following period, of the wide class of villani.[1] We shall see that the lawyers of later days will sometimes attempt to apply to them the Roman law of slavery, and ideas and rules based on personal servitude will live long beside ideas and rules based on prædial serfdom. But the clear conceptions of the Roman law could not be applied to an agricultural community organized on a feudal basis. Still less could they be applied to a community in which the royal power will for many purposes regard the serf as its subject, under the same laws, and liable to perform duties similar to those of the free man.

§ 2. Criminal Law

I shall deal firstly with the substantive law, and secondly with the principles of liability.

The Substantive Law

We cannot use the term criminal law in a technical sense in the Anglo-Saxon period. A primitive system of law has no technical terms. It has rules more or less vague, and terms corresponding thereto, which will, if the law has a continuous history, become the technical rules, and give rise to the technical terms of later days. In this period we have not yet arrived at the distinction between the law of crime and the law of tort; far less have we arrived at the leading distinctions of the later criminal law—felony, treason, and misdemeanour. Even when we have attained to these technical distinctions the criminal law will retain some traces of its origin in a very primitive society, and many traces of the processes by which these distinctions have been evolved.

Physical force is the natural method of redressing wrongs, and, when men are grouped in small families or communities, this leads naturally to the blood feud.[2] A step forward is made when recourse to a court appears as an alternative to physical force. But recourse to a court is an innovation disliked and with difficulty followed—regarded, in fact, much as some of us regard the submission of international disputes to arbitration. The court has little coercive authority. Primitive man is like the civilized state. He does not see that the court has any right to exercise authority unless he has agreed to submit to its decisions.[3]

We see many survivals of these ideas in the Anglo-Saxon codes. One of the laws of Alfred regulates the conditions under

[1] Below 264-265; vol. iii. 491 seqq.; cp. Vinogradoff, English Society 465-468.
[2] P. and M. ii 448, 449; Essays in Anglo-Saxon Law 263, 264.
[3] Sohm, Procedure of the Salic Law (tr. Thévenin) 105, 106, 115-119.

which the feud may be prosecuted.[1] One of the laws of Edmund regulates the manner in which the Witan shall appease the feud.[2] The laws of Cnut show that the feud was still prosecuted.[3] Some codes of tribal custom show that the obligation to prosecute the feud might be so burdensome that it might be better to withdraw from one's kin.[4]

As soon as society begins to become more settled some method must be found of stopping the interminable feuds to which an unrestrained recourse to physical force obviously leads. The Anglo-Saxon codes contain rules which define the occasions upon which physical force may be used. If a man be slain the slayer must show that his victim was attacking his kin or his lord, or that he was wronging his wife, mother, sister, or daughter,[5] or that he was in the act of carrying off stolen property,[6] or that he was resisting capture.[7] At the latter part of this period even the plea of self-defence is hardly allowed.[8] If a wrongdoer is not caught in the act he must be brought before a court. The laws of Ine impose a penalty if revenge is taken before justice is demanded.[9]

The most obvious method of putting a stop to the feud is to persuade the injured man or the relatives of the deceased to accept some pecuniary compensation. Just as in Roman law,[10] this compensation was at first voluntary.[11] If the injured man did not choose to accept the compensation (*bot*), if the relatives of the deceased did not choose to accept the *wer* of their slain relative,

[1] Alfred § 42, "That the man who knows his foe to be homesitting fight not before he demand justice of him. If he have such power that he can beset his foe, and besiege him within, let him keep him within for vii days, and attack him not if he will remain within. And then, after vii days, if he will surrender, and deliver up his weapons, let him be kept safe for xxx days, and let notice of him be given to his kinsmen and his friends. . . . In like manner also, if a man come upon his foe, and he did not know him before to be homestaying, if he be willing to deliver up his weapons, let him be kept for xxx days, and let notice of him be given to his friends; if he will not deliver up his weapons, then he may attack him."

[2] Edmund (Secular) c. 7; ibid. c. 1 there is an attempt to prevent a man's friends from joining in the feud.

[3] Cnut (Ecclesiastical) 5.

