy of study. Consequently, little or no interest is taken in the Law Tracts from an historical point of view, while their value in reference to the study of comparative jurisprudence has been only recently recognized. "The Brehon Law," as Dr. Riordan states, in the Preface to the third volume of the Law Tracts, "exhibits more completely than any other code the ideas of an early society, as to the whole body of facts included under the name of crimes and torts." Consequently, a study of primitive penal law will naturally begin with it.

The antiquity of a system of law in one sense of the word does not at all depend upon its date. The English Law of Alfred is ancient; while the Roman Law of Justinian, which was some centuries prior to it in time, is extremely modern.

(c) Early History of Institutions, Pref. p. viii.
The Irish Law, though much of it was written as late as the twelfth or thirteenth century, is extremely ancient; and the most ancient principles provided in it centuries after they had disappeared elsewhere.

The Irish had undoubtedly attained to a very considerable degree of civilization between the sixth and the eleventh centuries, and the study of law seems to have been very popular among them. Of the books mentioned in Ossian's Glossary, a work of the ninth century, all, with two exceptions, are law treatises. The Senchas Mor and the Book of Aedhil are the chief authorities on law which have come down to us. The Introduction to the former states that it was compiled nine years after the coming of St. Patrick into Ireland—that is about the year 444 A.D.; and though Sir Henry Maine is sceptical as to its being of such an early date, the authority of almost all Irish Scholars, including the translators, is against him, while from internal evidence there can be little doubt that it was composed, at any rate, very little later. A considerable portion of the text has been found to be in verse, which clearly points to an origin anterior to writing, the verification being evidently intended to assist the memory.

The Senchas Mor was, according to the account given in the introduction, composed in the time of Laoghaire, son of Niall, King of Erin, when Theodosius was Monarch (496-513) of the world. The occasion of its being compiled is thus stated:—

"Laoghaire ordered his people to kill a man of Patrick’s people; and Laoghaire agreed to give his own sword to the person who should kill the man, that he might discover whether he might grant forgiveness for it." Nenda Derg, brother of Laoghaire, then slew Ollrin, Patrick’s charmer. Patrick referred the matter to the judgment of the royal poet of the Island of Erin, viz. Dubhthach Mac na Lagair,” who pronounced judgment of death. “It is evil to kill by a foul deed; I pronounce the judgment of death, of death for his crime to every one who kills”; but although Nanda was executed Patrick obtained heaven for him.
The Irish Law, though much of it was written as late as the twelfth or thirteenth century, is extremely ancient; and the most ancient principles prevailed in it centuries after they had disappeared elsewhere.

The Irish had undoubtedly attained to a very considerable degree of civilization between the sixth and the eleventh centuries, and the study of law seems to have been very popular among them. Of the books mentioned in Cormac's Glossary, a work of the ninth century, all, with two exceptions, are law treatises. The "Sanctus Mar" and the "Book of Aedv" are the chief authorities on law which have come down to us. The Introduction to the former states that it was compiled nine years after the coming of St. Patrick into Ireland—that is about the year 441 A.D.—and though Sir Henry Maine is sceptical as to its being of such an early date, the authority of almost all Irish scholars, including the translators, is against him, while from internal evidence there can be little doubt that it was compiled, at any rate, very little later. A considerable portion of the text has been found to be in verse, which clearly points to an origin anterior to writing, the verification being evidently intended to assist the memory.

The "Sanctus Mar," according to the account given in the Introduction, composed in the time of Laoghaire, son of Niall, King of Erin, when Theodosius was Menarch (1992 A.D.) of the world. The occasion of its being compiled is thus stated—"Laoghaire ordered his people to kill a man of Patrick's people; and Laoghaire agreed to give his own son to the person who should kill the man, that he might discover whether he might grant forgiveness for it." Nunda Berg, brother of Laoghaire, thus saved Othair, Patrick's character. Patrick referred the matter "to the judgment of the royal poet of the island of Erin, viz. Dubhthach Mac na Luigir," who pronounced judgment of death. "It is evil to kill by a foul deed; I pronounce the judgment of death, of death for his crime to every one who kills"; but although Nunda was executed, Patrick obtained heaven for him.

"What is understood from the above decision which God revealed to Patrick," says the commentator, "is that it was a middle course between forgiveness and retaliation: for retaliation prevailed in Erin before Patrick, and Patrick brought forgiveness with him, i.e. Nunda was put to death for his crime, and Patrick obtained heaven for him. But there is forgiveness in that sentence, and there is also retaliation. At this day we keep between forgiveness and retaliation, for as at present no one has the power of bestowing heaven, as Patrick had that day, so no one is put to death for his intentional crimes as long as Erin fine is obtained; and whenever 'Erin fine' is not obtained he is put to death for his intentional crimes, and placed on the sea for his ignorant crimes and unlawful breaches."

After this judgment, Laoghaire decided that all the laws should be settled and arranged in accordance with the spirit of the new religion. "It was then Dubhthach was ordered to exhibit the judgments and all the poetry of Erin, and every law which prevailed among the men of Erin, through the law of nature, and the law of the races, and in the judgments of the island of Erin and in the poets," and "what did not clash with the Word of God in the written law and in the New Testament, and with the conscience of the believers, was confirmed in the laws of the Bishops by Patrick and by the ecclesiastics and the chieftains of Erin; for the law of nature had been quite right, except the faith and its obligations, and the harmony of the Church and the people. And this is the "Sanctus Mar.""

Two points are especially to be noted in this account. In the first place, it distinctly recognizes retaliation as the origin of penal law; and, in the second place, it identifies law with poetry, in a manner which appears extremely curious to the modern reader. The leading authority in legal matters is the Royal Poet, who exhibited the judgments "and all the poetry of Erin" to Patrick. This leads us at once to the conclusion that the work was originally compiled at a time when writing was unknown; and the extremely archaic character of the law..."
in other respects confirms this view. There can be no doubt, indeed, that at whatever date the Stavhch Mor was actually compiled, the contents of it had been handed down from a very remote period. There is no mention of coined money throughout the work; the measure of value is a "cumbal," which originally meant a female slave, and then her value, which was considered to be equivalent to that of three cows. Kinship is the basis of society. The land is chiefly owned in common, although separate ownership is not unknown. The family, and even the tribe, are responsible for the crimes of individuals; and all crimes are committed by a money payment. The strongest thing of all about the Stavhch Mor, as well as the other Law Tracts, is that, side by side with the most ancient principles, we find extremely modern doctrines on some subjects, the latter, in all probability, having been adopted from the Roman Law, and introduced at a later period as gibe to the original MSS. Minute regulations, for instance, are laid down as to contracts; and the provisions regarding fraud remind us forcibly of the very elastic concept de loco nulli of the Roman system. On the whole, however, the laws were just and equitable; hence the desire frequently shown by Norman or English settlers to adopt them—a tendency which took all the energies of the Parliament of the Pale to counteract and repress.

The Stavhch Mor became the leading authority on law throughout Ireland, and continued to be such as long as the Irish tribes retained their independence. Its authority did not completely cease until the seventeenth century. During all this period, of probably 1000 years, the laws underwent little or no alteration. Various causes produced this result, the chief one being the unsettled condition of Ireland, and the absence of any strong central authority to alter or develop the legal system. Hence the extremely statical character of the law, even in its latest development, and the interest which consequently attaches to it at the present day.

Anyone who is familiar with the history of Ireland will have little difficulty in explaining how it was that the law remained unchanged for such a long period. A strong central authority is the chief requisite for the development of a legal system, and such did not exist in Ireland at any time after the tenth century. The Norse destroyed the central monarchy which was creeping into existence at that time. Then the Normans came under Strongbow, backed up by Henry II. of England. They never completely subdued the country, but they were far too strong to be driven out. And, as Mr. Lecky so well expresses it, "the feudal power planted in the heart of the nation destroyed all possibility of central government, while it was itself incapable of fulfilling that function." (a) The absence of any authority to enforce or amend the law prevented its internal development, while foreign influence was in a great measure excluded by the intense hatred of the invaders, and the strong disinclination to adopt any of their institutions. Not a trace of English law is to be found in any of the Law Tracts.

The Book of Aiulf, the second in importance of the Law Tracts, is taken up with that branch of law which we now call Criminal Law. But in the Ancient Irish Law there was no distinction between civil and criminal law, or rather, it would be more exact to say, there was no such thing as criminal law in existence. Self-revenge was the one and only remedy recognised. All proceedings, whether for a crime, a tort, or a breach of contract, were identical in origin, and prosecuted in the same manner, namely, by laying a distress.

The learned editors of the Law Tracts, in the Introduction to the Book of Aiulf, shortly summarize the principles of the law which it contains as follows:—

1. The entire absence of any legislative or judicial power from which it follows—

"(2) That the law is purely customary, and theoretically incapable of alteration; and

"(3) That all judicial authority is purely consensual, and the judgments are merely awards founded upon a submission to arbitration, whose only sanction is public opinion;

"(4) That all the acts defined by us as crimes are classed as torts; and

"(5) That the form which all judgments assumed is an assessment of damages." (c)

All offences from murder or intentional homicide to the most trifling theft or insult were, under the Irish Law, the subject of pecuniary compensation only. The offender, if he paid the stipulated sum, was entirely free from any punishment. If he was unable or unwilling to pay, the injured person might either levy a distress on his goods, or upon those of his near relatives, or exact vengeance in whatever way he thought right. The Erne fine, as it was called, forms the most prominent, and to the modern student by far the most interesting, feature of the Laws. The rules for calculating its amount were extremely complicated, and a great portion of the Law Tracts is taken up in discussing them. The proportions are most minutely laid down in which relatives of the offender were bound to pay, in case of the latter making default; the primitive idea of the responsibility of the tribe for the acts of its members being recognised generally throughout the laws.

The amount of the fine varied, partly according to the rank of the person injured, partly according to that of the offender, and partly according to the nature of the act. A double fine was due for homicide, where anger was shown, i.e. where probably there was what we now call "malice"; but even for an accidental or unintentional homicide, an Erne fine was imposed. Exception from liability for an accidental injury is entirely a modern idea. All breaches of ancient law punished unintentional as well as intentional offences. Even in our own Criminal Law,

(c) Translator's Introduction to the Book of Avalon, p. 134.

The amount of the Erne fines varied, as I have said, according to the rank of the person killed; being highest in the case of a chief or a bishop, and next in the case of a priest. It was paid to the relatives of the deceased person in the proportion in which they were entitled to inherit his property. Different names are used in the tax for the fines, and there is some confusion as to the mode of calculating the amount. The terms monepan (malchurum), moneckam (conacham), and cipra (cereis), are used indiscriminately. The monepan or "honour-price," as it is translated, was the price at which a man's life was assessed. Whether it was equivalent to the cipra, or was a separate payment, it is impossible to say. The amount of the honour-price depended on either wealth, family, or profession, and a man was allowed to elect by which it should be calculated; but having once made his election he was bound by it for ever. Some passages in the Laws assume that a king or chief might elect to have his honour-price on the amount of his possessions. This is an extremely interesting fact, as showing that the great importance of wealth is not, as is generally supposed, peculiar to modern society.

The assessment of damages varying in this way became extremely complicated. If injuries were committed by both parties they could be set off against each other, so that if a feud had been going on for any lengthened period between two families, the legal proceedings which resulted resembled the taking of an account in equity rather than a criminal trial.

The so-called "moment of the law" and other crimes by a fine was common to all ancient systems of law. Everywhere there are traces of it; but in general it disappeared at such an early period in the development of the law, that we can learn little as to the way in which it originally sprung up. In Ireland, on the other hand, the law was, from various causes, stereotyped in its original form, and remained unchanged throughout the whole course of its history, so that this ancient
custom continued to prevail for centuries after it had disappeared elsewhere. Thus when an English Deputy, during the reign of Elizabeth, informed MacGuire of Fermanagh that he must admit a sheriff into his territory, the Irish Chief replied that the sheriff should be welcome, but that the time passed the amount of his "Eric," that in case anybody should cut off his head he might have it upon the country. To allow such a serious crime as murder to be committed by a money payment was certainly an indication of barbarism, and this probably contributed in a great degree to prevent the establishment of order throughout the native portion of Ireland. The English writers who denounced the custom of Eric fines as "wicked" and "dannable," were probably unaware that a similar custom originally prevailed in every country of Europe, including their own. Still there is a considerable amount of truth, though some exaggeration, in the remark of Davis, that "the people which doth use it, must of necessity be rebels to all good government, destroy the commonwealth wherein they live, and being barbarous and devastate upon the richest and most fruitful land of the world." The continuance of such a custom would effectually prevent any real social progress in the nation. "It cannot be doubted," as Dr. Richardson remarks, "that this is the idea of compensation owing for injury, and to a want of perception of the criminality of any act, much of the disorder and hardness apparently inherent in the Irish Celt's tribe must be attributed." (a)

The fine for homicide being thus such a very archaic institution, if we could ascertain the way in which it originated we would probably learn the origin of law itself. The account given of the Eric fine in the Breton Laws, and the reference to it in the historical tales of the Ancient Irish, materially assist us in this inquiry. The origin of law is stated by Sir Henry Maine to have been in all cases a voluntary submission to arbitration. This theory is based upon the forms of the legis jcei sacramentum of the Romans, as described by Gulis, and has been confirmed by many indications in other systems of law; but the Breton Laws show us that there was a stage anterior even to that of arbitration; and this we learn from any individual indications of it in the procedure of a more fully developed system, but from contemporary references, and from the provisions of the laws themselves. We stand here, it may be fairly said, on the very threshold of law, and we are enabled to see how it arose in a state of society where anarchy and disorder had previously prevailed. The theory that the system of pecuniary fines immediately succeeded the custom of mere retaliation, which is considered probable by Sir Henry Maine, is completely confirmed by the accounts given of the Eric fines in the Breton Laws, and in the historical tales of the Ancient Irish Celts. But how did the fine come to take the place of retaliation? This we shall see from the way in which the fine was itself originally regarded. The payment is invariably treated in the laws as a satisfaction to the injured party for his surrender of his right of revenge, and when the fine is paid, the right of revenge returns as of course. In very early times the acceptance of the fine was even judicial; the injured person if he preferred to revenge himself on his adversary might do so freely. A story contained in the Book of Leinster illustrates this stage of legal progress. It is called the "Fate of the Children of Taran," and is of very ancient date, being referred to in Gorman's Glossary, a work of the ninth or tenth century. The father of Lugs, a powerful warrior, had been slain by the children of Taran. Lugs, after celebrating the funeral rites, addresses his followers in the following terms:--

"Go ye now to Taran, and the King of Eric sit on his throne with the Dedumans around him; but do not make these things known till I myself have told them." (b)

So Lugs's people went straightway to Taran, as he had bade them; but if the number of a man they said naught. Lugs himself arrived some time after, and was received with great honour, being put to sit high over the others at the King's

(a) Introduction to Breton Laws, ed. 2, p. 122.
side; for the fame of his mighty deeds at the battle of the Assembly Plain had been noise over the whole country, and had come to the ears of the King.

"After he was seated, he looked round the hall, and saw the sons of Turann in the assembly. Now these three sons of Turann exceeded all the champions in Tara, in comeliness of person, in swiftness of foot, and in feats of arms; and, next to Laga himself, they were the best and bravest in the battles against the Fomorians; wherefore they were honoured by the King beyond most others.

"Laga asked the King that the chain of silence should be shaken; and when all were listening in silence, he stood up and spoke:—

"'I perceive ye nobles of the Dedannan race that you have given me your attention, and now I have a question to put to each man here present: what vengeance would you take of the man who should knowingly and of design kill your father?'

"They were all struck with amazement on hearing this, and the King of Erin said:—

"'What does this mean? For that your father has not been killed, this we all know well!'

"'My father has indeed been killed,' said Laga; 'and I see now here in this hall those who slew him. And furthermore, I know the manner in which they put him to death, even as they kill themselves.'

"The sons of Turann hearing all said nothing; but the King spoke aloud and said:—'If any man should wilfully slay my father, it is not in one hour or one day he would have him put to death; but I would lay off one of his members each day, till I saw him die in torment under my hands.' All the nobles said the same, and the sons of Turann in like manner.

"The persons who slew my father are here present, and are joining with the rest in this judgment,' said Laga; 'and as the Dedannans are all now here to witness, I claim that the three who have done this evil deed shall pay me a fitting Erin fine for my father. Should they refuse, I shall not indeed transgress the King's law, nor violate his protection; but of a certainty they shall not leave this Hall of Micile till the matter is settled.'

"And the King of Erin said:—'If I had killed your father, I should be well content if you were willing to accept an Erin fine from me.'

"'Now the sons of Turann spoke amongst themselves, and Ur and Ucur said:—'It is of us Laga speaks this speech. He has doubtless found out that we slew his father; and it is better that we now acknowledge the deed, for it will avoid us ought to hide it.'

"Brian, however, at first set his face against this, saying that he feared Laga only wanted an acknowledgement from them in presence of the other Dedannans, and that after this he might not accept a fine. But the other two were earnest in pressuring him, so that he consented, and then he spoke to Laga:—

"'It is of us thou speakest these things, Laga; for it has been said that we three have been at enmity with the three sons of Cúta. Now as to the slaying of thy father Kian, let that matter rest; but we are willing to pay an Erin fine for him, even as if we had killed him.'

"'I shall accept an Erin fine from you,' said Laga, 'though ye indeed fear I shall not. I shall now name before this assembly the fine I ask, and if you think it too much, I shall take off a part of it.'

"He then named the fine, and the story proceeds. (c)

"We see from this interesting anecdote that a voluntary submission to arbitration was not the first stage in the development of law, but that there was a stage earlier even than this, namely—that of an ordinary agreement or bargain between the parties, settling the amount of the damages. The fine is not imposed by any recognised authority. The King claims no jurisdiction in the matter. He does not even suggest the amount of

(c) The full tale, text and translation, is published by O'Corry in the _Aindrit._ It is referred to in Corrain's _Glacmary_ (about A.D. 900). The whole story is contained in the 'Book of Lecan' (about 1110 A.D.).
the fine—a matter which the parties settle between themselves. One of them has always the wrong, and demands to be paid compensation, as the price of his renouncing his right to revenge. He appeals to those around to say whether what he asks is fair compensation; and they merely give their opinion, without attempting to arbitrate or interfere in the matter in any way.