[4] Salic Law lx; Seebohm, Tribal Custom in Anglo-Saxon Law 134; for the passage in the Leg. Henr. 88. 13 which seems to lay down the same rule for England, see above 36 n. 7.

[5] Alfred § 42, "We also declare that with his lord a man may fight 'orwige' (i.e. without penalty) if any one attack the lord; thus may the lord fight for his man. After the same wise a man may fight with his born kinsman, if a man attack him wrongfully, except against his lord. . . . And a man may fight 'orwige,' if he find another with his lawful wife within closed doors . . . or with his daughter, sister, or mother;" Leg. Henr. 82. 7-9.

[6] Athelstan i 1; Leg. Henr. 57. 4. [7] Ine 12, 21, 35. [8] Below 51.

[9] Ine 9, 35, 73; Leg. Henr. 57. 4, "Si cum aliquo inventum sit unde culpatus sit, ibi necesse est causam tractari, et ibi purgetur vel ibi sordidetur."

[10] Gaius Instit. iii 189; Just. Instit. iv 4, 7; Girard, Droit Romain 396.

[11] Æthelbert c. 65.

the feud would be pursued. The wer is at first simply an alternative to the feud. But when we first get evidence as to Anglo-Saxon law this stage has passed.[1] Pecuniary compensation is, as a rule, obligatory. The laws of Æthelbert[2] are almost entirely taken up by a tariff of compensations payable for various offences. The tariff for injuries is very minute; and it varies in all cases with the rank of the injured person.[3] At the latter part of the Anglo-Saxon period we meet with two other payments to which an injury might give rise. The *fightwite* was due to a lord possessing soc over a place where a wrong was done.[4] The *man bote* was the payment due to a lord whose man had been slain.[5] It is clear that these are later developments due to the growth of dependency and of private jurisdiction.

Throughout the Anglo-Saxon laws we meet with these tariffs.[6] The bot and the wer dominate the code. We cannot understand either the amount of the wergild or the method of its payment unless we remember that it took the place of the feud, and that the feud was always in the background to be resorted to if the money was not paid. "Buy off the spear or bear it," ran the English proverb. Just as the kindred, paternal and maternal, would have been liable to prosecute the feud, so they paid or shared the wergild in the proportion generally of two-thirds and one-third respectively. Its payment and receipt was in the nature of a treaty between opposing clans.[7] The laws of Henry I. contain the significant advice that in paying the wergild it is better to make peace with all the relatives together than with each singly.[8] We have seen that in some of the continental codes liability to prosecute the feud might occasion a withdrawal from the

[1] A passage from the Frosta-thing laws of Scandinavia, cited Seebohm, Tribal Custom, etc., illustrates well these two periods, "Here begins and is told that which to most is dark, and yet many had need to know . . . how to divide the fixed bots if they are adjudged, for it is now more the custom to fix the bots, how many marks of gold shall be paid on account of him who was slain, and the cause of that is that many know not what the lawful bot is, and though they know it few will now abide by it. But the Frostra-thing book divides the lawful bots according to his birth and rank, and not those bots which they that sit in courts and make terms of peace put too high or too low;" for a survival of these old ideas see Tait, Mediæval Manchester 86, 87.

[2] §§ 3-90.

[3] Leg. Henr. 76, "Si homo occidatur sicut natus erit persolvatur."

[4] Ed. Conf. c. xii; Leg. Henr. 80. 6.

[5] Ibid 70; Chadwick, op. cit. 123-124.

[6] Alfred c. 47 seqq.; Wergilds, Thorpe i 187-191; Leg. Henr. 92-94.

[7] Seebohm, Tribal Custom, etc. 17, 43 (Welsh), 77 (Irish); Leg. Henr. 76. 6; below 91.

[8] Leg. Henr. 88. 17, "Et in omni weregildo melius est ut parentes homicide pacem simul faciant quam singillatim." For more detailed rules see ibid 76. 1 and 5; Ed. Conf. c. xii; see Dasent, Burnt Njal i clxviii, clxx, for the formula of the Icelandic reconciliation. For a late instance of such a composition of the year 1208 see Select Pleas of the Crown (S.S.) no. 102.

kindred.[1] The liability to pay the wer might produce the same result.[2] Just as there could be no feud within the kindred so no wer was payable if one kinsman slew another.[3]

If the compensation were not paid, the injured man or his kin might in former days have prosecuted the feud. In later days the defaulter was outside the law, and as a wild beast could be pursued and slain.[4] The decree of outlawry remained for many centuries the ultimate remedy of the state. But we shall see that with the growth of a more ordered society decrees of outlawry ceased to be so freely issued.[5] Many steps must intervene before this final step is taken. To withdraw the state's protection from the individual and to declare war against him is the only course open to a rude society, and in the infancy of the state it is not necessarily efficacious. The increasing organization of the state gives it other means of constraint, and renders this course so efficacious that, in fairness to the individual, it is only used when all other means have failed.

It is this system of bot and wer, resting upon the blood feud and upon outlawry, which is the groundwork of the Anglo-Saxon criminal law. In Domesday Book and in the laws of Henry I. we see it as distinctly as in the dooms of Æthelbert.[6] But though these ideas are the groundwork, they are not the whole of the Anglo-Saxon criminal law. We find there traces of ideas still more archaic. We find also more civilized ideas which, at the end of the period, are obtaining a greater definiteness and importance.

The older ideas.

Occasionally we see in survivals traces of the idea that the tribe must wipe out all memory of an offence by destroying not only the criminal, but also his property.[7] We see, too, in some of the Anglo-Saxon laws traces of an allied idea—the idea of the noxal surrender.[8] The guilty thing must be given up; and it is only if the owner declines to give it up that he can be made liable. The idea that guilt attaches to the thing by which wrong has

[1] Above 36, 44. [2] Lex Salica lviii; Seebohm, Tribal Custom, etc., 140-147.

[3] Ibid 63 (Beowulf), 176 (Alamannic laws), 242 (Scandinavian law); Leg. Henr. 75. 5, "Qui aliquem de parentibus suis occidit, dignis apud Deum pœnitentiæ fructibus emendet."

[4] Athelstan i 2; Ethelred i 4; Essays in Anglo-Saxon Law 271. Cp. the Salic Law lviii.

[5] P. and M. ii 448; vol. iii 604-606. [6] Ibid ii 454-456; D.B. i 262 b.

[7] For "house destruction" as a penalty for an offence against a community see Borough Customs (S.S.), ii, xxxv-xxxvii; and for an early form of this notion see ibid i 30, Customs of Archinfield (1086).

[8] Ine §§ 42, 74; Alfred § 24, "If a neat wound a man let the neat be delivered up or compensated for." There are similar provisions in the Ripuarian and Salic laws, Seebohm, Tribal Custom, etc. 471; Borough Customs (S.S.) ii, xxxix. lx.

been done lingered on in our criminal law till the nineteenth century. Till 1846 the instrument which by its motion directly caused death was forfeit to the crown as a deodand.[1] For a long period there are traces in the law of the idea that damage done by dogs or wild animals kept in captivity could be compensated by giving up the animal, and that the liability only lasted so long as the owner retained his ownership of the offending beast;[2] and it is this principle which governs the earliest law as to the liability of masters for the wrongs of their dependents.[3]

We can see also traces of the *lex talionis*—"an eye for an eye." It appears in a grotesque form in the laws of Henry I.[4] But sometimes the Anglo-Saxon codes represent the primitive ideas of the Old Testament rather than the primitive ideas of the Teutonic race.[5]

The more civilized ideas.