We are here at a much earlier stage of law than that which is exhibited in the splendid leges urbs ac urbis communis of the Romans. There is no command to the parties to agree, corresponding to the mittita nobis hinc resonavit of the Romans. There is no command to the parties to agree, corresponding to the mittita nobis hinc resonavit of the Romans. The injured person merely demands compensation, and it is perfectly optional with him to take it or not. The primitive right to retaliation has not yet disappeared, nor is there any moral or legal restraint on its exercise, provided the peace or protection of another is not violated thereby. The progress of the law from this beginning is not difficult to conjecture. If the parties could not agree as to the amount of the damages, nothing would be more natural than that it should be referred to the priest or Brennon who attended the chief of the tribe, to decide. His duty was to recite the history of the tribe at the various tribal gatherings, and he would consequently be able to say what had been given and accepted in similar cases. If either party, after having agreed to submit the matter to him, refused to abide by his decision, such breach of faith would naturally be severely condemned by the whole tribe, and means would probably be taken to induce punishment. In this way a regular legal system would spring up.

Although in the legal notion described by Gneo, the idea of law has been much more fully developed than here, still we find in an earlier period of the Roman Law, a striking parallel to the Irish Eriu fine. The fragments of the Twelve Tables which remain contain no provision regarding homicide, but the punishment for bodily injuries is specified, and ancient law invariably deals with these in the same way as with homicide. The words of the Eighth Table are, si mens em rupit, ni eamus e pacit bali in toto—"Retaliation against him who breaks the limb of another and does not offer compensation." Now if the words bali in toto mean, as I presume they may, "let the injured person retaliate," we are precisely at the same stage as that which the story of the children of Tarsus displays to us in the Irish Law. In the case of homicide indeed we are informed by Pliny that death was the punishment inflicted by the Twelve Tables; but it is not a very extravagant conjecture to assume that the bali in toto was qualified in the same way in this case as in the other. The law in Mahommedan countries is in general based on entirely different principles from those prevailing in Europe, yet strange to say we find there also an exact parallel to the Eriu fine. Mr. Sale tells us, in a note to the second chapter of the Koran, that it is a common practice in Mahommedan countries, particularly in Persia, when a man is murdered, that the relatives of the deceased should have their choice, either to have the murderer put into their hands to be put to death, or to accept a pecuniary satisfaction. Here we have a striking confirmation of the theory that Penal Law originated everywhere in the system of buying off revenge by the payment of a sum of money.

The close connexion between the Eriu fine and private revenge explains also the singular custom of levying the fine on the relations of the murderer, if the latter ascended or was unable to pay. Those who seek vengeance are not over-scrupulous as to the persons upon whom they inflict it; and the revenge would naturally be directed in the first instance against the relations of the wrongdoer. It is their interest then to buy it off to induce those to protect one of their number. Hence when the custom becomes a law, the fine is levied not alone upon the person who is morally guilty, but on his innocent relatives as well. If the fine was paid, a promise was made not to further seek vengeance, and the bargain was complete. In the case of an habitual criminal, the family could relieve themselves from responsibility for his acts by formally expelling him from their body. Probably this was a provision introduced into the laws at a somewhat later period.

The liability of the family to pay the fine for the offence of
one of its members was always regarded as reciprocal to its right to receive it in case such member was himself killed. The law contained provisions as to priority of payment corresponding to the rules of succession to property on death. The fine was leviable in the first instance on the criminal himself, then on his sons, then on his father, then on his "third-line" (a class of relations, the limits of which are not precisely known), then passing beyond the range of the family, on any person who harboured or assisted him, and finally on the king. If his relations were compelled to pay the fine they had naturally the right to compensate themselves out of his property, and his share in the land held in common was forfeited. The family could also relieve themselves from responsibility for the acts of an habitual criminal, by formally expelling him from their body, and paying a fine to the king and certain other persons, as a composition for any future crime he might commit.

The custom of levying the fine upon the whole tribe to which the murderer belongs is, as I have said, easily explained on the principle of retribution. In a tribal society, an injury inflicted by one member of a tribe on a stranger naturally brings down vengeance on the whole tribe to which he belongs. There is no such responsibility, however, for the acts of a stranger living under the protection of the tribe, provided he is given up to the vengeance of those whom he has injured. We have an account in the Séadhath Mór (Introduction, p. 71) of a "Leading Case" on this point. A chief, driven from his own country for his depredations, took refuge with Fergus, King of Ulaidh, who received him under his protection. After awhile he set out "to go to his own tribe to demand justice from them, but was met and killed by five members of the tribe, one of whom was the son of a stranger." Fergus went with forces from the North to demand satisfaction, and justice was done to him, i.e. three times seven ennubals (d) — seven ennubals of gold, and seven of silver, and half of seven ennubals for the crime of the five natives; and Domh the daughter of Buidhe, was given as a pledge for the crime of her son, for he was the son of a stranger, and was brought against the wish of, or without the knowledge of, the tribe of the mother. (e) After this Fergus made a perfect covenant respecting this Eric line, and returned to his own country, leaving his bondman with him in bondage.

The liability of the tribe appears from this case to have been strictly confined to its own members. For strangers there was no responsibility, if they were deprived of protection after they committed an offence, and given up for punishment. The Roman Law is here very forcibly suggested to us.

Thief was punished by fine in the same way as homicide, but it was lawful to kill a thief who was unknown, if there was no power of arresting him at the time of committing the offence. If he were arrested, and if he or his relations were able to pay fines, they were obliged to compensate not only the owner of the stolen property, but a number of other persons who were considered to be injured by the offence. "The fine for stealing from a house is a difficult fine," says the Book of Aedhil (p. 458). "A fine was due to the owner of the house for violation of his precinct, to the occupant of the room from which the stolen article was taken, and also to seven nobles or chiefs of companies who were in the habit of enjoying the hospitality of the house."

In one respect the Brechta Law was extremely modern in its view of crime. An attempt was considered equivalent to the actual commission of the deed. This is probably one of the causes in which the Irish lawyers borrowed from the Civil Law "Dolus pro facto scripto," being the rule regarding

---

(d) A "ennual" was the title of a female slave, generally considered to be equivalent to their own.

(e) A female member of the tribe marrying out of it lost all her rights, and her children were regarded as strangers. The rule in the Hebrew Law was the same. A daughter could not marry out of her tribe without forfeiting her inheritance. (See Numb. xxvii. 6, 7.)
homicide in that system. The intention was itself a crime, and punished by a separate fine, if it was clearly evidenced by an overt act. Thus, if a man went to kill one person and killed another by mistake, a fine for the intention was due to him whom it was intended to kill, even though no injury was done to him, in addition to that due to the friends of the murdered man.

"The general impression," says Dr. Risley, "produced by the rules in the commentary is that the attempt to commit an act was treated as equivalent to its commission, unless the results of the attempt were very insignificant. Thus, if an attempt were made to slay, or to inflict an injury which would endure for life, and blood were shed, thefine was the same as if the attempt had succeeded; if the injury did not amount to the shedding of blood the fine was reduced to one-half. If the intention were to inflict any specified injury, and a different injury was inflicted, a calculation was made of the total of "a seventh for intent, one-half for going to the place, and the body fine for inflicting the wound," and the plaintiff could elect between the result of this calculation and the fine for the wound he intended to inflict and the fine for the wound he actually inflicted." (6)

The judicial functions of the King are recognized in the Irish Law as in all other systems of ancient jurisprudence. A false judging King is frequently mentioned as one worthy of punishment. The account given in the commencement of the Book of Aedil of the composition of that work shows the important position occupied by a King in judicial matters. King Cormac having been accidentally wounded at Tornair was obliged to abdicate his sovereignty. "It was a prohibited thing that one with a blanch should be King at Tornair. And Cormac was therefore sent out to be cured to Aedill, close to Tornhair; and Tornair could be seen from Aedill, but Aedill could not be seen from Tornair. And

(6) Introduction to Book of Aedill, p. six.
the sovereignty of Erin was given to Conaire Lofodair, son
of Carai; and in every difficult case of judgment that came
to him he used to go and ask his father about it; and his
father used to say to him, "My son, that thou mayest know:
and explain to him the exceptions." (a).

The King, though he could declare the law, had no power
to alter it. His function was merely, as chief of the tribal
assembly, to see that the proper customs were observed. The
Royal justice which under the English system gradually
superseded all others in criminal matters did not exist in
Ireland.

Curiously enough, however, we find in the Irish Law
the very same germ from which Royal justice sprang in
England, though it never had time or opportunity to develop
itself in the Irish system. The violation of the King’s Peace
was the original offence from which the jurisdiction of the
Sovereign in criminal matters has gradually grown in English
Law. Such, at least, is the opinion of one of our ablest living
authorities on legal matters, Sir Frederick Pollock. I take
the following note from his Essay on “The History of
English Law as a branch of Politics”:

“The technical use of ‘The King’s peace’ is, I suspect,
connected with the very ancient rule that a breach of the peace
in a house must be atoned for in proportion to the householder’s
rank. If it was in the King’s dwelling, the offender’s life was
in the King’s hands. This peculiar sanctity of the King’s
house was gradually extended to all persons who were about
his business, or specially under his protection; but when the
Crown undertook to keep the peace everywhere, the King’s
peace became coincident with the general peace of the kingdom,
and his special protection was deemed to be extended
to all peaceable subjects. In substance the term marks the
establishment of the conception of public justice, exercised on
behalf of the whole commonwealth, as something apart from
and above the right of private vengeance—a right which the

(a) Book of Adam, Ancient Laws of Ireland, vol. ii., p. 56.
part of the population might pursue or not, or accept compensation for, as he thought fit (a).

A similar rule prevailed under the Domesday Law protecting the sanctity of a man's dwelling and the district around it, and punishing by a fine any act of violence committed there by a stranger. In the case of theft, we have already seen that a fine was due not only to the owner of the stolen property, but also to the owner of the house in which the theft was committed, for the violation of his "precinct." The household had a similar right in case any other offence was committed within the prescribed limits. The Irish word (margin) translated "precinct," meant a portion of land lying round the house of a chief or other dignitary. The territorial limits of this right are minutely specified in the laws, and varied according to rank. Within this "precinct" the owner of the house had a right to prevent acts of violence, but probably he or his property should be injured thereby. The early English law contained similar rules; the "thau" corresponding to the "maighin." Thus, by the laws of Æthelred, if one man killed another within the King's thau, he should make 100, 60, or 12 shillings, as within an earl's lân, 12 shillings. The mode in which the limit of the maighin was calculated proved its object; the smallest limit was the distance to which a spear could be thrown from the door, and that for the higher ranks was some multiple of this. The distance to which a spear could be thrown was the natural limit to the possibility of danger to the house or its occupant from the quarrel. Modern international law furnish us with an exact parallel. A maritime league from the shore of a neutral territory is considered the furthest distance to which a cannon-shot can carry; and no act of war within this limit is considered a violation of the rights of the neutral power in consequence of the danger to which it exposes the persons and property of its subjects. This is only one of the many cases in which ancient private law resembles modern international law.

(a) Digests on Jurisprudence and Ethics, p. 268 (note).
Ancient Irish Law.

The tract on Precincts (mogain), contained in the fourth volume of the *Aurical Law of Ireland*, lays down the following rules for calculating the extent of the precinct:—"The spear measures twelve feet between its iron head and the place where the horn is put upon its extremity, i.e. the extremity of its handle. Now, the shot of this which the bo-anre chief casts as he sits in the door of his house is the extent of the invisible precinct of the bo-anre chief, requesting his 'code'; and the 'aire-bhae' chief has twice this extent; and every grade from that up to the king of a territory has double it, i.e. the king of a territory has sixty-four shots as the extent of his invisible precinct. And it is by the 'green' these shots are measured for every invisible precinct; and where they are discharged from is from the place where they (the parties) constantly sit."

"A King of Kings: it is he that has Kings, i.e. the King of a province, and the King of Erin, and also the 'super' of Patrick (a); as far as their 'ecor' lands (b) extend on every side, that is their invisible precinct."

The large extent of the King's precinct made every offence committed within his territory an offense against him: if he chose so to regard it. And the Irish sovereigns succeeded in attaining to the same power and supremacy as the Anglo-Saxon monarchs, a system of Royal justice would probably have sprung up in Ireland as it did in England, but unfortunately this never happened.

The Brichen Law appears, indeed, to have been at one time on the point of attaining to the position of a code of rules enforced by a sanction—not a sanction of a religious or supernatural nature, as is suggested by Sir Henry Maine (c), but one suggested by this very principle of retaliation, which was the basis of the whole Penal Law, namely, outlawry. The Brichen Law in this, as in so many other points, gives us, I think, a correct illustration of the growth of law in all ancient communities. The right to receive fines was always correlative

(a) The Archbishop of Armagh.
(b) *Early History of Legislation*, p. 37.
with the duty of paying them. The persons who were entitled to receive the fine in the case of the death of any individual, were those on whom the personage of paying would have fallen if that individual had committed a crime himself. He who refuses, however, to bear the burden is not entitled to partake of the benefit of the law; and so we find that where a crime was committed, for which Fine fine was not paid, the criminal was permanently deprived of his right to honour-price. This was testamentary law, an exceedingly severe sentence in a disturbed condition of society. The life of the criminal was then at the mercy of anyone who bore enmity towards him, or who had any interest in his death. “The life of every lawbreaker is fully forfeited,” says the Book of Avall. “There are four dignitaries of a territory,” says the Scandian War, “who may be degraded: a false-giving king, a troublesome bishop, a fraudulent priest, an unworthy scribe who does not fulfill his duties. Death is not due to them.”

The commentary which follows this latter passage was in all probability written at a much later period; it does not only with the more serious crimes for which the whole of the honour-price was forfeited at once, but also with lesser offences, on account of which a part only was taken away, unless the offence was repeated, thus:—

“False judgment, and false witness, and false testimony, and imputable treachery, and false information, and false character-giving, and bad word, and bad story, and lying in general, whether in the case of the Church or the king—every one of these deprives the man who is guilty of such half his honour-price up to the third time, but it does not deprive him with regard to all until the third time, and it takes away even this half honour-price from everyone from the third time out. And he may lose this half honour-price by a different person; and he thus loses full honour-price with respect to the latter person, or with respect to the person against whom he had committed the first injury. Theft or eating stolen food in the house of one of any grade, or having stolen food

in it constantly; and treachery, and fratricide, and secret murder—each of these deprives a person of his full honour-price at once.”

This system of depriving persons of honour-price, either wholly or partially for offences, marks a completely new epoch in the law. Society now for the first time intervenes in the matter. We meet once from the era of torture to that of crimes. The true difference between a tool and a crime lies in the remedy, not in the nature of the act. All injuries are offences against individuals, and all more or less cause alarm and apprehension amongst others, but they should suffer in the same way. But in some cases the remedy is left in the hands of the individual wronged, in others the State imposes the penalty. In the first case we speak of the offence as a tort; and in the latter as a crime. This deprivation of honour-price was probably proclaimed at a tribal meeting. There is no reference indeed, as far as I know, in the Irish law to anything like a public trial; still, some passages manifestly imply it. Entire exemption from fine, for instance, is allowed in the Book of Avall to a person who kills “a condemned outlaw.”

Outlawry thus appears to have been the primitive punishment as distinct from revenge imposed for crimes. The Irish Law is, in this, as in other cases, a type of primitive usage generally. The early English Law was similar, allowing an fine or compensation to relations in case of the murder of an outlaw, “for that he resisted God’s law or the King’s”; and outlawry continued to be the chief punishment for crime in England until long after the Conquest. A great portion of Beowulf’s treatise, De Caro, is taken up with the matter—a fact which shows what an important position it occupied as a punishment in his time.

It is only necessary to consider, for a moment, the position of an outlaw in a chronically disturbed state of society in order to estimate the severity of the punishment. Suppose, for instance, he had been banished from his family, and that his tribe had deprived him of his honour-price, and declared that
no fine should be payable for his murder; he might then have been killed with impunity by any person, or any body of persons who had any motive for doing so. His only chance was to gain the "protection" of some powerful chief. As, however, anyone who sheltered him became liable for his acts, few would be willing to receive him; and if he escaped with his life, he became, practically, a slave to his protector, who was entitled to Eire-lene if he killed him, and luthar for his acts if he committed any crime. It is more than probable that the class of "fuldir," tenants, frequently referred to in the laws, was composed mainly of these homeless men who had fled from other tribes on account of their crimes. Their position was one of great misery. They were altogether at the mercy of their lords, and liable to whatever rent he might demand for any land they occupied. This is the class, most probably, referred to by English writers of the seventeenth century, when they speak of the Irish chiefs exacting their tribute from the chief, but no power to impose more than a "fair rent" on a member of his own tribe.

The study of the Breton Law thus enables us to trace the progress of primitive ideas as to penal legislation generally. The earliest source to which we can trace back Penal Law is the principle of simple restitution—an eye for an eye, a tooth for a tooth, a life for a life. This restitution was not imposed, but simply permitted by society. The next step is the custom of buying off vengeance, either by the individual who has inflicted the injury, or his tribe. A pecuniary payment thus comes to be looked upon as satisfaction for a crime. The wrong-doer gains his life; the injured man something valuable, in lieu of reparation, his pride at the same time being appeased by the submission: society is benefited by an end being put to disturbance and fighting. Once the custom becomes general, disputes will certainly arise as to the amount of the payment. If the parties cannot come to terms both will lose; to avoid such contingency they agree to refer it to the arbitration of the person who is most likely to know what was usually the amount paid in similar cases—this is the poet of the tribe, whose duty it is to recite its history at the tribal meetings. The ancient Irish Law expressly tells us that in former times the legal jurisdiction was vested in the poets. The next step is the direct intervention of the tribe itself, or its chief. The conduct of the man who refuses to submit his case to arbitration is plainly unreasonable. The whole tribe is interested in pursuing peace—his conduct implies it—they will therefore endeavour to force him to submit. The restorative principle again recurs here. If he refuses to pay fines, what more natural than to refuse to allow him to recover them? His honour-price is forfeited, and thereby he at once becomes a "lawless man," whom anybody may kill with impunity. The prototype of a modern criminal trial then appears in the solemn procuration at the tribal meeting, by the King or chief, of the sentence of outlawry. We have no direct evidence that the Breton Law ever attained to this latter stage of development—at all events it never passed beyond it.
Lecture III.

Law of Semitic Races.

I.—Hebrew Law.