From the earliest period at which we meet the German tribes we find that wrong must be atoned, not merely by *bot* or compensation to the injured man, but also by a *wite* to the king, or other person having authority, or the community.[6] In the *wite* we can see the germ of the idea that wrong is not simply the affair of the injured individual—an idea which is the condition precedent to the growth of a criminal law. A wrong is regarded as the breach of the "*grith*" or "*frith*" or "*mund*" of the king, of a community, of a person responsible for the preservation of order, of the person in whose house the wrong has been done.[7] The idea is that a wrong, if committed within the area which can be said to be under the protection of such a person, injures that person.[8] It is an idea common to many primitive codes. To this idea we must look for one of the origins of what will

[1] P. and M. ii 471, 472; Hales v. Petit (1563) Plowden at p. 260; Holmes, Common Law 24-26; 9, 10 Victoria c. 62; for cases in which the principle has been applied to the rolling stock of railways in cases of railway accidents see Webb, Local Government ii 75 n. 3.

[2] Holmes, Common Law 22, 23; May v. Burdett (1846), 9 Q.B. 101.

[3] Wigmore, Responsibility for Tortious Acts, H.L.R. vii 330-331; Laws of Ine § 74; the more severe principle that payment must also be made occurs in the Laws of Hlotheare and Eadric cc. 1 and 2.

[4] Leg. Henr. 90. 7, "Si homo cadat ab arbore vel quolibet mechanico super aliquem, ut inde moriatur vel debilitetur; si certificare valeat, quod amplius non potuit, antiquis institucionibus habeatur innoxius; vel si quis obstinata mente, contra omnium estimacionem, vindicare vel weram exigere presumpserit, si placet, ascendat, et illum similiter obruat."

[5] Alfred's Dooms c. 19.

[6] Tacitus, Germania c. 12, "Pars multæ regi vel civitati, pars ipsi qui vindicatur vel propinquis ejus exsolvitur;" Chadwick, op. cit. 127-133.

[7] Pollock, Oxford Lectures, the King's Peace; Seebohm, Tribal Custom, etc. 349; Chadwick, op. cit. 115-126, 131-133.

[8] Ibid op. cit. 117.

become, with the growth of royal justice, an environment as necessary and as natural as the air we breathe—the King's Peace. In this period the king's peace has many competitors. Its extent can be accurately measured. It is only on certain occasions, at certain times, or if specially conferred, that a wrong will be a breach of the king's peace.[1] Until a much later period it will die with the king.[2]

Another cause which contributed to the extension of the idea of the king's peace and to the growth of a criminal law is the increase in the number of offences which could not be compensated with money. Even in the earliest period such offences existed. They may then have been the offences which especially offended the moral or religious sense of a warlike community.[3] The introduction of Christianity, and the growing organization of the state, increased the number of these offences, and altered the principle upon which they were based. We can see these later elements, and perhaps an echo of the sentiments described by Tacitus, in Alfred's legislation as to treachery to a lord—legislation which is one of the germs of our law of treason.[4] At the end of the period they comprised also *murdrum* or secret homicide, robbery, coining, theft of property over the value of twelve pence, rape, arson, aggravated assault, forcible entry.[5] And, with the feeling that certain offences are thus unemendable, it came to be thought that such offences should be dealt with by the king.[6] They are a contempt (*overseunessa*) of the king. This idea obviously makes for an extension of the conception of the king's peace, because it tends to emancipate it from the somewhat circumscribed geographical area to which the ideas based upon "grith" or "mund" tended to confine it. We shall see that, in the following period, this idea that a contempt of the

[1] Leg. Henr. 10. 1, 2; 12. 1; 79. 3, 4; P. and M. ii 452.

[2] A.-S. Chron. s.a. 1135, "The king died on the following day after St. Andrew's mass day in Normandy: then there was tribulation soon in the land, for every man that could forthwith robbed another."

[3] Tacitus, Germania c. 12, "Distinctio pœnarum ex delicto. Proditores et transfugas arboribus suspendunt; ignavos et imbelles et corpore infames cœno et pallude, injecta insuper crate mergunt."

[4] Alfred's Dooms (Thorpe i 59), "They then ordained, out of that mercy which Christ had taught, that secular lords, with their leave, might without sin take for almost every misdeed, for the first offence, the money bot which they then ordained; except in cases of treason against a lord, to which they dared not assign any mercy, because God Almighty adjudged none to them that despised him, nor did Christ the son of God adjudge any to him who sold him to death." Cp. Theodore's Pœnitential 1, iv 5 (H. and S. iii 180), if a person kills a bishop or a priest, "regis judicium est de eo."