From the study of the Ancient Irish Law, I pass at once to the consideration of another system of archaic jurisprudence, which illustrates in a remarkable manner the primitive history of Penal Law: namely, the Ancient Hebrew Law, as exhibited to us in the Books of the Old Testament. Like the Irish Law, it never developed into a regular system of criminal jurisprudence, but continued throughout its history to exhibit the same features of primitive usage as in its earliest origin. The non-progressive character of the law is, however, due to entirely different causes in the two cases. In Ireland it arose from the unsettled condition of the country, and the absence of a firm, settled government. Among the Jews it arose from the connexion between Law and Religion. So much so. That the growth of Law in a community is the identification of it with religion. The recognition of the universality of rules of Law naturally offers a very strong obstacle to alteration of any kind in them. Nothing has so much facilitated legal progress among European nations as the fact that the religion of all of them is derived from a foreign source. A native religion naturally becomes identified with Law and retains progress; but religious precepts taken from a foreign source, on the other hand, by offering an ideal of morality to which the law seeks to attain, assist very materially in the improvement and development of the Law. The Doctrina, that "smallest, but oldest and most important of all works of law," as it is called by Blackstone, has materially assisted the growth of English Criminal Law, by affording a succinct and definite code of morality, which it is the true aim of all law to apply and enforce. It proclaims its divine origin, by the comprehensive manner in which it deals with the most important of all matters to society and to the individual, the observance of religion, truth, justice, the protection of life, of chastity, of property, and of civil security; while the commanding commandment, which contains merely a general prohibition of the mental state which leads to the transgression of the others, binds together the moral and legal elements in one comprehensive whole, and thus forms a fitting close to a code, so far in advance of any moral or religious ideas of the time, that we are constrained to acknowledge its divine origin.

Among Eastern nations, where ideas of progress scarcely exist, primitive customs usually acquire the same sanctity as moral and religious precepts, and thus the law, instead of being assisted, is retarded in its development by the influence of religion. Such was the case with the Jews. The following incident, mentioned by Mr. C. P. Hill, C.B., in an interesting article on Indian Codification, recently published in the "Law Quarterly Review" (vol. iii., p. 347), shows the tenacity with which the Jews still cling to their primitive customs. "Some time in the year 1866," he says, "I received a deputation from the Jews of Aden, asking that they might be exempted from the operation of the Indian Succession Act (X. of 1865), that Act applied to the Jews of British India, a small class of persons. Aden is technically part of British India. Therefore the Act applied to the Jews of Aden. But for some twenty years the Jews of Aden remained in blissful ignorance of its existence. At last a case raising a question of succession among Aden Jews found its way into the Civil Court at Aden.
The Judge looked up his law, and found that the Succession Act regulated the case. His decision startled the community, and they asked that they might be restored to their old law.

On inquiring what that law was I was referred to a passage in the Book of Numbers (xxvii. 1-11), containing what may without profanity be called the ruling in Zadokiah's case. The text lays down the rule of succession to be observed when an inside dies leaving daughters, but no son. My Arab friends told me that the Jews of Yemen, including themselves, had been under this law for some thousands of years, that it gave them what they wanted, and that they would like to remain under it. I stipulated for two conditions, first, for evidence of the particular customs of the Yemen Jews, and secondly, for an assurance that any exemption granted to them should not be used as a precedent for granting a similar exemption to the Jews of India generally. The stipulations were complied with by the production of evidence as to the laws and customs of Yemen Jews (very curious and interesting evidence it was), and by an undertaking from the leading Jews in British India that they would be content to remain under Anglo-Indian law.

And the Jews of Aden were accordingly allowed to revert from Art. X. of 1865 to the Pentateuch.

Here we have an indication of the persistence with which a Semitic people adheres to its ancient customs, and we find in the matter of criminal law the same characteristic of unchangeableness. The Hebrew Law exhibits us primitive usage of a similar type to that contained in the books of the Brahman Law; but the ideas of the two peoples were very different, and the contrast, as well as the comparison of the two systems, is most instructive.

The leading idea of the Hebrew Penal Law was the sanctity of human life. That man was created in the image of God was a precept of religion which was fully recognized by the Law. The life of a stranger was as much protected as that of one of the nation (a). To take it away involved the same sin and the same offense. "That the life," says Rashi, "or, to express the idea in another more Hebrew word, the 'soul,' of a man possesses of itself an inviolable sanctity is one of the first principles which was firmly established among the holier races from the very earliest times, and in which all those provisions of something infinite being implicated in man ought to find the element of expression possible" (a).

The punishment for murder among the Hebrews, as among other primitive races, was Revenge. The relatives of the murdered man were allowed to retaliate. Vengeance of blood, as it was called, was always looked upon as a sacred duty by the nearest relatives of the deceased. To neglect to inflict it caused inexcusable disgrace. The Avenger of Blood is the same invariably given to the next heir of the murdered man. Sometimes the whole family took the duty upon themselves, as in the story of the widow of Tekoa, told in the Book of Samuel:—"And, behold, the whole family is risen against thine handmaid, and they said, Deliver him that smote his brother, that we may kill him, for the life of his brother whom he slew." (2 Sam. xiv. 7).

The punishment of death for homicide was invariably:—"He that smiteth a man, so that he die, shall surely be put to death." (Exod. xxi. 15). Retaliation was also enjoined or permitted for lesser offenses. Life for life is only the application of the ordinary rule:—"If a man cause a bruise in his neighbour; as he hath done, so shall it be done to him: breach for breach, eye for eye, tooth for tooth: as he hath caused a bruise in a man, so shall it be rendered unto him" (Levit. xxiv. 19, 20). We are in no doubt as to the manner of execution in case of murder:—"The murderer shall surely be put to death. The avenger of blood shall himself put the murderer to death: when he meeteth him he shall be put to death." (Num. xxxv. 15). Here we have only another instance of the retaliation which is said by the Scoptes Mor to have existed in Ireland before the coming of Patrick.

(a) Levit. xxiv. 19, 20.
There is no trace of a judicial process of any kind, before the execution, in the Jewish Law. "Whenever he werteth him he shall be put to death." There was no need even to justify the execution at any subsequent time before any assembly of any kind. Where death was caused the Avenger of Blood was always justified in retaliating. Whether the murder was premeditated or not, the Avenger of Blood had the same right of inflicting summary execution. Even in case of the accidental infliction of death, the unwilling slayer might be killed with impunity if he did not succeed in escaping to a city of refuge (Deut. xix. 6). And even though the slayer had so escaped to a city of refuge, and was there dwelling, if he left his place of refuge, even for the shortest possible time, he might be slain by the Avenger of Blood, and the latter was guilty of no offence in slaying him (Num. xxxv. 27, 28).

Such a system was not in any way peculiar to the Hebrews. It existed universally. The earliest mitigation among most communities of the terrible severity of this Law was the institution of the death fine as a substitute for the death penalty, at least in cases where the original slaying was accidental or unpunomitted. This death fine was at first a composition arranged between the Avenger of Blood and the manslaughter. I have already mentioned that it was almost universal in ancient law. It may possibly have existed among the Hebrews at an early stage of their history, but it is distinctly forbidden in the Mosaic legislation — "Ye shall take no ransom for the life of a manslayer, which is guilty of death: but he shall surely be put to death." (Num. xxxv. 31). "The acceptance of blood-money was not permitted in any form whatever, and so deep were the roots of this feeling that no special Hebrew word was found to express this mode of compensation." (Ewald: Antiquities of Israel, p. 171.)

It was not only in the case of what we would call culpable homicide that the acceptance of a death fine was prohibited.

---

even in the case of accidental homicide compensation by a money payment was not permitted. A man who had escaped to a city of refuge, and was entitled to remain there, could not bargain with the Avenger of Blood to be allowed to return to his home (Num. xxxv. 32). In one exceptional case the acceptance of pecuniary compensation was permitted by the law in lieu of the death penalty. When an ox, which was known by its owner to be dangerous, had gored a man, the owner was liable to be put to death; but "If there he lay on him a ransom, then he shall give for the redemption of his life whatsoever is laid upon him" (Exodus, xxi. 36). This was probably an exceptional permission of the continuance of a custom once more general. The very prohibition, in other cases, indicates the existence of the custom either among the people themselves or among surrounding tribes at some time or other.

No right of sanctuary was permitted for an intentional homicide. "If a man come presumptuously upon his neighbour, to slay him with guile, then shall he flee from him into the cities of refuge." (Exodus, xxi. 14.) But in the case of accidental homicide, the severity of the law was mitigated by the institution of the cities of refuge, where the person who so caused death might live in security. The fact that no place but one specially sacred was sufficient to protect even a man who had accidentally slain another, shows the terrible nature of the vengeance of blood which ancient Hebrew Law exacted.

It was only in cases where the death was caused entirely by accident that resort could be had to one of the cities of refuge. "This is the case of the manslayer, which shall flee thither and live; whose kith and neighbour avaunces, and hated him not in time past: as when a man goeth into the forest with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down the tree, and the hand slippeth from the handle, and lighteth upon his neighbour, that he die; he shall flee unto one of these cities, and live; but the avenger of blood pursueth the manslayer, while his heart is hot, and overtaketh him, because the way is long, and smiteth him mortally;"
whereas he was not worthy of death, inasmuch as he hated him not in time past" (Deut. xix. 4-6).

Although the original institution of the cities of refuge was for cases of pure accident only, it is probable that where death was caused in a sudden attack, or in the heat of a quarrel, without enmity, as we would say in our law, as near to a city of refuge was allowed. This would appear to be the natural meaning of one passage in the Book of Numbers (xxxv. 22, 23). But apparently if a stone or a deadly weapon was used, such excuse could not be pleaded; and although there might have been no intention to cause death, the offender was given over to vengeance.

The primitive retaliation among the Hebrews was, as elsewhere, entirely a custom, without any judicial process or condemnation. It is in connection with the right of sanctuary in a city of refuge that we find the first trace in Hebrew Law of a judicial investigation. The right of refuge only existed, as I have said, in the case of accidental homicide; it was therefore necessary to decide, in every case where it was claimed, whether the person who claimed it was entitled to the privilege. Upon arriving at the city of refuge, the fugitive was bound to stand at the entrance-gate and "declare his cause in the ears of the elders of that city" (Joshua, xx. 4). If he made a false case once he was admitted, and once admitted could not be surrendered to the Avenger of Blood. But suppose the slayer had really committed murder, and procured admission to the city of refuge by a false account of the transaction, what was done? Once the right of refuge was allowed, subject to certain restrictions, it was necessary to determine judicially in what case it might be availed of. This was done, not as we might expect, by the authorities of the city of refuge, but by the elders of the city from which the manslayer had fled. It was their duty upon complaint made by the Avenger of Blood to send to the city of refuge for the accused, and there to determine the matter whether the slaying was accidental or not. If it was, they restored the accused to his city of refuge, where, notwithstanding his acquittal of any intention to do wrong, he was bound to remain until the death of the High Priest; if, on the other hand, they decided that the slaying was not accidental, they delivered the culprit over to the Avenger of Blood for vengeance. This appears quite clearly from a comparison of two passages, one in the Book of Numbers, and the other in the Book of Deuteronomy:—"If any man hate his neighbour, and lie in wait for him, and rise up against him, and smite him mortally that he die; and he flee into one of these cities: then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood." (Deut. xix. 11, 12). From this account alone we might suppose that the trial took place in the absence of the accused, before he was sent for, and that it was only in case of his conviction that he was brought back to his own city. The passage in the Book of Numbers, however, shows that this was not so. It appears from it that the accused was brought back for trial in every case. After examining the various cases of excusable homicide, it goes on:—"Then the congregation shall judge between the slayer and the avenger of Blood according to these judgments: and the congregation shall deliver the man Accused out of the hand of the avenger of Blood, and the congregation shall restore him to his city of refuge, whither he was fled: and he shall dwell therein until the death of the High Priest, which was anointed with the holy oil." (Numb. xxxv. 24, 25). It is plain from this account that the judicial inquiry by the elders of the city was confined to cases where the accused had fled to a city of refuge, and had been brought back thence. The congregation is merely to restore the accused to the city of refuge, whither he was fled. If the avenger of blood were able to kill him, before he first reached the city of refuge, it was lawful for him to do so with impunity.

It was necessary that two witnesses should testify to his guilt, before the refuge was given over for execution. "One witness shall not testify against any person that he die" (Numb. xxxv. 30), i.e. apparently some persons should corrobor-
rate the overseer, if the accused pleaded that the deed was accidental. Naturally everyone who caused the death of another would flee to a city of refuge as his only chance of escape, and in nearly every case he would be demanded by the avenger of blood. The investigation by the elders of the city would thus come to be a universal custom in cases of homicide (except in cases where the avenger of blood had actually slain the culprit before he reached the city of refuge). In this manner the transition from the primitive system of revenge to a regular criminal trial is complete; the only trace of the former system being the execution of the sentence by the avenger of blood personally.

The Hebrew Law thus, by the prohibition of the death fine, and the institution of cities of refuge, as a mitigation of the primitive custom of revenge, developed itself in an entirely different manner from the Law amongst Assyrian communities. With the latter the first origin of a judicial trial is the reference to arbitration of the amount of the death fine to be paid. There is no reference to arbitration, and no trace of its existence, so far as I am aware, in the Hebrew Law. The jurisdiction of the elders to determine a question as to the accidental character of the deed or otherwise is of an entirely different nature, and was probably the real origin of Criminal Law.

Bodily injuries not causing death were subject to the rule of retaliation also. The Lex Talionis was applied here as rigorously as in the case of death. "If a man cause a blemish in his neighbour; as he hath done, so shall it be done to him; bruise for bruise, eye for eye, tooth for tooth." (Lev. xxiv. 19-20.) It is probable that this rule was confined to the case of intentional injuries. "That unintentional injuries," says Ewald, "would not be included here is a matter of course. Even in the case of those that were intentional, the law interfered only at the expression of the injured person; and undoubtedly in later times compensation for injuries was mostly made in money" (e).

(c) "Liturgy of Israel," p. 175.

LECT. III.

Hebrew Law.

There was no prohibition of the acceptance of compensation in this case. If a man, for instance, hurt a woman with child, so as to produce a premature delivery, but no further harm happened to her, it was provided that the offender in this case should be fined, "according as the woman's husband shall lay upon him, and he shall pay as the judges determine" (Ex. xxii. 25). If, however, mischief followed to the woman, "then," said the Law, "then shall give life for life" (ibid. ver. 23).

Bodily hurt in a quarrel could also be compensated for, the Law providing that the offender "shall pay for the loss of his time, and shall cause him to be thoroughly healed" (ibid. ver. 19). This was apparently where both were equally in fault originally. But in the case of intentional injuries, the Lex Talionis was enforced with all its rigour, and although there was no prohibition against a money compensation, there was no obligation on the injured person to accept same. "Life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot" (Deut. xix. 21).

So far was this principle carried that it was applied even in the case of false testimony. The offence of false testimony necessarily involves the existence of a judicial inquiry, and so belongs to a later stage of civilization than that which sanctions revenge. Still the principle is maintained. A similar punishment is inflicted to that which the victim would himself naturally wish to impose. It is provided in the Book of Numbers (vi. 19-20) that "If an unrighteous witness rise up against any man to testify against him of wrong-doing, then both the men, between whom the controversy is, shall stand before the Lord before the Priests and the Judges, which shall be in those days; and the Judges shall make diligent inquisition; and behold, if the witness be a false witness, and hath testified falsely against his brother, then shall ye do unto him, as he hath thought to do unto his brother." Private property, both in moveables and in land, was recognized by the Hebrew Law. Instances of land being allotted to deserving chiefs and soldiers are frequent in the Old Testa-
The paternal rights over children, recognized by the customs of all early nations, are found also in the Hebrew Law; and apparently a father was allowed, for the most trivial offenses, to take the life of his children (Deut. xvii. 18-21). But this was not inexact as it appears from the same chapter, that parents were not themselves to inflict the penalty, but that they were to bring the matter before the whole community, who were to inflict the punishment. This may have been, and probably was, a restriction on the primitive absolute right of life and death vested in the father. The punishment for adultery and unnatural offences was likewise stoning by the community (Deut. xxiii. 21).

We thus see that among the most important of Semitic peoples, the general course of development of Penal Law was the same as among Aryan communities. The instinct of Revenge is the origin of the Law. Regulations as to the manner of its exercise gradually arise; and in some exceptional cases, the punishment is taken in hand by the public authorities, in order to prevent an excessive or unjust exercise of the privilege. The principle of retaliation continues, however, to be the sole principle upon which the Law is based.

11. — MOHAMMEDAN LAW.

The Mohammedan Law exhibits, as we might naturally expect, the same traces of primitive usage in relation to crimes and offenses. Nothing is more opposed to the spirit of Islam than the idea of progress; and even until the present day, in countries ruled by Mohammedan Law, the same principles and practices prevail as were in existence more than a thousand years ago. The Penal Code adopted in the Turkish Empire in 1840 introduced some modern ideas; and the Koran has, in many respects, been partially abandoned. The latter is, however,
Law of Semitic Races.

still recognized as the principal, if not the sole, authority in legal matters. The identification of law with religion, here also, created an almost insuperable obstacle to legal development. The only loophole for escape, for legal ideas, from the narrow prison of the Koran, lay in the principle of tradition. From Musulmans, who acknowledged the absolute authority of the Koran in legal matters, do not assert that it has left nothing unsaid, or that a precedent for every case must be found in it. They hold, on the contrary, that many things were revealed to Mohammed which were not written down by him, but which were orally communicated to his companions who have carefully transmitted them to future generations of the faithful.

According to an Arab author of high reputation, El Hubayr, the decisions of the Prophet upon special cases which called for his intervention were known only to humble followers who were with him at the time, and escaped the notice of others. Thus, in one case where Omar was ignorant as to what was the proper fine (Dho), he asked for an authority infant, a humble Arab of Hudain, was able to tell the Prophet's decision in a similar case (a).

Tradition is always more or less elastic, and in all probability traditions, conventionally invented, assisted much in the growth of the law in various branches. It is not, therefore, surprising to find considerable diversity of detail arising in different systems of Mohammedan Law.

While the Mohammedan Penal Law is based upon the same principle of primitive retaliation and self-redress as the other systems to which I have referred, we have the same absence of State intervention, and the same custom of death dues as we find to have existed under the Brahman Laws. "Dans les sociétés," says M. Albert Du Bocq (b), "au long d'un siècle, en quelque sorte, une régulation l'exercice du droit de vengeance, de la lition existe dans sa dernière nature, l'État n'intervient que pour sanctionner ce lois, ou pour le remplacer par une composition pécuniaire par laquelle il règle les conditions mises à la rançon du meurtier et en pénalise le parent de la victime."

The Koran lays down in the most absolute terms this principle of retaliation in the case of murder, and at the same time it also expressly allows the relatives of the slain to take a ransom (called Dho, or price of blood) for his life. "O true believer, the law of retaliation is ordained for you for the slain: the free or the free for the free, and the servant for the servant, i.e., woman for a woman, but he whom his brother shall slay may be proceeded against and obliged to make satisfaction, according to what is just, and a free shall be set on him with humanity" (Koran, chap. ii.). "Whoever shall be slain unjustly we have given his heir power to demand satisfaction: but let him not exceed the bounds of moderation in putting to death the murderer in too cruel a manner, or by revenging his friend's blood on any other than the person who killed him; since he is assisted by this law" (ibid., chap. xxii.).

This is the common practice in Mohammedan countries, such as Persia, to the present day. The relatives of the deceased have their choice either to have the murderer put into their hands to be put to death, or else to accept a pecuniary satisfaction (a). In Turkey, until a very recent time, murder was never prosecuted by the public authorities. The nearest relatives were allowed to revenge the slaughter of their kinsman if they thought fit; or, if they preferred, he who generally did so to accept the Dho, or price of blood, they could do so, and the murderer then escaped liability. The Penal Code of 1814, however, entirely abolished this system of pecuniary compensation, and imposed the penalty of death for murder in every case (Art. 19). The Code Montefeltro had, in 1821, in a great measure effected this end; but the right to the payment of the Dho was preserved by it in some exceptional cases.

In the case of accidental killing, a fine was also payable to

(a) Revue d'Asie sur le Droit Musulman, par D. Viellet, p. 20.
(b) Histoire du Droit Civil des Peuples Moderns, vol. i., p. 300.
the family of deceased, if they were true believers. "Whoso kills a believer by mistake, the penalty shall be the freeing of a believer from slavery, and a fine to be paid to the family of the deceased, unless they renounce it as sins." (Koran, chap. iv.); but if the offender was unable to pay the fine, vengeance was not to be exacted. He was obliged to fast two months consecutively, and so became free. The fine was in all cases divisible among the relatives of the deceased according to the laws of inheritance laid down in the Koran itself.

Theft was originally punished by mutilation. The hand, as the offending member, was first cut off as a suitable retaliation. For a second offence the thief lost his foot, and so on, until all his members were amputated. But, as in the case of homicide, the owners of the stolen property might compound with the thief, and accept whatever penalty in lieu of revenge they thought right. "Compounding," it is laid down in a work of authority (5), "is lawful with respect to every right or claim for which a consideration may legally be taken, whether the right or thing compromised be capable of being sold (as actual property), or incapable (like the compensation for a crime or offence, or for wilful bloodshed, the right of occupancy of a house, and the compensation for a defect or blench in an article bought). Further, in the case of a compromise of the right of retaliation, whether it be executed for more, or less, than the deed, or line of blood, it is equally legal and valid; but in the case of accidental homicide, if it be executed for more than the deed, or line fixed by the law, and that be of the same species, and of a nature in which many can take place, the validity of the composition is liable to doubt.

The Penal Code of 1839 abolished mutilation for theft, throughout the Turkish Empire, and substituted therefor a maximum term of seven years' imprisonment as a penalty. Previous to the adoption of this Code there was really no such thing as Criminal Law existing in Turkey. The primitive

(5) Digest of Mohammedan Law according to the Text of the Twelve Imams, p. 285.
LECTURE IV.

THE ROMAN PENAL LAW.

IN studying the Roman system of Laws the importance of the distinction between Criminal Law and Penal Law becomes extremely marked. The notion of a crime was of exceedingly slow development in Rome. The theory of punishment by means of a civil action was well recognized in the matured Roman system. Real Criminal Law did not appear at Rome until a much later stage of legal history than it did in England. While the Republic was in its prime there was practically none in existence. It was only when it began to waste away that we find true Criminal Law coming into existence. The Lex regia Cornelia passed by Sulla about the year 81 B.C. were the earliest statutes which punished offenses against individuals as public wrongs. From this time forward numerous statutes were passed dealing with particular offenses, until under the Empire the general rule was adopted that anyone who could bring a penal action on a delict might, if he preferred it, prosecute the delinquent before a criminal tribunal. (a)

The slow development of the Criminal Law is extremely remarkable, in contrast to the very rapid manner in which the Civil Law developed itself. The earliest view we get of the Roman Civil Law exhibits it, in a great measure, already

free from the formalism and superlition which usually pervade early systems of law.

"The chief result," says the historian Mommsen, "of an inquiry into the ancient jurisprudence of the people of Italy, "may be summed up in saying that few traces, comparatively, of the primitive state of things have been preserved in the case of the Italians, and the Romans in particular, than in the case of any other Indo-Germanic race. This bow and arrow, the war-chariot, the incapacity of women to hold property, the acquiring of wives by purchase, the primitive form of burial, human sacrifices, blood revenge, the clan constitution confiding with the authority of the community, a lively natural symbolism: all these, and numerous phenomena of a kindred character, must be presumed to have lain at the foundation of civilization in Italy as well as elsewhere; but at the epoch when that civilization comes clearly into view they have wholly disappeared, and it is only the comparison of kindred noci which informs us that such things once existed. In this respect Italian history begins at a far later stage of civilization than e. g. the Greek or the Germanic, and from the first it exhibits a comparatively modern character." (b)

Sir H. Maine states the origin of true Criminal Law in Rome at the year 140 B.C., when the Lex Calpurnia de Repanditis was passed. (2) This statute established the first Quaestio Perpetua or permanent criminal tribunal, and thus from the point of view of criminal procedure it may be considered the origin of the Criminal Law; and as its object was to punish the misappropriation of public funds by Provincial Governors, it dealt with what is undoubtedly a crime, but it does not clearly recognize what is the gist of Criminal Law,—that an injury to an individual may be a public wrong. It dealt only with a direct injury to the State, although individuals might of course be indirectly injured thereby. The Lex regia Cornelia, however, passed some 70 years later, dealt with murder, arson, forgery, and such matters, where the offence

was directly against the individual, and the State was only
wronged in so far as alarm was created or public order
disturbed. From this legislation therefore we may date the origin
of true Criminal Law at Rome. It never really obtained any
great importance, and such offences as theft (furto) and
robbery (at bonorum rapiendi) were always dealt with as delicts
rather than as crimes in the Roman Law.

In the English legal system, on the other hand, the notion
of a crime was very early developed, and the Criminal Law
always occupied a prominent place. The delict delinctor, on the
other hand, which once took an important position in the
Roman system, gradually disappeared, or became merged in
ordinary actions of tort. The difference between the two
systems arose probably from the different form of government,
and is one of the many illustrations of the necessity for the
historical study of law. The Roman form of government
being a Republic, the English a Monarchy, the notion of an
injury to the State through an injury to an individual was
much more easy to comprehend in the latter case than in the
former. The State was an impersonal abstraction at Rome.
In England it was represented by a distinct individual, who
would naturally punish as a wrong to himself an injury
committed against anyone under his protection. When we
come to consider the development of the English Criminal
Law we shall see what an important part the personal position
of the King took in it; the violation of the King’s peace being
at first the fact, and afterwards the fiction, upon which every
criminal charge was grounded.

The Roman Law is interesting as being the only important
system of laws which has grown up under a republic, and it
affords us also the best example of a logically developed system
of private penal jurisprudence. It is also interesting on account
of another peculiarity in contrast to most other systems, viz., its
freedom from religious influences. The distinction between a
delict and a crime, as Professor Hunter remarks, “lies at the root
of all legal development;” but it is not, in general, recognized
until a comparatively late period. Indeed, even at the present
day, the notion of punishing sins as sins is not entirely extinct
in our Criminal Law, while the only English Law fully rec-
ognized the principles of doing so. The Romans were not a
religious people, and they adopted the sensible principle of
allowing the gods to avenge their own injuries. Thus, in the
later law, the distinction between delictus as an offence against
the gods, and false testimony as an offence against hum was
well recognized. Perjury as such was not a crime unless the
accused swore per os principii, in which case he was consi-
idered to have offered no insult to the Emperor. Laws against
heresy, when annulled, were justified upon the grounds that new
forms of worship tended to disturb the minds of weak persons.

The non-religious character of Roman Law was another
cause, probably, of the slow development of the Criminal
Law. Amongst the religious people, the idea that it is a public
duty to punish a sin is more likely to arise than that a private
wrong should be so avenged; and it is extremely likely that in
many cases private injuries, such as murder and theft,
were punished in the first instance by the State as sins rather
than as torts. The allowance of the Romans as regards the
punishment of sins against the gods probably contributed,
with other causes, to the slow development of Criminal Law, and
the importance of private Penal Law.

The earliest known Laws of the Roman people are comprised
in the code called the XII. Tables, which was compiled by
the Decemvirs about the year 450 B.C. An ancient code differs
essentially from a modern code in this, that the latter, unlike the
former, is supposed to be the piece of new legislation entirely super-
seding the laws previously prevailing. Such a compilation as
the XII. Tables, however, was considered only as a summary of
the existing law, for the purpose of informing those who were
bound to obey, what rules they were obliged to follow. We
can thus rely upon finding in such a code, traces at least of the

(c) Paul, Rest., 6, 21-2.
Primitiva Law of the people. Unfortunately the greater portion of the XII. Tables is now lost. Fragments are, however, preserved through the frequent references to the code in the writings of the classical jurists. Gaius constantly refers to it; and from these scattered references modern scholars have attempted to reconstruct the Tables. A complete collection of the existing fragments, with references to the passages in later writings, stating the purport of others now lost, may be found in Grol_authentication's *Lettres Sur la Legislation Romane*.

We find in the XII. Tables, as we might naturally expect, that there is no trace of Criminal Law in our modern signification of the term — no punishment inflicted by the State for an injury done to an individual. Self-defense is the principle recognized here as in all Ancient Law. Table VIII. deals with delicts, and is the source of the later Roman Law of torts and crimes. There is no extant provision as regards homicide. It is stated by Pliny (Hist. Nat. xxv. 3) that the punishment for this offence was death, but we have no knowledge of how this punishment was inflicted. It can scarcely have been by a regular judicial sentence, or we should have some record of a change in the law in this respect; for capital punishment was not practiced in historical times at Rome. The probability is that the infliction of death was here as elsewhere merely amoeopathy inflicted by the Law, if inflicted, in retaliation, by the near relatives of the murdered man. Such was apparently the rule with regard to serious bodily injuries not causing death. The words of Table VIII. with reference to such injuries are "Si unquem or un leader deit, nisi eum se proelii, tale iacta." "If a person strike another's limb, unless he come to terms with him, let there be retaliation." This passage affords us a good illustration of the point of view in which Ancient Law regarded torts and crimes. Modern Law both provides the wrongdoer and compensates the injured person for a wrongfull act, such as an assault. The act in reference to the punishment is called a crime, in reference to the compensation a tort. Ancient Law recognized no such distinction. It simply allowed the injured man or his relations

LAW IV. Roman Penal Law. to punish the wrongdoer unless the latter was able to buy off vengeance by a money payment. The Table was inflicted by the nearest relative(s). The XII. Tables thus bring us in this provision to the very threshold of Penal Law — simple retaliation: "Tale iacta." The custom of retaliation is recognized as reasonable. The custom of the wrongdoer buying off the revenge is also recognized and encouraged by the Law, but in no way enjoined. The tendency of the Law was, as I have said, to encourage these pecuniary compensations, with a view to preventing disorder. The XII. Tables, in the case of lesser injuries, fix the amount of the compensation to be paid absolutely. Thus according to Table VIII. — "Si injuriam facti, albuit viginti sexis poenas sanatas." "Injury," apparently is here used to signify slight assaults, libel, &c. "Injuria" says Gaius, "is inflicted not only when anyone strikes another with his fist, or with a stick, or whip, but also by using abusive language (verba), or when anyone wrongfully seizes the goods of another, knowing that he owns him nothing, and advertises them for sale, or by writing defamatory statements or songs, or by following about a woman or a young boy, or in many other ways." (Susas, iii. 260).

A law which provided a fixed penalty for all cases of assault, slander, libel, illegal seizure, and solicitation, seems strange to us; and it is probable that this sum of 20 asses was only a suggested amount of what would be reasonable in ordinary cases as between the parties. We know from Gaius that in his time, at any rate, there was no fixed sum, but that the lender or the judge, according to the nature of the injury, fixed the amount of the penalty (Gaius, iii. 254). In the case of damage caused accidentally the rule was simply that it should be required.

The theory of the Ancient Penal Law being thus revenge, the amount of the punishment awarded, or of the damages or penalty assessed, varied, not according to the moral guilt of the

(a) Table for previous negative adjective. — Calis, in Paterculus, 6, 300.
diligent, nor according to the injury sustained by the injured party, but rather in proportion to the provocation. The Law sanctioned what would be a natural amount of punishment, and provided as a measure of damages what an injured person would be likely to accept as the price of surrendering his alternative right of revenge. This theory prevailed in the whole Roman Law of delicts or torts, even in its most mature stage.

In addition to the provisions regarding personal injuries, the extant fragments of Table VIII contain provisions as to theft, fraud by a patron on his client, intentional administration of poisons, and the various offenses of a witness to the solemn form of contract by means relating afterwards to testify as to the transaction. The punishment provided for this offense was based upon the same principle of retaliation, which was applied in other cases. The person offending became infamous. He was incapable of giving evidence himself for the future, and no person was allowed to give evidence in his favour.

During the whole period of the Republic at Rome, Criminal Law can scarcely be said to have existed. Crimes were punished by penal actions, i.e. actions which conferred upon the person injured a right to recover a penalty as a punishment to the wrongdoer, not as a means of providing compensation to the sufferer. It is not correct, however, to speak of these actions ex delicto as corresponding to our actions of tort, for our law of torts is almost entirely based upon the principle of compensation rather than punishment. They were rather a substitute for our modern criminal prosecutions.

Obligations ex delicto always involved either dolus or culpa. "Dolus" is a term constantly occurring in the Roman Law, and is generally translated by the English term "fraud." In reference to contracts this rendering is fairly accurate, but when used in reference to delicts it has a somewhat different significance. It means a general unlawful intention—a deliberate intention to violate the law. "Dolus" is thus very nearly equivalent to our term "Malius." "Malius," in law, does not denote anything with reference to the motive by which a man is actuated. It implies only that he has a deliberate intention to do a wrongful act. "Malius" is really equivalent to "criminal intention." "Culpa" is exactly equivalent to "negligence." The rule, therefore, that a person can only be held liable for a criminal offense, if he has acted either with "malius"—i.e. a deliberate intention to break the law—or with such gross "negligence," as the law considers to be equivalent to intention.

The remedy for a delict in Roman Law was invariably a penal action. The penalty was in some cases fixed by law; in others it was based on the value of the property taken or injured; and in others, as in the case of Iuvenae in the time of Gaius, it was assessed either by the President or the Judges. In the case of an action which was purely penal, such as the action of theft, the right to recover the penalty was entirely separate and distinct from the right to recover the article stolen. In other cases what was called a "mixed action" was allowed, namely, one in which both the penalty and compensation for the injury could be recovered (Inst. Inst. 4, 4, 18). Of this class of action were those for robbery (eiusdem rei aestimatione) and Iuvenae Iuvenae under the Lex Aquilia. These actions appear to have been later in origin than the action of theft, which always remained the most ancient of all actions ex delicto. The action itself did not, as it sometimes said, correspond to our action of trespass. Its sole object was to recover the penalty and the property itself; its value was recoverable in another form of action, corresponding to our action of trespass. "Iterum ibi non pertinuit nisi actu pertinuit quod ad malum manifestum duplum, de suo non esse antiquum, esse quoque manifestum, auctum quadriplex non esse manifestum duplum, de suae non esse antiquum, esse quoque manifestum, auctum quadriplex." Inst. Inst. 4, 6, 18.
And it is also laid down in the Digest that in a case where a slave hires a slave and then appropriates him, the two actions, one for the breach of contract and the other for the theft, may be maintained. "Si locutum isti servum subipsi, utraque judicium adversus est excedere; locutus est huius." (D. 10. 2. 42). In the same way in our own law, an owner of property stolen can prosecute for theft and at the same time bring a civil action to recover the value of the goods stolen; but he cannot combine the action, one in contract and one in tort, mixing out of exactly the same state of facts, for the law forbids what is called the splitting of the cause of action.

Penal actions, being based on the theory of punishment, were naturally not available against the heir of the wrongdoer.

"Et enim certis, si fuerit in multitudine pecuniae actiones in hancem non competere, velut socii, in honorum septenarii, suadens injuriam, damnal injuriae." (J. 4, 14, 1). Thus also in our own Criminal Law, the death of the accused puts an end to a prosecution; but the principle of the Roman Law in this respect has been also applied in our Common Law, with a complete ignorance of its origin and limitation, the maxim "actio personarum mortui coram persona" being transferred into "actio personalis mortui coram persona." No legal maxim has caused so much confusion in our law as this. It is impossible to draw down any general rule as to when it applies and when it does not. The confusion and uncertainty thus produced should be a solemn warning against the adoption of principles from other legal systems without a complete understanding of their origin and real limits.

The measure of damages in the Roman Law in the case of obligations ex contractibus, and obligations quasi ex delicto, properly so called, was very much the same as that in our own law in the case of actions of contract—namely, the amount by which the property of the injured party would have been greater if the obligation had been fulfilled or the harmful act or event had not occurred. "Id quod interesse, id quantum est res est." A preterit afectiones which was purely personal and not pecuniary was not taken into account. The theory of compensation was applied strictly and regularly. In the case of obligations ex delicto the principle applied was not compensation, but punishment or vindication. The measure of damages was not "id quod interesse," or what loses the Plaintiff had sustained, but rather what would be a fit and suitable punishment for the offence; and this, in the first instance at all events, was based on a calculation of what the injured party would be content to take in consideration of his foregoing his right to revenge.