[5] Leg. Henr. 10. 1; Athelstan i 6, iv 6, v; Ethelred iii 8, 16, iv 5, v 24, 30, vi 28, 37, 39, viii 6; Cnut (Secular) 8, 21, 53, 58, 65, 75.

[6] Leg. Henr. 9. 1, "Qualitas causarum multa est: emendabilium et non emendabilium, et quæ solum pertinent ad jus regium;" see also n. 4.

king's command is an offence against him, which gives jurisdiction to his court, was used both to extend the civil and the criminal jurisdiction of his court, and to introduce the most characteristic of the features of the procedure of the common law—the procedure by royal writ.[1]

Perhaps we may see a third cause which made for the extension of this idea in the breaking up of the solidarity of the kindred. If a man has no kindred, if for any cause a man renounced his kindred, the state steps in and takes their place.[2] The manumitted slave had no kindred.[3] The man of a conquering race might well have no kindred. The king will take the place of kindred. To him some share of the money due must be paid. He will protect them; and in the interests of justice he will hold liable the district where the deed was done.[4] The later presentment of Englishry[5] would thus appear to be founded partially on primitive ideas. The payment made to the king may originally have represented the payment due to the maternal kin.[6]

The more definite organization of the state is a fourth cause which leads to the growth of a criminal law. Neglect of public duties is a definite offence. In the laws of Æthelbert neglect of the fryd occupies almost the first place.[7] The laws of Athelstan, Edmund, and Ethelred penalize those who neglect to keep their men in borh.[8] The laws of Edgar and Cnut fine those who neglect their police duties.[9] In the laws of Henry I. neglect to attend the county court is a contempt of the king.[10] With the great increase in the power of the state after the Norman Conquest we shall see a great and a sudden development of this branch of the law.

The influence of the church accentuated all these tendencies, because, as we have seen, it helped forward the development of the state, it sanctified the royal office, it taught men that the king was the representative of law and order, the maintainer of justice and equity.[11] At the same time the sanctuary afforded by the church mitigated the hardness of a law which was not yet

[1] Below 172.
[2] Seebohm, Tribal Custom, etc. 134.
[3] Kemble, Saxons in England 222.
[4] Leg. Henr. 75. 6, 7, "Si Francigena qui parentes non habeat in murdro perimatur, habeat precium natalis ejus qui murdrum abarnaverit; rex de hundreto ubi invenietur xl marc argenti; nisi intra vii dies reddatur malefactor justiciæ regis, et talis de eo justicia fieri . . . ad patrem vero non ad matrem generacionis consideracio dirigatur; omnibus enim Francigenis et alienigenis debet esse rex pro cognacione et advocato, si penitus alium non habeat."
[5] Vol. i 11, 85; vol. iii 314-315.
[6] Seebohm, Tribal Custom, etc. 322, 323.
[7] Æthelbert c. 2.
[8] Athelstan c. 20; Edmund (Concilium Culintonense) vii; Ethelred i.
[9] Edgar (Secular) 6; Cnut (Secular) 20, 25.
[10] Leg. Henr. 53. 1.
[11] Above 23.

strong enough to be lenient.[1] But all through this period we must allow that from one point of view ecclesiastical influences introduced confusion. The line between offences which should be dealt with as crimes and offences against morality was ill drawn. In England at this period the union between church and state was, as we have seen, very close—closer, perhaps, than abroad. But in England as elsewhere rulers often considered that they were under as strict an obligation to promote morality and religion as to keep the peace.[2] The result is that much of the legislation of the Anglo-Saxon kings is vague and unpractical. More was attempted than would be possible even to a modern state with all the organization and all the orderly instincts of an old civilization. In reading the Anglo-Saxon dooms we are constantly confronted with that contrast between the ideal aimed at and the result accomplished which is present throughout mediæval history.