The main distinction between obligations ex contractibus and obligations quasi ex delicto was this, that the former implied some moral guilt, something deserving of punishment; the latter, as a general rule, arose out of facts which did not imply any moral delinquency, but only a certain amount of negligence, sufficient in the view of the law to put the loss upon the person who had been guilty of the negligence rather than upon the sufferer thereby. The principal cases in which obligations quasi ex delicto arose were those where persons were held responsible for the fault of others, such as masters for the acts of their servants; but although the greater part of such obligations arose in this way vicariously, still all did not. A Judge who gives a wrong decision (ei judex ille sua quaerit) was considered liable quasi ex delicto. He was liable, even though he had erred through ignorance (per ignorantiam). If he acted corruptly, there was of course culpa, and in such cases we would call exemplary damages could be recovered (Just. 4, 5, pro). The distinction in principle between liability ex contractibus and quasi ex delicto was not strictly adhered to, though it existed. The Roman Law, like our own Law, was in many cases badly classified, but a distinction nevertheless existed. In our own law of torts no such distinction is recognized, and consequently very great confusion and uncertainty exists as to the measure of damages. The theory in all cases in English Law is compensation, but in a considerable number of cases, principles are applied quite inconsistent with this theory; and we may fairly say that all cases where juries are allowed to award exemplary

[65]

LECT. IV. [Roman Penal Law.]

...
Roman Penal Law.

Roman Penal Law.

 damages are cases where the principle applied in punishment, not compensation. These cases of actions ought to be classed by themselves, and carefully distinguished from cases where only compensation is awarded; but this has never been done. The result of the non-recognition of this distinction has been to introduce confusion and uncertainty into the rules of English Law on the measure of damages in actions of tort.

Delicts in the natural system of Roman Jurisprudence were divided into four classes—(1) Theft (furto); (2) Robbery (cu bancum venientem); (3) Injuries to property (damnum injurias per legem Aquilini); and (4) Injuries to the person (injurias). Theft and Injuries to the person are mentioned in the XII. Tables. Robbery was not originally distinguished from theft. Cicero tells us that it was constituted a separate delict by the edict of the Praetor Aquillius in the year 77 a. c. Damnum Injurias was also constituted a separate delict by the Lex Aquilina about the year 226 a. c. It was never the subject of criminal prosecution, as the other three were. Furto and Injurias thus represent in Primitive Penal Law at Rome the two great classes of offenses which exist in every system of Penal Law.—(1) Injuries to property; and (2) Injuries to the person. As they are mentioned in the earliest records of the Roman Law, and were gradually developed with its growth much in the same way as their analogies in English Law, their history is both interesting and instructive.

There were originally in the Roman Law four distinct actions of theft, namely—(1) Theft detected in the commission (furto mensurato); (2) Theft not so detected (furto non mensurato); (3) Possession of stolen property discovered upon search (furto auscio); and (4) The introduction of stolen property (furto obtinuere).)

"The penalty" (punio), says Gaius (5), by the law of the Twelve Tables, was capital for furto mensurato. A free man was sentenced and delivered over to the person from whom he had stolen (whether he became a slave by the delivery or

(6) Cæcina, loc. cit., 163.
(9) loc. cit. 163.

reduced to the condition of an insolvent judgment debtor was an old question. A slave was first scourged and then flung from the Tarpeian rock. Afterwards the severity of this penalty was disapproved, and by the edict of the Praetor an action for fourfold damages was constituted in the case both of theft by a slave and by a free man.

"The penalty for furto non mensurato by the law of the Twelve Tables was double damages: this the Praetor has preserved.

"The penalty for furto auscio and furto obtinuere by the law of the Twelve Tables was triple damages: this has been retained by the Praetor.

This passage has been frequently cited to illustrate the entirely different view taken by ancient and modern law of wrongful acts. Without an historical knowledge of the fact we could never have conceived that the distinction between different forms of an offense should depend altogether upon the time and manner in which it was detected. The modern ideas of punishment for the sake of reforming the criminal, and preventing a repetition of the offense, have no place in Primitive Law. Vengeance against the wrongdoer is the sole object which is aimed at.

"The reason," says Mr. Porter, "why furto mensurato was subjected to a heavier penalty than furto non mensurato was not because the barbarous legislator supposed that detection in the act was an aggravation of the offense, but because he wished, by the multitude of the legal remedy offered, to induce the aggrieved party not to take the law into his own hands and inflict summary vengeance on the offender, particularly as it was lawful to kill a nocturnal thief, or one who during the day defended himself with a weapon. In the infancy of society it is an important object to the legislator to induce an injured person to have recourse to the public tribunals instead of righting himself, that is to say, constituting himself both law-giver and judge."
It would perhaps be more true to say that the Ancient Lawgiver sanctioned the recovery of such a penalty as the person wronged would probably be content to take. The notion of tribunal being set up and persons being induced to enter them, as it were by a bribe, is entirely contrary to fact. Law existed before lawgivers or legal tribunals; and tribunals when they grew into existence simply confirmed what was the prevailing custom for settling the particular class of cases with which they dealt. "The standard of punishment," as Mr. Hunter says, "was thus determined with a regard to the feelings of vengeance that might be expected to actuate a sufferer taking into his own hands the punishment for the depredations on his property."

There is a striking analogy in the early English Laws to this variation of the punishment, depending upon the time of apprehension rather than upon the character of the offence, not, indeed, in the case of theft, but in reference to the offence which has become the foundation of the whole Criminal Law of England—breach of the King's peace. The Law of King Alfred imposed death as the penalty for fighting in the King's hall if the offender was taken in the act. If he escaped and was subsequently apprehended, "wer-gild" only was exacted. "If any one fight in the King's hall, or draw his weapon, and be taken, let it in the King's doom either death or life, as he may be willing to grant him. If he escape and be taken again, let him pay for himself according to his 'wer-gild,' and make 'bea' for the offence, as well 'wér' as 'wite,' according as he may have wrought."(a)

The various differences which existed between the Roman and English Law of theft arose chiefly from the different definitions adopted in each system.(b) Thus the term *controversio*, although it implied some overt act—"necque verbo, necque scriptura qui fortunam facit" (D. 47. 2. 52. 19)—yet it did not require that the offence should be complete at the actual moment when possession was first taken by the thief. According to English Law, if the first "taking" is lawful, no subsequent fraudulent dealing amounts to theft. Thus, supposing a man's house takes fire, and his neighbour takes his goods with his consent for the purpose of protecting them, if the neighbour afterwards changes his mind and converts them to his own use, this is not larceny in English Law, as the original "taking" was lawful (c), but in Roman Law it would clearly be theft, the subsequent appropriation being a sufficient "controversio."

In spite of these points of difference, the Roman Law of theft was in the main the same as our own. Thus, in the important case of the finding of lost property, the Romans applied exactly the same test as to whether the appropriation by the finder was or was not theft, namely, whether the finder took the property knowing who the owner was, or having reasonable grounds for believing that he could be found. "Qui alienum rem alterui aedificavit, cum id se invitum domino faceret judicaret debet, furtum mittere. Sed si non fuit se deditum potius tamen deditum, furti non tenetur." (Sabin n.p. Gell, l. c. § 20).

Under the Empire, as I have already mentioned, the general principle was adopted that anyone who could maintain a civil action for theft could, if he preferred to do so, prosecute the thief criminally. The penal action of theft was thus transformed into the Criminal trial, and was gradually superseded by the latter. In the time of Justinian, civil actions for theft were rare, as they could not be maintained at the same time as a Criminal prosecution. "Nemo furti pleonaceae criminabile agit" (D. 47. 2. 92). The question may naturally be asked how it arose that an offence like theft, which is generally one of the earliest recognized as belonging to the Criminal Law, remained for such a long period a matter of a civil nature. The expla-
nation is to be found, I think, in the severity of the ancient Roman Law of debt, as well as in the other general causes which retarded the development of the Criminal Law at Rome. If the debtor was in a position to pay the value demanded by the injured party and approved of by the Judge, he was assigned by the Judge to the person from whom he had stolen as a bondman (a). Thieves are not usually found among the wealthier classes; so in a large proportion of cases theft at Rome was punished even under the civil law by permanent loss of liberty.

Robbery was not in the early law distinguished from theft. A person guilty of this offence could always be proceeded against as for theft, 

(a)
manifestum ex non manifestat, according to the circumstances of his detection. The actio ex bonarum reposi-

tum was first instituted, as Cicero tells us (pro Tullio, 8), by Lucullus in B.C. 77, by reason of the frequent crimes of violence of that time. The penalty was triple the value of the property taken. It is improbable that it was ever used except when the offence did not come within the definition of 

fictus manifestat; and the principles applicable in reference to it were very much the same as in the case of theft.

The actio damnum injuriae ex Lege Aquilia is not properly speaking an actio ex delecto at all, but one quiest ex delecto. It was not purely penal, like the actions foris, injuriam, and ex 

bonarum repositorum, but mixed, the damages being assessed not on the principle of punishing the wrongdoer, but of compensating the party injured. It was the first true action of tort in the Roman system.

Injuria was an offence against the person, as distinguished from the other three delecto which dealt with offences against property. It was a comprehensive term, defined by Mr. Moyle (Just. Inst., p. 519, note) as a wilful violation of what writers on jurisprudence term the primordial rights of a free man—the rights to personal freedom, safety, and reputation. Assaults of all kinds, libels, slander, violent abuse in public (contumacia), illegal seizure for the purpose of annoyance, solicitation.

(c) See Moyle's, Just. Inst., p. 519.
may have caused the death of another person, and it is often times right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him." The Act then provides a remedy for the benefit of the wife, husband, child, or parent.

The theory of both systems of Law is that the value of human life is too great to be estimated in money. Life is too sacred to be assessed for others than by the most severe punishment. At Rome the life of a citizen was always regarded with peculiar sanctity; and this may account for the absence of any trace of the death fine in the early law. In the Lex Coriaria there is no mention of death; and in all probability the same prohibition was enforced in early times at Rome.

What then, was the early Roman Law of Homicide? We have surprising little information on the subject. The existing fragments of the XII. Tables contain no reference to homicide, though it is stated by Pliny (5) that, under this code, the penalty of death was awarded for the crime. This may, however, only have been a recognition of the right of private vengeance, as it was provided in the case of a limb being broken: "Si membrum rupt, ai num ex pietat, tace esto." It is, however, stated in the Digest that the XII. Tables provided for the existence of Questores Persecutendi. "Questores consuetudinaria populi, qui capitis remissae possessae; hi appellabanturquestores perpetuidi; quorum eliam numinit Lex XII. Tabularum." (D. 1. 2. 2. 23.)

It may be doubtful whether these "seekers of murder," as Mounten calls them, were actually in existence at the date of the XII. Tables as here stated, but there can be no doubt that they were appointed at a very early date. They acted as a sort of police, their duties being to search for and arrest all murderers; Persecutendi being apparently used to denote murder in general, not alone the murder of a parent or ascendant.

(a) See Deboras v. Collyer, 1. E. 4 Exch. 28.
(b) Digest, vol. 3.
(c) "Amicus curiae, p. 287, or seq.
(d) "War Crimes, 1. 18."
occurred to the Roman lawyers, but there are various passages in the Digest which state the principal cases in which the intentional infliction of death was considered justifiable. They are all reducible to the cases of self-defence, and the arrest or punishment of criminals."

The Criminal Law of Rome may then be said to have originated in the legislation of Sulla. Prior to this, indeed, in the single case of homicide, the State appears to have punished as an offence against itself, an injury to one of its members, but this did not imply any regular system of Criminal Law. Nor was there any permanent Criminal tribunal in existence until in the year 149 B.C., the first Quaestio Perpetua was appointed by the Lex Calpurnia de Repetundis. This law, however, dealt only with a political offence, viz. extortion by Colonial Governors. Sulla’s legislation, a little more than half a century later, covered the whole field of Criminal Law. In the matter of criminal procedure he adopted and extended the principle of the Lex Calpurnia de Repetundis. He instituted at least seven Questiones in addition to that de repetundis, viz. for Treason (De Magnate), for Injuries to the person or Insult (De vi et injuria), for Murder (Inter Siesavies), for Bribery (De ambito), for Fraud (De falsis), for Embezzlement (De peculato), for Adultery (De adulteris). From the sentences of these Courts there was no appeal to the people. Their introduction, properly speaking, marks the birth of true Criminal Law.

"From this Sullan legislation," says Mommsen (a), "arose the distinction—substantially unknown in the earlier law—between civil and criminal cases in the sense which we now attach to these expressions; henceforth a criminal case appears as that which comes before a bench of judges (via. a Questio), a civil case as that which comes before the individual Judge. The whole body of the Sullan ordinances as to the Questiones may be characterized at once as the first Roman Code after the XII. Tables, and as the first criminal code specially issued at all."

(a) Hist. of Rome, book iv., chap. 15.

From the time of Sulla onward Criminal legislation was abundant; until, after the establishment of the Empire, not only was there a large body of Statute Criminal Law, but what we would in English Law designate as Common Law criminal offences came into existence; the general rule having been adopted that anyone against whom an action or delict would lie for gravina, et hominem repugnans, or injuria, might at the option of the injured person be prosecuted criminally instead.

Why was it, then, that the Roman Law, which was so rapid in its development on the civil side, was so slow in attaining to a system of criminal jurisprudence? For this there were, I think, three main reasons:—(1) The form of government; (2) The essentially religious character of the people; and (3) The existence of slavery.

In the first place the Republican form of government greatly hindered the development of Criminal Law. We see in the history of early English Criminal Law, what a large share the existence of the monarchy had in its creation. An offence against one of his subjects became an offence against the King himself. The extension of the Criminal Law administered by the King personally or his deputies, strengthened and secured the Monarchy enormously, while it gave to his subjects the blessings of peace and security.

The Republican spirit, on the other hand, is very much opposed to the growth of Criminal Law. It is usually jealous of the recognition of any authority for punishment except the supreme will of the people; and so we find that at Rome, during the Republic, in every capital case there was an appeal to the people. The case was discussed always in three public assemblies before it was finally decided. The magistrate who had given judgment was obliged to appear and defend his sentence, and in this manner occupied the position of a public prosecutor rather than that of a judge. It was not until the fourth meeting that the question as to the verdict was put. "In this way," says Mommsen, "the Roman criminal procedure was
completely void of principle, and was degraded into the sport
and instrument of political parties" (c). Every great crime be-
came a party question. The result is well described by Cicero.
"Plura causae multa, homines judicii edidit ut amore ut cupiditatem, ut
insecundam, ut dolorem, ut lasciviam, ut sapientiam, ut
error, ut aliquis semper semetipsum quosque veritatem, ut
prescriptum, ut justis normas alterius, ut judicii formam aut signum"
(b). A criminal trial thus quickly degenerated into a party
mess; and to this, probably more than to any other cause, is to be
traced the decline of the Roman Republic. Let us hope that
Democratic government may not produce the same result with
us. The appeal from a Judge and Jury to "the Press of the
United Kingdom," which has now become usual in every case
of capital condemnation, seems to promise us very much the same
result. It may have been with a view to checking disorder, and
not as supposed by Mommsen with the object of putting an end
to capital punishment, that C. Gracchus in 133 B.C. attempted
to withdraw the cognizance of murder and poisoning from the
popular assemblies altogether and to entrust it to permanent
judicial commissions. This reform was actually carried out by
Sulla a short time afterwards.

The absence of any religious element is one of the most
strongly-marked features of the Roman Law; and the growth of
Criminal Law was greatly checked by this characteristic. The
first offenses which the community as such punishes are usually
what is regards as grievous sins, or wrongs of such a paricular
bequeathed nature that religion forbids that they should be
compassed for merely by a money payment. That this was
so in the history of English Criminal Law appears plainly
from the extracts from the writings of King Alfred, quoted by
Sir H. Maine, in the last chapter of his "Ancient Law." (e)
The Romans, on the contrary, as regards the first class of
offenses, adopted the cynical principle that it was a matter for
the gods themselves to revenge insults offered to them; and as

(e) p. 528.
LECTURE V.

EARLY ENGLISH PENAL LAW.

At the present day, as Sir Henry Maine remarks (a), two systems of law divide between them the whole civilized world—one is the Roman Law, which forms the foundation of the legal system prevailing throughout Continental Europe, the other is the English Law, which practically rules the whole new world as well as the United Kingdom. In my last Lecture I briefly sketched the origin and development of Criminal Law at Rome: I now come to our own system, the history of which is, in many respects, even more interesting to the student of general jurisprudence, and of course much more important to those who intend to devote themselves to the practice of law in this country; for our modern Criminal Law has retained many of the features which it exhibited in very early times, and a knowledge of its history is absolutely essential in order to understand its principles. Its history is continuous from the earliest origin of the Anglo-Saxon race to the present day. There was no break at the Norman Conquest as is commonly supposed. The Norman kings administered the Saxon Law, and merely took the place of their Saxon predecessors in the administration of justice as in the performance of the other duties of government.

The laws of the Anglo-Saxons were, as might naturally be

(a) Early Law and Custom, p. 185.

expected, almost identical with those of other German tribes; for the Saxon invaders of Britain brought with them all the customs of their forefathers. The primitive method for the punishment of crimes with them as with other nations was merely vengeance. Each individual protected his own rights and avenged his own wrongs by whatever power he himself possessed, and in the manner in which he himself thought best. At this stage of legal progress Courts of Justice did not exist; and there is nothing that we can properly term Law in existence, no rule or limitation as to the right of vengeance except the powers of the person injured to exact it, and the power of his enemy to resist. “It is,” in the words of Mr. Langbaine (b), “one of the most instructive lessons in the history of English Law to trace the growth of the power of government over the individual; the establishment of Courts of Justice; the gradual suppression of private warfare; the substitution of permanent kings for temporary leaders; and in the course of time, the assumption by the king of the ‘ideal attributes of absolute perfection, absolute immortality, and absolute ubiquity.’”

We do not find this lex titubis established as the principle of early German Law. In so far as it existed it was only a limitation of the right of revenge. It was allowable to inflict mutilation of one kind in revenge for mutilation of another kind, provided the punishment was not excessive, but the gravity of the offence was the measure of the punishment. The first form of legal procedure is here found in an ex post facto investigation by the community into the act of vengeance whatever it was, with a view to deciding whether the revenge taken was reasonable or not, according to this test. Thus, by the laws of the Saxon (c), it was provided that anyone who had slain a thief should take an oath of his guilt, and that in that way he should escape liability for his act. “Quod ferox commissit, debet inventario suae juramentato, quod illum culpabilius et de ob ita satisfactio concedantet, et non solvet” (Isa. 16).

And by the laws of Henry I. (really a summary of the

(b) Essays on Anglo-Saxon Law, p. 302.
existing Saxon Law, it was enacted—"If anyone kill another in revenge or self-defence, let him take to himself some of the goods of the dead, whether his horse, or helm, or sword, or any money: but in wanted manner let him arrange the body of the dead—his head to the west, his foot to the east—upon his shield, if he love it; and let him drive deep his lance, and hang there his horse, and to it reain his steed; and let him go to the nearest vill, and to him whom he shall first meet, as well as to him who has seen, let him declare it, that he may have proof and make defence against his (the slain man's) kinsmen and friends" (39, § 6).

The right of revenge is here recognized, in the same manner as that of self-defence. Even if the criminal escaped and was taken by some other person, the right of vengeance remained, and he was delivered to the relatives for the purpose of executing it. This is put beyond doubt by a passage from the Laws of Cadwal (t. 56): "Quod supruxit apero perpetribus, reprodit, pax anta norto interfectum" (Laws Kirt. t. 56). This system of private vengeance of course led to horrible anarchy. The offender was often as strong as, if not stronger than, his adversary; and the assistance of the kinsmen on each side created a blood-feud, lasting perhaps for generations, out of a single crime. But in the evolution of law remedy was at length found.

The great step towards the limitation of the right of private vengeance was the introduction of pecuniary compositions for offences. The acceptance of such was originally, it is safe to assume, purely voluntary, the offender paying off revenge at such a price as the person injured might choose to accept in consideration of forgoing his right to it. There is, no doubt, that in the Braban Law this system of composition was at first purely voluntary; and though there is no direct authority that it was so in the Anglo-Saxon system, there are passages in the laws which seem to imply it. Thus, by the laws of Eadbert, it is provided:—"If a thigh be broken, let but he made with £10; if a man become bald, then the friends must arbitrate."(a) We have under the Braban Laws many instances of persons who had slain others endeavoring to persuade the relatives to accept a composition, and sometimes succeeding not sometimes not. (b) There is no doubt therefore that in that system the decision rested, not with any legal authority, but with the parties injured or their friends. Probably this was also the case under Anglo-Saxon Law.

When once the system of compositions was established everything tended to extend it. The influence of Christianity by teaching indulgence and forbearance; the influence of the government, when a settled government was once instituted, in seeking to check disorder; and finally, the manifest advantage, both to the wronged and the injured parties of preventing a resort to bloodshed. These considerations led in time to an actual endorsement of the system. The first criminal legislation in England consisted merely of an ordinance by the king forbidding the resort to vengeance before an effort was made to obtain pecuniary composition for the wrong. To enforce this command required not only the sanction of public opinion, but also some real authority in the sovereign.

When Alfred held the throne he was sufficiently strong to carry out this policy, and to forbid a resort to vengeance unless a claim for compensation was first made. The following is his enactment on the subject:—

"Also, we decree that the man who knows his foe to be home-sitting shall not fight him before he asks satisfaction.

"If he have power to surround and besiege his foe let him watch him during seven days, and not attack him if he wish to remain there. If he wish to surrender and give up his arms let him guard him until thirty days, and annunciate it to his kinsmen and his friends."(c)

(a) Thorpe, Ancient Laws, etc. of England, p. 8. Compare the provision of the XII. Tablet quoted, ante, p. 91. No memmoria rex at non in prex inLatin.
(b) See ante, p. 27.
(c) Supposedly with the object of enabling them to assist in making up the required amount of composition.
"If he have not power to besiege him within, let him go to the unlawful and ask aid; if he be unwilling to aid him, let him go to the king before he attack his foe" (Laws of Alfred, § 42, p. 13).

This passage is interesting, not only as showing the nature of the fine or composition paid, but also by its reference to the position of the king in the matter. He is not a judge. He is merely a referrer of the justice of vengeance. This is probably the first recognition in the laws of the necessity of any application to the sovereign before the right of private vengeance was enforced. We will see how, from this first beginning, the king gradually increased his authority, chiefly availing himself, in order to do so, of the plea that an unauthorized act of vengeance was a violation of his peace. It was not, however, until long after the Conquest that the king, by means of this plea, attuned to himself the whole criminal jurisdiction, and finally put an end to private warfare and private revenge.

We have in Modern English Law one rule which is probably a survival of the right of private revenge. One of the cases mentioned by Alfred in which private vengeance was justifiable, was where a husband found a woman with his wife under circumstances which would justify him in supposing that they were together for the purpose of committing adultery. "A man may fight 'cornige' (i.e. without committing war) if he find another with his lawful wife within closed doors, or under one covering, or with his lawfully born daughter, or with his lawful born sister, or with his mother, who was given to his father as his lawful wife" (Laws of Alfred, § 42). Modern Law recognizes the provocation in this case to a certain extent. It treats the killing of an adulterer taken in the act in the same ways as if he had been killed in a quarrel. The killing is not indeed held to be justifiable, but it is laid down that the provocation reduces the crime from murder to manslaughter. (Hale, Plea of the Crown, i. 386, K. v. Kelly, 2 C. & K. 814.) This is, I believe, the only case in which provocation, other than by actual harm, is considered sufficient to reduce homicide to manslaughter, if the killing be effected with a deadly weapon.

The compensation which was paid for homicide under Anglo-Saxon Law was threefold—

(1) The corvee, which was the regular price of a man fixed according to his rank, and which was paid to his relatives in case of his death. This was purely a personal value estimated according to a man's rank and position.

(2) The bleth, also paid to the relatives as compensation for the crime. This varied according to the nature of the act. In case of theft, it amounted to the value of the goods stolen. It was also paid as a satisfaction for an injury to person or life, or such injuries to the person as inflicted no pecuniary loss. The term is derived from the same root as our modern word "better."

(3) The wite, a fine paid to the king as a penalty for the breach of his peace. This, as we shall afterwards see, was the origin of royal jurisdiction in criminal matters. The right of a person to be undisturbed in his dwelling by an act of violence committed near it is one early recognized by the law. The higher the man the greater the distance to which this right extends, and ultimately it comes in the case of the sovereign to include the whole kingdom.

This system of fines is recognized as the sole punishment for offences throughout the Anglo-Saxon Laws, unless we consider the primitive revenge, which under certain conditions, was always permitted a punishment.

The imposition of the fine in serious cases was always discretionary with the injured party, who might refuse to accept it, and insist on his right of revenge. "If a thief be seized let him pass by death, or let his life be reckoned according to his wife" (Laws of Thane). In the case of murder the option of accepting or refusing pecuniary compensation lay with the nearest relatives of the deceased. The guilty person was delivered over to the relatives, who might kill him or spare him as they thought fit, exacting in the latter case the customary
The rule in the case of injuries not causing death is next stated: "Si autem incipientem non fecit mortum, et causis varietatem vel prohibitionem corporis contrariam agriculturam, omendatur, sequatur antiquae dictionibus, sicut accident." In this latter case apparently vengeance was not permitted. Nor was it allowed in cases of homicide by misadventure.

When the Monarchy grew in strength, the King sought to preserve order in his dominions by enforcing the acceptance of reparation, and prohibiting revenge, unless the injured person had previously offered to accept pecuniary compensation. The extent to which revenge was permitted varied in different reigns, according to the King's authority prevailed. Thus, although the laws of Henry I. revenge was justified, it was forbidden by laws of Jos. The "Leges Hieremarii Primi" were not, as I have already stated, a regular code established by that King, but rather a compilation of the existing Anglo-Saxon Laws by some unknown author. Consequently, in many respects they are more accurate than earlier codes. Thus, although they sanctioned revenge in every case of serious injury, it was provided by the laws of King Jos, that if anyone took revenge before he demanded justice, he should give up what he had taken to himself, and pay the damage done, and make 501 with 50 shillings.

It was not until long after the Conquest, that this system of private revenge ceased. The King's Courts gradually grew powerful; and finally, by the Statute of Marlborough (52 Hen. III. cap. 1), it was made a simple offense to exact revenge or enforce the payment of compensation in this manner without the intervention of a court of law. That statute commenced by restating that "whereas at the time of a commotion late stirred up within this realm, and also situate, many great men, and divers other, have discharged to be justed by the King and his Court, like as they ought, and were wont in time of the King's noble protector, and also in his time, but took great revenge and distress of their neighbours, and of other, until they had amount and fines at their own pleasure." It then provides that "none from henceforth shall take any such revenge or distress of his own authority without award of our Court, though he have damage or injury whereby he would have amount of his neighbour either higher or lower." And it further enacts, "that if any from henceforth take such revenge of his own authority, without award of the King's Court as before is said, he shall be punished by fine, and that according to the trespass." Henceforth self-redress was entirely forbidden in English Law, except in a few specified cases. An injury inflicted in revenge for another is treated in all respects as if it were an unprovoked trespass.

The prohibition of revenge, even although it were only until after demand made for pecuniary satisfaction, necessarily implied some means of enforcing the payment of fines; for otherwise the offender could by flight entirely evade his adversary. Hence arose the system of outlawry. A person who refused to pay theacebooked satisfaction, and sought safety in flight, was declared an outlaw, and thereby punished for his offence.

Outlawry was the punishment for non-payment of fines in all systems of law, and forms the connecting link between
private Penal Law and true Criminal Law. The sentence was pronounced at the County Court, which, with the Anglo-Saxons corresponded to the tribal assembly of other nations. It was necessary that the accused should be called at four successive Courts, and if he failed to appear, he was then declared an outlaw at the fifth. The effect of the sentence was to deprive the outlaw of all rights as regards person or property. He was really placed outside the law in every respect. He could be killed with impunity by any person who met him. He lost all his property, movable and immovable. He could not demand payment of fines for any injury done to him. He lost his wergeld, as the Irishman lost his honour-price.

The punishment of outlawry, though originally a means merely of enforcing the payment of fines, continued to exist long after the system of fines had disappeared. In fact it is theoretically recognized in our Criminal Law to the present day, though practically it has long become obsolete (see Blackstone, Commentaries, iv., ch. 24).

The importance of outlawry as a punishment in early times may be estimated by the space which is occupied in discussing it in early treatises on Criminal Law. Bracton, in his work De Causis, most minutely specifies the requirements necessary before sentence of outlawry can be pronounced; and the effect of each sentence when imposed upon any person.

Chapter xx. of that work deals with outlawry, and provides in what manner an accused person is to be summoned before sentence of outlawry is pronounced:

"When indeed any person has so withdrawn himself on account of homicide or any other crime, by the beneficence and grace of the prince he shall be called to come and make answer, and to stand on his defence, if there is anyone who will speak against him; otherwise he is not to be forthwith called without the suit of someone, because when grave crimes are charged against an absent defendant, sentence is not usually hastened, but he is summoned to be called that he may be required, not indeed for punishment, but that he may have the power to purge himself, if he can purge himself, and a legitimate time shall be allowed to him, namely five months, that he may within the fifth Court (Court) to attend on his defence, and to answer to the accusation concerning the crime imputed to him; but if he should not have come within that time, he shall be held to be an outlaw, since he does not obey the prince nor the law, and he shall be therewith declares an outlaw, like him who is out of the law, Lawlessman (Lawless-man)" (6).

He then goes on to say that a person is not to be declared an outlaw unless he has been pursued by some person entitled to exact reparation from him:

"But when the murderer has taken flight, there ought to be someone to follow the fugitive, to speak from sight and hearing that he is a fugitive ('). . . . . and let him then state all the words of the charge as if the fugitive were present, and let him in the charge, and his accusation, add that if he shall see the person charged, he shall speak against him. But to make this kind of suit let not any one of the people be admitted unless it appertains to him by relationship to pursue him, by reason that he is of blood and relationship connected with the slain person, and in which case when there are several nearest, the nearest relation is always preferred to the more remote.

It is the "avenger of blood," according to the language of the old Hebrew Law who alone in case of murder can enforce the outlawry. No substitute was allowed to be appointed.

The duty of pursuit was sacred. "No person ought to pursue to outlawry for another, unless it be for a person slain, so connected by relationship or on account that if the accused party were present, an appeal would lie between them" (6).

(7) The word "in visum aed ebx" (Odium, p. 2. c. 5) was abolished by Stat. West. 1, chap. 21 (5 Ed. 11).
(8) Bracton, ed. ii. p. 192.
An outlaw forfeits by his outlawry all his rights. “Likewise the outlaw forfeits every benefit which belongs to the peace of the King, because from the time when he is outlawed he carries a wolf’s head, so that he may be killed by everyone with impunity, particularly if he defends himself or takes to flight, so that his capture is difficult” (a). He loses his property, and forfeits “everything which is of right or possession, of right accruing or likely to accrue, of right acquired or to be acquired, and all possession in like manner in the form and mode of possession.”

A person outlawed might, however, be inlawed by the grace of the King, and admitted to the King’s peace (chap. xiv.). “But a person inlawed is not restored to anything but the King’s peace, for the King cannot grant a pardon with injury or damage to others [non omni potest rei graudium esse, cum injuria et danno alienum]. He is therefore not restored to his rights of action or property which he has lost by outlawry” (b) (chap. xiv.).

Such, apparently, was the manner in which personal revenge for offences became transformed into a system of pecuniary fines, the payment of which was enforced by outlawry. We have now to inquire into the manner in which the system of fines was in turn superseded by a regular system of punishments.

In considering the various causes which led to the disappearance of the fines in our own legal system, we must in the first place bear in mind that it was always considered as an indulgence to an offender to allow him to escape the consequence of his crime by making a money payment. The Anglo-Saxon Laws required an injured person to accept the accustomed payment in most cases, but this rule was never universal. Thus in one of a second offence by the same person, the acceptance of a fine was never enforced. “At the first time,” says a law of Ethelred, “let him make &c to the assessor, and to the lord his &c., and let him give true bonds that he will henceforward abstain from all evil. And at the second time let there be no other bond but the bond” (c).

Certain crimes also, in consequence of their enormity, were always considered incapable of being compensated for by money. Thus, the Laws of Athelstan declare that “Housebreaking and arson, and open theft, and open-murder, and treason against a lord are by the secular law bot-bes” (d). The imposition of fines had thus only a limited range at any time, and many causes tended to still further restrict it.

The first of these was the influence of religion. Curiously enough, Christianity helped both the growth and the decline of the system of pecuniary fines. It assisted its establishment as a mitigation of the terrible system of private revenge for wrongs. To accept pecuniary satisfaction was always looked upon as an act of forbearance. This clearly appears from the account given in the Secutor Mors, of the establishment of the Elc fine which I quoted in a previous lecture (c). It was, as the commentator in that work calls it, “a middle course between forgiveness and retaliation.” Probably the same view was taken by the Anglo-Saxon Church, which consequently encouraged the system. But once regularly established, the fines came to be looked upon as a punishment rather than as the price of forgiveness; and as moral ideas became developed, the fines appeared to be in many cases a most inadequate punishment.

In so far as the offence committed was a sin, the Church then discouraged the idea that it could be atoned for by money alone. The passage from the writings of King Alfred, quoted by Sir H. Maine (Ancient Law, p. 388) clearly indicates the growth of this idea. “After this it happened that many nations received the faith of Christ, and there were many synods assembled throughout the earth, and among the English men also after they had received the faith of Christ, both of holy bishops and of their ecclesiastical Witan. They then ordained

(a) Thorpe, I, 381.  (b) Thorpe, I, 371.  (c) ante, p.
that out of that money which Christ had taught, secular lords, with their leave, might without sin take for every misdeed the last in money which they ordained; except in cases of treason against a lord, to which they durst not assign any money, because Almighty God adjudged none to them that deserved Him, nor did Christ adjudge any to them which sold Him to death; and He commanded that a lord should be loved like Himself."

Here the acceptance of the fine is plainly regarded as

*print jace wrong*. It is only permitted by the Church in the case of lesser offences, and condemned in the case of more heinous crimes. The same idea which led the Hebrews to condemn the acceptance of a death fine as a grievous sin, gradually put an end to the *corveé* in England also.

Another cause for the disappearance of the fine was the system of frankpledge. By means of the latter, the imposition of fines was gradually transformed into a more effective police organization. According to the system of frankpledge, as established in the 10th and 11th centuries, all men were bound to combine themselves in groups of ten, each of whom was responsible for the acts of the others. If one committed an offence the others were bound to arrest him and deliver him over to justice, or make good the mischief which the offender had done. Even to the present day there are remnants of this system in English Law, though for centuries it has had no practical operation.

There can be no doubt, I think, that frankpledge was a survival of the system of tribal responsibility for crime which prevailed almost universally at an early stage of legal progress, and of which we find in the Dacian Laws the most complete and elaborate code. There always existed with this responsibility, whenever it prevailed, a right to surrender a criminal in lieu of being answerable for his acts; such, for instance, appears to have been the origin of the *noven status* of the Roman Law.

---

(c) See Stephen's History of English Law, i. 90.
Early English Penal Law.

Lect. V.

able for them, unless the custom of the country introduces a different principle, that he ought not to be responsible for his household. ....... Because every man, whether free or a serf, either is or ought to be in frankpledge, or in somebody's household, unless he be somebody different from place to place, who does not keep himself to one more than to another, or who has something which suffices for frankpledge, as a dignity, or an order, or a free tenement, or real property in a city. And according to the Law of King Edward, everyone who is of the age of twelve ought to make oath at the view of frankpledge that he is not a robber nor will conspire with a robber; and every person who has land and house, who are called 'householders,' ought to be in frankpledge, and also others who serve them who are called 'followers,' for neither ought a person to repel from himself his servant before he is purged from every charge of which he has been previously charged" (c).

But the main cause of the disappearance of the system of fines from our Criminal Law was the growth of Royal Jurisdiction in criminal matters. This opens up such a wide subject for inquiry that I must reserve what I have to say upon the matter for another Lecture.


LECTURE VI.

EARLY ENGLISH CRIMINAL LAW.

The distinguishing feature of modern English Criminal Law is the fact that the Sovereign is in all cases the prosecuting party. The Queen prosecutes every petty iniquity, and at the same time, by her delegate, the Judge of Assizes tries the offender. Theoretically she is judge in her own cause, a position which is repugnant to every principle of jurisprudence.

What, then, is the origin in English Law of this prosecution by the Crown in all criminal matters? The answer of Blackstone and the Analytical School of Jurisprudence is simply that the King is the fountain of justice, and that he is bound to see that the law is enforced in the public interest. If this be so, why is the name of the Sovereign not used in civil actions? Surely it is as much in the public interest that the Civil Law should be enforced, as that the Criminal Law should be. The answer to the question is really historical. The prosecution by the Crown first arose not from any notion of public convenience, but in an entirely different way; and moreover our Criminal Law still retains traces of the manner in which the system originally grew up.