We see, therefore, some of the beginnings of a criminal law. Wrongdoing is not only the affair of the person wronged. The state is beginning to assert its right to interfere in its own interests. But, as we have seen, all the powers of the state were tending at the end of this period to pass into private hands. The result is a confused mass of many principles old and new. The feud, bot, wer, wite, breach of the king's peace, unemendable wrongs—all find their places in the Anglo-Saxon codes. Rank, time, and place must all be considered before the various sums due from a wrongdoer can be calculated. Whether from this confused mass of rules a criminal law will emerge will depend largely on the personality of those who rule the land.

The Principles of Liability[3]

In the main the principles upon which liability for wrongdoing is based are the logical outcome of a system dominated by the ideas of the blood feud and of bot and wer. When the main object of the law is to suppress the blood feud by securing

[1] Alfred 5, "We also ordain to every church which has been hallowed by a bishop this frith: if a fahman (i.e. one who has exposed himself to the feud) flee to or reach one, that for seven days no one drag him out;" Ine 5; Athelstan iii 6; Edmund 2; Ethelred vii 5; vol. iii 303-307.

[2] Fustel de Coulanges, Les Transformations des Royautés, 533, "Ce que nos sociétés modernes appellent l'ordre, et qui est une chose purement matérielle et exclusivement politique, apparaît à ces générations sous la forme de paix et concorde, c'est-à-dire comme chose morale, et d'ordre à la fois politique et religieuse. Ce gouvernement se donnait pour mission, non pas seulement d'accorder les intérêts humains et de mettre l'ordre matériel dans la société, mais encore d'améliorer les âmes et de faire prévaloir la vertu."

[3] See on the whole subject Wigmore, Responsibility for Tortious Acts, H.L.R. vii 315, 383, 441.

compensation to the injured person or his kin, it is to the feelings of the injured person or his kin that attention will be directed, rather than to the conduct of the wrongdoer. We must have regard to the rank of the injured person or his kin, because, if his or their rank is distinguished, a larger bribe is needed to keep them quiet. This is one of the reasons why the wer varied so greatly. In the later codes the same feeling leads to giving the lord a compensation for the death of his man in addition to a wer to his kin. It leads also, in the interest of the state, to the increase in the wer of officials.[1]

The main principle of the earlier law is that an act causing physical damage must, in the interests of peace, be paid for. It is only in a few exceptional cases that such an act need not be paid for.[2] Even if the act is accidental,[3] even if it is necessary for self-defence,[4] compensation must be paid. "Qui peccat inscienter scienter emendet," say the laws of Henry I., and they say it more than once.[5] A man *acts* at his peril. It is otherwise where he is purely passive and the act is the act of the person injured.[6] These ideas dominate the Anglo-Saxon law. It is true that in certain cases a man appears to be made liable for carelessly doing acts which are obviously dangerous.[7] In one passage in the laws of Alfred there is almost an attempt to establish a standard of diligence.[8] But we must be careful how we read modern ideas into ancient rules. Many of these cases which seem to put liability upon the ground of negligence really illustrate the dominant conception of Anglo-Saxon law—the

[1] Seebohm, Tribal Custom, etc. 134. [2] Above 44.

[3] Leg. Henr. 90. 8, "Si alicujus manus aberraverit, ut alium occidere volens, alium perimat, nichilominus eum solvat;" ibid 75. 3; 90. 1.

[4] Ibid 80. 7; 87. 6, "Si quis . . . monstrare possit, quod assaliatus fuerit, quod coactus et se defendente fecerit homicidium, dignis satisfacionibus hoc monstrare liceat, et rectum inde sit; quia sicut prediximus, multis modis potest homo weram suam forisfacere."

[5] Ibid 88. 6; 90. 11.

[6] Ibid 88. 4, "Si quis in defensione sua lanceam vel gladium vel arma quælibet contra hostem suum extendat, et illa dira nocendi cupiditate cecatus irruat, sibi imputet quicquid habeat;" cp. Brunner, Rechtsgeschichte ii 549, cited H.L.R. vii 317, 318.

[7] Ibid 90. 4, "Quod si in sepem animal inpalaverit, et ipse sepes mentonalis (reaching to a man's chin) non fuerit, dominus sepis interfeccionis seu debilitatis reus judicetur." Cp. Æthelbert c. 7, "If the king's ambiht smith (official smith) or leadrinc (outrider) slay a man let him pay a *medume leodgild*." Seebohm, Tribal Custom 458, 459, thinks that this means that he will only pay a half wergild because he is engaged in a specially dangerous trade; but cp. Chadwick, op. cit. 108, 109, who thinks that "medume" means simply "ordinary."

[8] § 36, "If a man have a spear over his shoulder, and any man stake himself upon it, that he pay the wer without the wite . . . if he be accused of wilfulness in the deed let him clear himself according to the wite; and with that let the wite abate. And let this be, if the point be three fingers higher than the hindmost part of the shaft; if they both be on a level, the point and hindmost part of the shaft, be that without danger."

idea that a man acts at his peril. One of the commonest of these cases is the liability for the negligent custody of arms. Another is the negligent custody of animals.[1] If a man leaves his arms about, and another knocks them over so that they kill or hurt a man, the owner is liable; if a man lends his horse to another, and ill befalls the borrower, the lender is liable;[2] if a man asks another to accompany him, and the other is attacked by his enemies while so accompanying him, the man who made the request is liable.[3] It is clear that such liability is founded not upon negligence, but upon an act causing damage. The liability so imposed stretches far beyond the proximate consequence of any supposed negligence. The law is regarding not the culpability of the actor, but the feelings of the injured person whose sufferings may be traced ultimately to the act. This idea is well illustrated by the oath which a defendant must swear if he would escape liability. He must swear that he has done nothing whereby the person slain was "nearer to death or further from life."[4] It is practically only when a person slain has himself alone to thank, when the defendant has been purely passive, that liability will not be imputed.[5] These ideas lived long in the law. In the time of Bracton the man accused of homicide must make the same allegation as is required in the laws of Henry I.;[6] and till 1828 the man who committed homicide by misadventure or in self-defence did not in theory escape unpunished.[7]

We have seen that there are some traces in Anglo-Saxon law of noxal liability. The owner of a thing through which harm has been done is guilty unless he will surrender it.[8] In some cases this rule may have helped to strengthen the idea that a man is liable for any act to which damage can be traced. If a man's sword has been used to kill, the owner is liable, either as the owner of a guilty thing, or because, by allowing it out of his control, he has done an act which will prevent him from saying that he has done nothing whereby the deceased was

[1] Ine c. 42; Alfred c. 24. [2] Leg. Henr. 87. 1, 2; 90. 11. [3] Ibid 88. 9.

[4] Ibid 90. 11, "In quibus non potest homo legitime jurare, quod per eum non fuerit aliquis vitæ remotior, morti propinquior, digne componat, sicut factum sit;" P. and M. ii 468, 469; we see traces of these ideas in the Borough Customs, Borough Customs (S.S.) ii xl; Miss Bateson there says, "Ancient law could not discuss the question of intent because it had not the machinery wherewith to accomplish enquiry . . . offences which were not criminal could be made the ground of an appeal of homicide if they could be put forward as conducing, however indirectly, to a death;" cp. ibid lxxxiv, at Dublin, if one took another's servant without warning, he was liable in life and limb for any death that took place in the late master's household owing to the want of a servant.

[5] Above 51. [6] f. 141.

[7] 9 George IV. c. 31 § 10; below 259, 358-359. [8] Above 46.

nearer to death and further from life.[1] On whichever ground we put the liability, we are far from the modern ideas which ground liability upon some moral deficiency actually existing or presumed to exist.

The liability of one who has slain another in self-defence or by misadventure, the deodand, the remoteness of damage for which a man may be liable, show clearly upon what a primitive foundation are based the ideas as to liability to be found in the Anglo-Saxon codes. They were beginning to look archaic in the laws of Henry I.; but they still lived on. Some of them reappear in Blackstone's Commentaries; and even then they have a few more years of life. We can want no better illustration of the continuity of English law.