Every lawyer is familiar with the modern form of an indictment. The offence is always alleged to have been committed "against the peace of our Sovereign Lady the Queen, her
Grown and dignity," until a very recent date, an indictment prepared without this formal ending was wholly bad. A recent statute, however (11 & 12 Vict. c. 100, s. 24), specially provides that an indictment is not to be held insufficient in consequence of the omission of the words "against the peace." Before it became law an indictment without these words was considered not to charge any offence, no matter how formal it was in every other respect. Why was this? The real reason was that the averment that every offence was "against the peace," which in time had become a mere formality, was originally the real statement of the crime with which the accused was charged. An investigation of the history of English Criminal Law shows that originally only a real violation of the King's personal rights was the subject of an indictment; and that the origin of our present system of criminal proceedings was a proceeding to avenge an offence against the King personally, which he prosecuted in exactly the same manner as a private individual proceeded against one who had wronged him. The violation of the King's peace was an insult to him personally, and so was punished by him.

In nearly all ancient systems of law the violation of the peace of any chief or person of importance is recognized as an offence. Thus, we find elaborate provisions relating in the Ancient Irish Law as to the murder or "prentice" of a chief, and the penalties laid down for any violation of its sanctity. The Early English Laws contained similar provisions (a). An act of violence within the ambit of the King's or a Lord's domain was an offence against him, in the same manner as a violation of neutral territory is regarded as an offence by modern International Law. The King's peace first extended only to the particular place where he happened to be; and to such places as had this special privilege conferred upon them (b).

(4) See Stephen's, History of Criminal Law, l. 60.
(5) Ibid., 69 (note).

"The King's presence," says Sir F. Palgrave, "implied

peace, not only to his residence, but to a considerable district around it. Three miles, three furrows, and three men's breadth, nine feet, nine palms, and three barley-corns, constituted the mystical radius of the verge, which was reckoned from or nascent where the King held his Court; and within this ambit the protection of royalty was to remain unviolated. At certain times and holidays also, the King's peace was to be observed throughout the realm. The week of the observance of the ceremony constituted one of these privileged periods; they also occurred periodically at the great festivals of the year, Christmas, Easter, and Whitsuntide, being the several seasons when the King wore his crown in the great Councils of the respective Anglo-Saxon States or Kingdoms. Lastly, the King's peace could be "given" by his word and will, by his "hand" or by his writ as by his seal; and the punishment of the transgressor was greatly enhanced if he violated the protection thus afforded. In some cases the breach of the King's peace, or violation, or contempt of the royal authority, increased the torture and the punishment of the culprit. In others it placed his life and limbs at the King's mercy, or exposed him to the dread penalty of outlawry, rendering him guilty of a capital crime, which was visited by the extreme rigours of the law. Sometimes after the Conquest, all these special protections were discarded; but they were replaced by a general proclamation of the "King's peace," which was made when the community assembled to the accession of the new Monarch; and this first proclamation was considered to be in force during the remainder of his life, so as to bring no disturbance of the public tranquillity within its penalties. So much importance was attached to the ceremonial act of the proclamation, that, even in the reign of John, offences committed during the interregnum, or prior to the observance of the public assembly, or the recognition of his successor, were unpunishable in those tribunals whose authority was derived from the Crown" (Palgrave, Rise and Progress of the English Commonwealth, l. 284-6).

The original "peace of the Crown" were either offences
against the King personally, such as treason or concealment of treasure-trove; or some act of violence committed in such a manner as really to amount to a breach of the peace. Theft, for instance, is not found in the list of pleas of the Crown given by Blackstone, though robbery is, as it necessarily involved an act of violence. Gradually the system of alleging that
an offence such as theft was committed "against the peace," even though accompanied by no violence whatsoever, by this means the prosecutor escaped the awkward incident which always attended a proceeding by him personally, of being liable to be challenged by the accused to a trial by combat. It was laid down that the King should not fight, as such a course would be beneath his dignity, and consequently to prosecutions by him the accused could not claim a trial by combat.

The allegation of a violation of the King's peace thus gradually became a mere fictitious device to confer jurisdiction; but for a long time a real distinction was made between cases where there was and where there was not a real breach of the King's peace. Thus in Britton's Digest, written probably in the reign of Edward I, it is laid down in reference to larceny, that there are two modes of proceeding, either by the party from whom the goods are stolen or by the King, and it is stated on behalf of the King that when the wrongdoer has been sued in form of trespass by the owner of the goods the King will not proceed against him, even though his peace may have been broken.

The definition of murder given by Lord Coke (3 Inst. 47) shows a trace of the same idea: "when a person of sound memory and discretion unlawfully killed any reasonable creature in being and under the King's peace with malice aforethought, either express or implied."

Probably also, this idea of a violation of the King's peace explains the strictly territorial limits of modern English Criminal Law. If an Englishman makes a contract with another in France, it may be enforced against him in an English Court, but if he steals his fellow-countryman's property there, he cannot be tried by an English tribunal! The "peace of our Sovereign Lady the Queen" is not affected by anything which takes place outside her own territory. This is not the only feature in our modern Criminal Law which is explained by its historical origin.

The gradual change from a system of private revenge or pecuniary compensation to a true system of Criminal Law was, as I have already shown, materially assisted by the growth of the royal power. When once the Sovereign became strong enough to preserve the peace, the reasons in favour of a system of fines for the sake of preserving order and putting an end to blood feuds ceased to exist, and thus entirely disappeared from our criminal system. The prosecution by the Crown in criminal matters finally disposed of the system of pecuniary compensation. It emphasized the growing idea that punishment, not revenge, was the object of the proceeding, for it was obvious to any person who took the trouble to consider the matter that the Sovereign was not really injured in any way, and that his motive for the proceeding must be more or less of a moral or utilitarian nature. In fact, the interpolation of the Sovereign as a party, not merely as a judge, really effected the transformation from Penal Law to Criminal Law in our system. It is not merely a matter of conjecture that the growth of Royal Jurisdiction as regards crimes gradually transformed our criminal system in the way I have stated. Royal prosecutions did not at once supersede prosecutions by the parties themselves. This was only a gradual process. All through the Middle Ages, and indeed long after that period is considered to have come to a close, two systems of prosecutions for crimes continued to exist side by side. Either the party aggrieved or his relatives

(a) Britton, p. 112.

(b) See Sir Matthew Hale's History of Criminal Law, i. 21, a ref.
in one of his death) might institute a proceeding (c) which was called an appeal, or, if he failed to do so, the Sovereign might take up the matter and prosecute for the violation of his person. Gradually appeals became rarer and rarer, and at last entirely obsolete; but they were not formally abolished until the year 1819 (d). As long, however, as they continued to exist they retained all their primitive characteristics. The accused had the option of a trial by battle; and he could compound with his accuser by the payment of a pecuniary fine. When the King prosecuted, both these barbarous incidents disappeared. It was laid down by Bracton that the King did not give wage of battle; and it was obviously still more beneath his dignity to make a bargain for the life of a misdemeanor. As then we find that where the King did not prosecute, the acceptance of pecuniary compensation was always allowable, and when he did, it was not, we may safely assert, that the cause of the disappearance was the fact of the Crown prosecuting in nearly every case.

The history of this system of appeals is both interesting and instructive. When Blackstone wrote his Commentaries appeals were not entirely obsolete, and in his fourth volume he gives a short account of them. He defines an appeal as "an accusation by a private subject against another for some heinous crime, demanding punishment on account of the particular injury suffered, rather than for the offence against the public." (e)

"The chief object of an appeal at all times," he further states, "was to compel the defendant to make a pecuniary compensation. For when the verdict in an appeal was given in favour of the appellant, he might insist upon what terms he pleased as the ransom of the defendant's life, or a commutation of the sentence" (f). An appeal was in reality a survival of the primitive mode of redress by revenge or pecuniary satisfaction, it corresponded exactly to the penal action of the Roman Law. It had very little resemblance to the criminal prosecution in the modern sense of the term, being rather akin to an action of tort. In cases which were not capital such as assaults the right of appeal indeed actually merged in an action of tort for damages, but this did not take place in the case of murder, or more serious offences, such as mayhem or robbery.

The account given in the older authorities of appeals for murder leave no doubt whatever that they took their origin in the primitive custom of vengeance of blood. The right of exacting vengeance was a privilege as well as a duty, and conferred by English, in the same way as by primitive Hebrew Law, upon the nearest relative of the deceased. "If there be anyone who would seek vengeance of the death by appeal of felony, lest the male, whomsoever age he be, be received before the female, and the nether of blood before one more remote" (g).

The execution of the sentence too was left to the relatives of the murdered man. Blackstone tells us that it was an ancient usage which lasted until the reign of Henry IV, for the relatives of the slain to drag the appeals to the place of execution. This was manifested a survival of primitive usage when the avenger of blood slew the murderer without any formal trial whatsoever.

Originally the right of an injured party to an appeal had priority to the King's right of proceeding by indictment. The appellant, however, was obliged to sue within a year and a day. Thus the law of Edward I. provide that:—"As to larcenies and robberies committed in time of peace, where the offenders were not freshly pursued, the owners of the things shall have their suit by appeal of felony within the year and day, as in other felonies; but after that time their right of appeal shall cease, and the suit shall be ours. It is equally so

(a) It is scarcely necessary to point out that our modern private proceedings have nothing to do with the ancient "Appeals." In private, as well as in public prosecutions the Crown is formally the prosecuting party.
(b) Bracton, i. 111, c. 46.
(c) Commentaries, iv. 292.
(d) Ibid. 318 (note).
within the year and day, if no other suit is commenced, and as in all manner of felonies. And if the demandants bring their suit in form of trespass, they shall be heard, if they have not before commenced their suit in form of felony, in which case they cannot, by withdrawing from their suit, deprive us of ours. But where they have sued in form of trespass, although our peace may have been broken, we will not prosecute." (B toton, bk. i., ch. xxv., s. 6.)

Previous to the statute 3 Hen. VII. cap. i. no person was ever put on his trial by indictment at the suit of the King until the year and the day had expired. And this appears to have been the origin of the curious rule in our law that a man cannot be indicted for murder, unless the death of the victim has taken place within a year and a day of the date of his receiving the fatal injury. The statute which enacted that indictments at the suit of the King might immediately be proceeded upon, and, before appeal brought, fully recognized, however, the right which the heir-at-law had at common law to bring an appeal for the death of his ancestor, and prevent the acquittal of the appellee from being an effectual bar to the suit, though apparently a decision of the appeal in favour of the appellee was a bar to a subsequent indictment. The appellee was deprived of his right of trial by battle if there existed a violent presumption of his guilt, as if in an appeal of death, a man were taken with a bloody knife in his hand. (Stamford, Pies of the Crown, bk. iii. c. 13. p. 178.) In Bracton's time these presumptions led to immediate execution, but in the time of Stamford they were only held to exist the defendant of his wager of battle, and to compel him to put himself upon the country, as if he were accused by the King, or by a person, such as a woman, or infant under fourteen years of age, who in consequence of physical infirmity was unable to wage battle against the appellee.

In the case of an appeal the right of pardoning always rested with the appellee or plaintiff, not with the Crown. In fact it is distinctly laid down in several cases that the Crown had no right of pardon. In the fifth year of Elizabeth's reign in a case of Strongbearsong v. Heyman (Moore, 571), an appeal was brought by a wife for the murder of her husband. The appellee was found guilty of manslaughter only. The question in the case was, whether the general pardon could pardon the burning in the hand, and, says the book, it was agreed that the Queen could not pardon it, and that the pardon could not operate thereon, because it was at the suit of the party. Whereupon the appellee compounded the prosecution for forty marks (see 3 Duke Williams, 463).

From the time of Elizabeth's trial by appeal became practically obsolete. Two cases are mentioned as having been tried in the reign of Charles I., but after that reign there were none until at the end of the eighteenth century the practice was revived by some antiquarian lawyers, who were possibly stimulated thereto by the publication of Blackstone's Commentaries, the first edition of which was published in 1765. At all events we find that in the year 1770, an appeal was brought by one Anna Bigby against Matthew Kennedy and Patrick Kennedy for the murder of her husband. The case is fully reported in 5th Barrow, at p. 2045.

"The following case of Bigby against the two Kennedys," says the reporter, "is of so peculiar a nature, and upon a subject which occurs so very seldom, that I have been intentionally very minute and circumstantial in describing the method and form of proceeding in it; as I conceive that it may not only be an amusement to the curiosity of some readers, but may also be useful as a precedent, and save the trouble of searching into rule-books and records, whenever a future appeal shall happen to be brought. . . . As it is only a vindictive action, the proceedings are on the civil side of the court, and not the criminal, though the defendants are pursued not only criminally, but even capitally."

The case resulted in the excape of the defendants upon a technical point, and there was no further attempt to revive the practice until the year 1818, when the last instance of the
antiquated procedure was tried in our courts. One Abraham Thornton had been tried on indictment for the rape and murder of a girl named Ashford. Though a strong case was made against him he was acquitted, owing to a flaw in the indictment, but as there was no bar to an appeal an attempt was made to bring him to justice by means of this form of action. The case is fully reported in 1 Howland & Alderson's Reports at page 405. The eldest brother and heir-at-law of the murdered girl was plaintiff or appellant in the suit. The following is a short sketch of the proceedings:

The appellant (Thornton) having been brought into court and placed at the bar, claimed his plea the right of trial by battle. He pleaded as follows: "Not guilty; and I am ready to defend the same by my body." And thereupon taking his glove off, he threw it upon the floor of the court. The appellant (Ashford) then put in a plea in reply stating strong circumstances of suspicion against the accused with a view to depriving him of this right. This plea set out all the facts of the case, which appear upon the statement to have been almost conclusive of guilt. It concluded as follows:

"And this, he, the said W. A. is ready to verify when, where, and in such manner as the Court here shall direct and award; whereas he prays judgment, and that the said A. T. may not be admitted to wage battle in this appeal against him, the said W. A." The Court overruled this plea, and decided that the accused was entitled to his wager of battle and that he could not be ousted of this right unless there existed such great and violent presumptions of guilt as would admit of no denial or proof to the contrary. "The general law of the land," said Lord Ellenborough, C. J., "is in favour of the wager of battle, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejusdices therefore may justly exist against this mode of trial, still as it is the law of the land, the Court must pronounce judgment for it" (1 B. & Ad., p. 406).

"This mode of proceeding, by appeal," says Mr. Justice Bayley, "is unusual in our law, being brought, not for the benefit of the public, but for that of the party, and being a private suit, wholly under his control. It ought therefore to be watched very narrowly by the Court, for it may take place after trial and acquittal on an indictment at the suit of the King; and the execution under it is entirely at the option of the party suing, whose sole object it may be to obtain a pecuniary satisfaction. One inconvenience attending this mode of proceeding is, that the party who institutes it must be willing, if required, to stake his life in support of his accusation. For the battle is the right of the appellant at his election, unless he be excluded from it by some violent presumption of guilt existing against him" (1 B. & Ad., p. 407).

The "inconveniences attending this mode of proceeding" was fully illustrated in this the last instance of it, for the appellant declined the issue of battle. Whereupon the Court gave judgment that the appellee should go without day, and a man who in all probability had been guilty of a foul murder escaped coolly. In the following year the procedure by way of appeal was wholly abolished by Act of Parliament (39 Geo. III. cap. 40).

Nothing illustrates so forcibly the strong conservative instinct of our law as the theoretical continuance, until the present century, of this system, with its barbarous accompaniments of trial by battle and pecuniary compositions for crime. It is astonishing how little attention there was in English Law between the times of Dronson and Blackstone; less probably than there has been during the last hundred years, and this is true alike of Civil and Criminal Law.

True Criminal Law arose in England, as we have seen, in proceedings by the Sovereign to avenge personal wrongs to himself. By the fiction of a violation of his peace, whenever a crime was committed, the Crown was enabled to prosecute every offender, and in time it became the usual rule to do so, whether there was any real breach of the peace or not. But just as the procedure by way of appeal retained to the last the main features which originally distinguished it, so our modern Criminal Law
Early English Criminal Law. [LECT. VI.

retains in many respects, even to the present day, traces of its historical origin. The test, for instance, whether a libel is a criminal offence is still whether it tends to provoke a breach of the peace.(a) If it does not, it only gives rise to a civil action for damages; but if it does, even though it is not communicated to any third person, but is contained in a letter addressed to the person defamed, it is a matter for indictment, the theory of the law being that it tends in that case to provoke a breach of the peace as much as if it were published (b). For the same reason, the truth of the libel is no defence to an indictment for publishing it, although it is an answer to an action for damages. "The greater the truth, the greater the libel" is the rule in criminal matters; and with good reason, for a denunciatory statement certainly tends all the more for its truth to provoke hostility!

There are many other rules of Criminal Law which seem to us so natural that we can scarcely conceive them otherwise, but which owe their origin, as a matter of fact, to the accidental circumstance that the Crown prosecutes in all criminal cases. For instance, the general rule of English Law is that there is no prosecution in criminal matters—no limit of time within which offence whether beinous or trifling must be prosecuted (c). This rule seems to us now so natural, that we are almost inclined to treat with ridicule any proposal to introduce a period of prescription into the Criminal Law; yet when we come to think of it, these do appear to be some reasonableness in allowing a man to be prosecuted for stealing an article, when the article itself could not be recovered from him in a civil action. Most writers upon jurisprudence advocate a rule of prescription, at least as regards lesser offences (d). And in

(a) Rex v. Allen, 22 Q. B. D. 66.
(b) 22 Q. B. D. at p. 59.
(c) Curiously enough there is a statutory exception to this rule in the case of treason. Penalties for treason must be commenced within three years from the commission of the offence, unless the treason consists of a design. assassination of the Sovereign (3 & 8 Will. III. c. 31).

early every system of Criminal Law, except our own, the principle of prescription is adopted. According to the Roman Law, no crime could be prosecuted more than twenty years after its commission, and there were shorter periods of prescription in certain cases. According to the French Penal Code, the period is fixed at ten years for crimes, three years for delicts, and one year for misdemeanours (Arts. 467, 468, and 469).

The absence of a rule of prescription in our Criminal Law is due altogether to a rigorous application of the maxim, "nulla lege novum juris创 creatur."

No time bars the King in seeking for a remedy against his subjects. The moral aspect of the question had apparently nothing to do with the matter, for we find that in the cases of appeals there was a strict limit of a year and a day, within which the suit should be instituted.

Again, the right of pardon as a prerogative of the Crown took its origin historically in the fact that the King was supposed to be injured by a crime, and could therefore waive his remedy. There was no right of pardon vested in the Crown in the case of an appeal. "On an indictment which is at the suit of the King," says Blackstone (e), "the King may pardon and remit the execution; on an appeal which is at the suit of a private subject, to make an abatement for the private wrong, the King can no more pardon it than he can remit the damages recovered on an action of battery." The right of pardoning in the case of an appeal rested with the prosecutor not with the King. "As the King by his pardon may frustrate an indictment, so the appellant by his release may discharge an appeal." (f).

The curious offence of compounding a felony in our Law appears also to have originated in the system of Royal prosecutions. If a man forsook to prosecute a thief, upon being restored his own goods again he is in the eye of the law guilty of a criminal offence, punishable by fine and imprisonment, though few would consider him guilty of any moral delinquency. It is no offence to compound a misdemeanor; and such

(e) Commentaries, ch. 316. (f) Ibid.
a course is frequently actually encouraged by the judge before whom the case is being tried. But misdemeanours are of comparatively recent origin in our Criminal Law: felonies were the crimes first recognised, and being offenses against the King personally, to compound a felony was to prevent the King obtaining the redress to which he was entitled for the breach of his peace. Every loyal subject was bound to assist him in obtaining such redress. "To observe the commission of a felony without using any endeavours to apprehend the offender is a misprision" (1 Hale, P. O. 431), which was a wrong to the King, just in the same manner as misprision of treason or concealment of treasure-trove.

The doctrine of English Criminal Law, as regards the consent of the injured person to the act charged, probably arises in the same way. It is no defence to a prosecution for murder that the deceased agreed to take the risk of, or even consented to, his own death. Thus, if two men fight a duel, and one kill the other, he is guilty of murder; and it has been said that if two persons agree to assist each other in committing suicide, and one survives, he is guilty of murder (R. v. Dyson, N. & R. S29). The breach of the King's peace, not the wrong done to another person, is the gist of the crime. So, also, suicide was considered in the old law to be felony, and involved forfeiture of goods (Hawkins, P. C., chap. 27). Even in the case of an assault, if the act amounts to a breach of the peace, the consent of the person assaulted is no defence to the indictment.

"Whatever may be the effect of a consent in a suit between party and party, it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace, so as to bar a criminal prosecution. In other words, though a man may by his consent deter himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order" (per Hawkins, J., The Queen v. Conyn, 8 Q. B. D., at p. 553).
INDEX.

ÆTHELBERT:
  laws of, as to bodily injury, 80.

ALFRED:
  laws of, quoted, 68, 77, 81, 82, 89.

ANALYTICAL METHOD:
  disadvantages of, 4.
  main defect of, 4.

ANCIENT LAWS:
  not commands, but customs, 6.

ANGLO-SAXON LAW:
  history of, continuous, 78.
  origin of modern English Criminal Law in, 79.
  principle of retaliation recognized by, 80.
  system of pecuniary compensation in, 83.
  as to violation of king's "Mīn," 84.
  outrage recognized by, 85.
  system of frankpledge in, 90.

APPEALS:
  nature and history of, 88.
  Blackstone's account of, 88.
  instances of, in reign of Elizabeth and Charles I., 101.
  last instance of, 102.
  when abolished, 102.

ARBITRATION:
  Sir H. Maine's theory of origin of law in, 21.
  no traces of, in Hebrew Law, 48.
  origin of, in Irish Law, 27, 28.
Index.

ATTEMPTS:
how dealt with in Ancient Irish Law, 31.

AUSTIN:
his theory of law, 6.
— contrasted with historical view, 16.

AVENGER OF BLOOD:
his duty of exacting vengeance, 10, 43.

BLACKSTONE:
his commentary referred to, 86.
his account of appeals, 98, 103.

BOOK OF AIUILL:
account of, 18.
recognizes outlawry, 36.

BOOK OF LEGAIN:
story from, showing optional nature of Eric Fine, 25.

BUT:
nature of, according to Early English Law, 83.

BRACTON:
his "De Causa" referred to, 57, 86, 91.
his account of outlawry, 86.
— Frankas, 91.

BRETON LAWS:
value of, in study of Ancient Law, 9, 17.
chief authority of, 18.
— principal features of, 21, 22.
— punishment of homicide in, 22.
— theft in, 56.
— judicial functions of king, 32.
— violation of king's peace, 34.
— recognition of a "saction" in, 35.

BRITTON:
his account of prosecution by the King, 96.
— the right of appeal of felony, 99.

INDEX.

CANUTE:
laws of, as to murder, 80.

CAPITAL PUNISHMENT:
case of its absence in Roman Law, 66.

CHRISTIANITY:

CICERO:
his account of the acts of human capture, 60.
— the degradation of criminal trials at Rome, 76.

CITIES OF REFUGE:
institution of, 45.
protection of, when permitted, 46.

CODE MOULTEKA:
of the Turkish Empire, 50.

COKE (Law):
his definition of murder, 96.

COMPOSITION FOR CRIMES:
system of, in Anglo-Saxon Law, 81.

COMPOUNDING A FELONY:
why a crime? 105.

CONSENT:
of person injured to a crime, how for a defence, 106.

COUNTY COURTS:
origin of, among Anglo-Saxons, 15.
proclamation of sentence of outlawry in, 15, 86.

CRIMEN:
true meaning of term, 14.

CRIMES:
acts which became such in different legal systems, 15.

CRIMINAL LAW:
distinction between it and Penal Law, 1.
subject matter of, 2.
modern growth of, 3, 15.
slow development of, in Roman system, 57.
Index.

CROWN:
prosecution by, in criminal matters, origin of, 93.

CUSTOM:
force of, among uncivilized nations, 10.

DAMAGES:
measure of, according to Roman Penal Law, 62.
——— in Roman Law of contracts, 64.
——— according to English Law, 65.

DAMNUM INJURIA. Nature of action of, in Roman Law, 66.
the first true action of tort at Rome, 70.

DAUGHTERS:
right of inheritance of, among the Jews, 90.
lost of excommunication rights by marriage out of tribe, 91.

DAVIS (Sir John):
declaration of Eric Fine, 24.

DEATH fine:
Honor's reference to, 10.
presumptions of, in different countries, 11.
prohibition of, among the Jews, 41.

DECAPOLOGUE:
its characteristics, 41.

DECAPITATION:
the fate of blood, according to the Mahomedan Law, 54.

DELECTUS:
four classes of, in Roman Law, 95.

DEBEKOLZEBIA:
Book of, quoted, 44, 46, 47, 49, 50.

DOM: death fine according to Mahomedan Law, 52, 53.

DIRE FINE:
equivalent to Eric Fine, 96.

DISTRESS:
universal remedy in Breton Law, 21.

DOLUS:
meaning of term, in Roman Law, 62.

DU BOYS:
Histoire du Droit Criminal des Peuples Modernes, quoted, 62.

DURTHACH MAC UA LUGAIR:
the royal poet of Erin, 18.

EDWARD I.:
laws of, as to appeals and crown prosecutions, 99.

ENGLISH CRIMINAL LAW:
private vengeance prevailed in, formerly, 9.
onlawy still theoretically recognized by, 96.
distinguishing feature of modern, 99.
territorial limits of, 96.

ERIC FINE:
account of, in Ancient Irish Law, 22.
parallel to, in Roman Law, 98.
tried on relatives, by Breton Law, 29.

ETHERLEIGH:
laws of, quoted, 89.

EXODUS:
Book of, quoted, 44, 49, 60.

EWALD:
his history of Jerusalem, quoted, 41.
his antiquities of Israel, quoted, 43, 44, 50.

FAMILY:
origin of liability of, to pay Eric Fine, 29.
how released from this responsibility, 30.

FATHER OF THE CHILDREN OF TUBERN:
story of, 29.

FITZHERBERT'S ABREVIATION:
referred to, 6.

FAMILY PLEDGE:
account of system of, in Anglo-Saxon Law, 90.

FRENCH PENAL CODE:
rule as to prescription in, 105.
INDEX.

FUDHIR TENANTS:
position of, under Breton Law, 38.

FURTUM MANIFESTUM:
importance of, in history of Penal Law, 67.

GAIUS:
his Institutes quoted, 61, 66.

GERMAN LAW:
in ancient times, as to offenses, 78.

GLANTHILL:
his list of "Places of the Crown," 96.

GRACCHUS:
his attempted reforms in Criminal Law, 76.

HEBREW LAW:
non-progressive character of, 46.
leading idea of, 42.
as to murder, 43.
as to daughter marrying out of tribe, 31.
resort to cities of refuge, when allowed by, 43.
compensation for lesser injuries allowed by, 49.
private property recognized by, 49.
as to succession to property, 60.
as to theft, compared to Roman Law, 50.
as to parental rights, 51.

HENRY 1:
laws of, as to killing in revenge, 80.
laws of, as to punishment for murder, 84.

HISTORICAL METHOD:
advantages of, 8, 4.
errors to be avoided in, 7.

HOLMES (O. W.):
his Common Law referred to, 6, 7.

HOMER:
reference to death fine in Eliud of, 10.

INDEX.

HOMICIDE:
punishment of, according to XII Tables, 11.

In Breton Law, 22.

In Hebrew Law, 42.

In Mohammedan Law, 53.

In Roman Law, 72.

In Anglo-Saxon Law, 83.

HONOUR-RIOT:
in Ancient Irish Law, 23.
law of, for crime, 55.

ICELAND:
account of outlawry in, 14.

INA:
laws of, referred to, 6, 79, 83.

INDIAN SUCCESSION ACT:
its application to the Jews, 41.

INDICTMENT:
form of, as indicating its history, 94.

INJURIA:
definition of, according to Gaius, 61.

nature of action of, in Roman Law, 70.

ILBERT (MR. C. P.):
his article on Indian Codification quoted, 41.

INTENTION:
first for, under Breton Law, 32.

INTERNATIONAL LAW:
Comparison of, with Ancient Private Law, 34, 94.

IRELAND:
value of Breton Laws in study of history of, 17.

JEWES:
laws of, characteristics, 40.
tenacity of, as regards their ancient customs, 41.

JOSUH:
Book of, quoted, 49, 50.
JUDICIAL PROCEEDINGS:
- first steps in, 12.
- theory of, originally in Jewish Law, 44.
- first trace of, in Jewish Law, 46.

JURISPRUDENCE:
- disadvantages of the analytical method of studying, 4.

JUSTIMAN:
- institutes of, quoted, 68.

KING:
- judicial functions of, how far recognized by Braban Law, 27, 32.
- position of, in administration of Early Saxon Law, 82.
- origin of his jurisdiction in criminal matters, 89.

KING'S PEACE:
- technical use of term, origin of, 33.
- recognized in Braban Law, 34.
- real origin of royal jurisdiction in criminal matters, 94.

KORAN:
- provisions of, as to murder, 53.
- accidental homicide, 54.

LAUGHLIN:
- his Essays on Anglo-Saxon Law quoted, 70.

LECKY:

LEOSS CORNELIAN:
- real origin of Criminal Law at Rome, 57.
- de scenarii, 72.
- different opinions established by, 74.

LEXIS ACTIO SACRAMENTI:
- of Roman Law, 28.

LEVITICUS:
- Book of, quoted, 43.

LEX AQUILIA:
- as to injuries to property, 60.

LEX CALPURNIA DE REPETUNDIS:
- its importance in the History of Roman Criminal Law, 37, 74.

LEX SALICA:
- death thus recognized by, 11.

LIBEL:
- Roman Law of, 70.
- when a criminal offence, according to Modern English Law, 107.

LORD CAMPBELL'S ACT:
- provable quoted, 71.

MOHAMMEDAN LAW:
- as to death fines, 29.
- provisions of, as to crime generally, 51-53.
- punishment for theft by, 64.
- digest of, according to Isna, 54.

MAINE, Sir Henry:
- his Ancient Law referred to, 3, 37, 77, 89.
- Early Law and Custom, 13, 14, 78.
- Early History of Institutions, 14-36.

MALICE:
- meaning of, in English Criminal Law, 63.

MABBERTHORPE: STATUTE OF,
- referred to, 85.

MASTER:
- liability of, for negligence of his agent, origin, 4.

MOMMSEN:
- his History of Rome quoted, 57, 74, 78.

MOSAIC LEGISLATION:
- as regards murder, 44.
MOYLE:
- his account of private vengeance in Ancient Roman Law, 8.
- original meaning of term passa, 14.
- action of injury, 70.

MURDER (see Homicide).

NOXIA DEDITIO:
- origin of, in Roman Law, 6.
- traces of, in English Law, 6.

NOXAL ACTIONS:
- in Roman Law, origin of, 5.

NUMBERS:
- Book of, quoted, 42, 44, 48, 47, 63.

OBLIGA TIONES EX DELICTO:
- nature of, in Roman Law, 62-65.

OBLIGA TIONES QUASI EX DELICTO, 65.

ORTOLAN:
- his Histoire de la Legislation Romaine referred to, 60.

OUTLAWRY:
- the first punishment imposed by society, 13, 37.
- recognition of, in Breton Laws, 35.
- in Anglo-Saxon Laws, 86.
- Baron’s account of, 87.

PALGRAVE (Sir F.):
- his Rise and Progress of the English Commonwealth quoted, 95.

PARDON:
- right of, in case of appeal, 100.
- origin of king’s right of, in criminal matters, 105.

PATRICK (Sawyer):
- account of compilation of Smolins Mor by, 18, 19.

PRESCRIPTION:
- substituted for revenge, 10, 80.

PENAL ACTIONS:
- in English Law, 1.
- in Roman Law, 53.

PENAL LAW:
- distinction between it and Criminal Law, 1.
- systems of, compared, 7, 8.

PENAL LEGISLATION:
- primitive ideas as to, 30.

PENTATEUCH:
- his legal authority among the Jews at the present day, 42.

PERJURY:
- not a crime according to Roman Law, 59.

PHRASIA:
- law of, as to murder, 29, 33.

PLEAS OF THE CROWN:
- what were such originally, 96.

PLINY:
- his Natural History referred to, 90.

PONFA:
- original meaning of term, 14.

PULLING (Sir F.):
- his theory as to technical use of “King’s peace,” 53.

POSTE:
- his edition of Gaius referred to, 12, 67.

PRESNICT:
- violation of, forbidden by Breton Law, 34.
- analogy to this rule in Anglo-Saxon Law, 94.

PRESCRIPTION:
- absence of rule of, in English Criminal Law, 104.
- rule of, according to French Law, 105.
PRIVATE REVENGE:
- earliest method of punishment, 8.
- prevalence of, among the Jews, 33.
- prevalence of, among the Anglo-Saxons, 30.
- survival of system of, in Modern English Criminal Law, 82.
- prohibited by Statute of Marlborough (see Retaliation), 83.

QUAESTORS PARICIDII:
- established by the XII. Tables, 72.
- importance of their appointment, 73.

RELIGION:
- its influence on law, 40.

RESTITUTION:
- the role in all early societies, 3.
- account of, in the Norman Law, 19.
- how far recognized in Roman Law, 28, 61.
- enjoined by Hebrew Law, 42.
- allowed by the Koran, 62.
- how regulated by Early German Law, 79.

RICHARDS:
- his introduction to the Broken Laws quoted, 17, 22, 24, 32.

ROBEY:
- action for, in Roman Law, 66.
- —— why instituted, 70.

ROMAN LAW:
- penal actions of, 5.
- —— compared with Hebrew Law, 50.
- slow development of action of crime, in, 56.
- non-religious character of, 69.
- measure of damages in, 64.
- history of actions of theft in, 86.
- analogy to English Law in case of theft, 66.
- severity of, as to debt, 69.
- of homicide, 72.
- causes of slow development of, Criminal Law in, 75.

ROYAL JUSTICE:
- grants of, in English Law, 35.
- origin of, in English Law, 35.

SAGA OF GISHI THE OUTLAW:
- quoted, in reference to outlawry, 14.

SAMUEL:
- story of widow of Tekoa quoted from Book of, 43.

SANCTUARY:
- the right of, according to Hebrew Law, 45.

SAXON LAW (see ANGLO-SAXON LAW).

SEMITE RACES:
- their tendency of ancient customs, 42.

SENCHUS MOR:
- account of, 48.
- character of its contents, 60.

SINS:
- how far punished as such, by Roman and English Criminal Law, respectively, 49, 76.
- punishment of, by Anglo-Saxon Law, 89.

SLAVES:
- origin of master's liability for act of, 6.

SLAVERY:
- influence of, in retarding the growth of Criminal Law at Rome, 77.

SOVEREIGN (see KAIN).

STALFORD:
- his Plate of the Crown referred to, 100.

STEPHEN (Sir J. FREEMAN):
- his History of Criminal Law referred to, 28, 34, 35.
- Digest of ditto, 7.
SUCCESSION:
  law of, among Jews of Adon, 41.
  ——— in Hebrew Law, generally, 50.

SULLA:
  his legislation on criminal matters, 57, 58.
  ———— general account of, 74.

THEFT:
  punishment of, how regulated by Roman Law, 12, 66.
  ———— how regulated by Ancient Irish Law, 31.
  ———— how regulated by Hebrew Law, 50.
  comparison of Roman and English Law of, 84.

TORT:
  distinction between, and crime, 37.
  different view of Ancient and Modern Law respecting, 60.

TRADITION:
  its influence on the development of Mohammedan Law, 52.

TRIAL:
  origin of, in Hebrew Law, 47.
  (See Judicial Investigation.)

TRIBE:
  liability of, for acts of its members, 50.

TRIBAL ASSEMBLY:
  fixing of sums by, 12.

TURKISH PENAL CODE:
  provisions of, as to theft, 54.
  ———— as to murder, 52.

TWELVE TABLES:
  provisions of, regarding homicide, 11, 74.
  ———— regarding bodily injuries, 26.
  general character of, 59, 60.
  establishment of Quodamora Perićidii by, 72.

VENGEANCE OF BLOOD:
  among the Jews, 49.

VICARIOUS LIABILITY:
  origin of, 8.

WAGER OF BATTLE:
  nature of, 66.
  when accused was deprived of his right to, 100.

WED:
  nature of, under Anglo-Saxon Law, 85.

WEREGELD:
  cause of disappearance of, in England, 80.

WIFE:
  nature of, according to Anglo-Saxon Law, 83.

WITNESSES:
  two necessary according to Hebrew Law, 47.

THE END.