These ideas were, as I have said, beginning to look archaic even in the laws of Henry I.[2] We can see that some attention was being paid to the culpability of the delinquent. This was largely due to the influence of the church; and, as we have seen, the boundary line between church and state, between morals and law, was not clearly drawn. The ecclesiastical laws and the pœnitentiaries naturally looked primarily at the state of mind of the individual sinner. They were concerned to save the souls of sinners, not to stay the blood feud.[3] "The sense of individualism in Christianity was opposed to the solidarity and joint responsibility of the kindred."[4] In the laws of Cnut it is said that, if stolen property were found in a man's house, it was at one time thought that his infant child was "equally guilty as if it had discretion"—"but henceforth I most strenuously forbid it, and also very many things that are very hateful to God."[5] It is recognized in the laws of Henry I. that the lunatic and the infant cannot be held liable, though it does not follow from this that those responsible for their custody will entirely escape.[6] The man whose conduct has only remotely caused death or injury is liable, it is true; but "in hiis et similibus, ubi homo aliud

[1] We seem to see a confusion of the two ideas in Leg. Henr. 87. 2. The writer is considering the question of the liability for damage done by the arms of a man while out of his custody. The owner, to escape liability, must swear that he knew nothing of the act, and should see to it that "ea non recipiat antequam in omni calumpnia munda sint."

[2] In these laws we get the sentence "reum non facit nisi mens rea" (5. 28). This sentence is applied to perjury. As Maitland says (P. and M. ii 475), "that any one should ever have thought of charging with perjury one who swore what he believed to be true, this will give us another glimpse into ancient law."

[3] Theodore's Pœnitential, I. iv (H. and S. iii 180), killing "odii medietatione," "per jussionem domini," "per iram, casu, per poculum, per rixam" are distinguished. Cp. Bede's Pœnitential iv (H. and S. iii 330).

[4] Seebohm, Tribal Custom, etc. 385. For a similar development in Burgundian and Wisigothic law see ibid 123-128.

[5] Laws of Cnut § 77; Thorpe i 419-420. [6] Leg. Henr. 59. 20; 78. 6, 7.

intendit et aliud evenit, *ubi opus accusatur non voluntas*, venialem pocius emendacionem, et honorificenciam judices statuant, sicut acciderit."[1] The man who has killed by misadventure or in self-defence is liable to pay the wer, but his wrong is emendable. So unjust was this strict rule as to liability beginning to appear that the writer feels that he must explain it. "Every outlaw," he says, "is brother to another; and he who answers a fool according to his folly is like unto him."[2] Such a rationalistic explanation shows that the rule is beginning to look archaic. Even in this period it is possible that the rigour of the old rules was reconciled with more advanced ideas by the help of the king's power to pardon.[3] The fact that in some of these cases no *wite* was due shows that the more modern ideas of criminal law, which the wite represents, were based rather upon the culpability of the wrongdoer than upon the feelings of the injured party.[4]

When in the following period these more advanced ideas gain greater influence, when all serious crime comes to be regarded as an offence against the king, the royal power to pardon will help to reconcile the new ideas with the old. The king, it is true, will not be able to prevent the injured man or his kin from prosecuting an appeal for bot or wer upon the old principles. But when bot and wer become obsolete, when crimes which call for punishment become differentiated from torts for which damages can be obtained, the ideas which ground criminal liability upon moral delinquency will have freer play—so much free play, in fact, as is consistent with political expediency. Some of these ideas will also be extended to civil liability. The old ideas will live on in the law, just as trial by battle and compurgation lived on, simply because they are obsolete.

§ 3. The Law of Property

All systems of law must recognise the distinction between movable and immovable property. The physical difference necessitates at all times a difference in legal treatment; but the extent and the details of this difference in legal treatment will depend upon many different accidents of time and place. In a pastoral society it is the cattle rather than the land which possess value In a primitive agricultural society, where population is sparse and land is plentiful, the land brought

[1] Leg. Henr. 90. 11. [2] Ibid 84.
[3] Ine c. 36; Edgar ii 7; Edward the Confessor xviii.
[4] Alfred § 36; above 51 n. 8; Leg. Henr. 88. 3.