testimony to the feudal and personal character of the parliamentary contests of the later Middle Ages.[1] At the same time it is fair to remark that it would then have hardly been possible to settle this question satisfactorily, since the problem of sovereignty, to which it is intimately related, had not as yet been even envisaged.[2] As late as the end of the seventeenth century the English common law was the only body of law in Europe which had effected a reconciliation between the dogma of the personal superiority of the king to the law, and the dogma that the royal prerogative is subject to the law. But, as that reconciliation was then only effected after a rebellion and a revolution, it was obviously a feat too difficult for the childhood of the common law.

The Pleas of the Crown.

The machinery by which the central government brings the control of the law to bear upon all the subordinate officials and organs of government is gradually becoming perfected. Cases turning upon the exercise of this jurisdiction still form a large part of the pleas of the crown.[3] From the point of view of the development of the common law they form a most important part. We shall see that it was this control which did more than anything else to insure in the local courts—communal or franchise—a regularity of practice and procedure, and, consequently, a uniformity in the law which they administered.[4] In one way or another—by repeated amercements, by proceedings in error, by prerogative writs—their acts and their doings were constantly being tried by the tests of reasonableness and justice applied by the royal court. It is, perhaps, in that branch of the pleas of the crown which will contain our criminal law that we can see the most important developments. The procedure by way of appeal and the procedure by way of indictment still exist side by side.[5] But the former mode of procedure is gradually becoming merely subsidiary to the latter. The popularity of the writ de odio et atia had already shown that the procedure by way of appeal was liable to abuse.[6] The procedure by way of trial by battle, though still in use,[7] was rapidly becoming archaic. During this and the following century the judges continued to discourage appeals.[8] They seemed to regard them as valuable chiefly

[1] Below 414 and n. 6.
[2] Figgis, Divine Right of Kings (1st ed.) 32-33.
[3] Above 197; Gloucester Pleas pl. 12, 35, 44; Northumberland Assize Rolls (Surt. Soc.) 296.
[4] Below 396-400.
[5] Above 197-198.
[6] Vol. i 57; Bracton f. 123.
[7] Gloucester Pleas pl. 87, 73.
[8] Above 198; cp. Gloucester Pleas pl. 20; the judges use the jury to help them in deciding points connected with appeals, ibid pl. 20, 76; Eyre of Kent 1313-1314 (S.S.) i 111; cp. ibid 117 *per* Spigurnel *arg.*; below 360.

because they supplied hints as to the existence of crimes which "pro pace observanda" should be enquired into by a jury.[1] It was coming to be felt more and more strongly that the suppression of crime was not the affair only of the injured individual or his kin.[2] In 1226 it was held that an agreement between a criminal and the relatives of a murdered man, even though it was cemented by a marriage, could not avail to save the murderer from an indictment, a trial by a jury, and a sentence of death.[3] It is clear that, as the appeal of the private accuser sinks into the background and the indictment is substituted for it, the state is gradually taking the place of the injured individual, and we are thus approaching to the modern conception of a crime. The appeal, therefore, is gradually decaying as a mode of criminal prosecution; and it was not allowed to be used as a mode of procedure in any but serious criminal cases. The facts must disclose the commission of a felony. Bracton tells us that an appeal will not lie for small injuries.[4] Such matters should be prosecuted by a civil action.[5] It will be in the action of trespass that litigants will eventually obtain a mode of getting compensation for wrongs under the degree of felony; and, by the insertion of the allegation that the king's peace has been broken, it will always be possible to remove such actions to the king's court.[6] But we shall see that it is not till the end of this period that this action becomes popular.[7] We can see, however, that the growth of a strictly criminal procedure and the discouragement of appeals were creating a need for such an action.

The king's court continues to draw rapidly to itself jurisdiction over the more serious offences. We see the offence of treason—as yet very elastic and by no means clearly defined.[8] We see that the term "felony" is already being applied to the more serious offences.[9] But outside these boundaries there is still a large tract of debatable land, as yet imperfectly surveyed,

[1] Gloucester Pleas pl. 106, 343; Northumberland Assize Rolls (Surt. Soc.) 92, 320, 321; Eyre of Kent 1313-1314 (S.S.) i 118 *per* Bereford, C.J.; ibid 124; below 360 n. 7.

[2] Bracton f. 142b, "Videtur etiam quod appellatus non solum tenetur appellanti, imo domino regi, sicut videri poterit per verba appelli, ut si dicatur, talis appellat talem, quod nequiter et in felonia contra pacem domini regis, etc., per quod videri poterit manifeste quod appellatus non solum tenetur appellanti, imo domino regi."

[3] Gloucester Pleas pl. 101; Northumberland Assize Rolls (Surt. Soc.) 117.

[4] f. 144, "Declinatur appellum propter parvitatem plagæ;" f. 145b; Gloucester Pleas pl. 20, 99.

[5] Bracton's Note Book cases 85, 287, 314, 843, 1250—these cases generally arise out of some dispute as to proprietary rights, which, in former times, might have been the subject of an appeal, above 197-198.

[6] Bracton f. 154b, "Cognoscere quidem (vicecomes) potest de medletis, plagis, verberibus, et consimilibus pro defectu dominorum, nisi querens adjiciat de pace domini regis infracta."

[7] Below 364. [8] Below 360, 449-451. [9] Below 357-358.

within the limits of which the king's peace, the peace of the sheriff, and the peace of the lord still reign together.[1] Bracton and the rolls of the king's court can still tell us of old customs and archaic words. We may read of hamsoken,[2] of the thief hand-habbende, and back-berende,[3] and of the old summary procedure in cases where the criminal is caught in the act,[4] of the laws of Athelstan[5] and of Edward the Confessor,[6] of the custom that the owner of stolen goods who catches the thief with the goods upon him acts as his own executioner.[7] Childwyte and blodwyte were still known in Kent;[8] and in Herefordshire the murderer could still compound with the relatives of his victim.[9] Under the name of *actio furti*, or appeal of larceny, we can still see the old process by which a thief can be pursued and goods vindicated.[10]

It is the rules relating to the principles of criminal liability that show the greatest advance in this period. We have seen that even in Anglo-Saxon times the criminal law had been slightly influenced by the higher ethical standards of Christianity.[11] The rise and growth of the canon law tended to increase this influence by giving to it a greater precision. Maitland has pointed out that Bracton's treatment of homicide has been influenced by a treatise upon the canon law written by Bernard of Pavia.[12] But, as we have seen, the problem to be solved by the canonist is different from the problem to be solved by the criminal lawyer. The first must say under what circumstances moral guilt is imputable; the second must say whether some definite offence has been committed. Now a consideration of what guilt

[1] Bracton ff. 154b, 155; for the house-peace see Borough Customs (S.S.) ii xxv, xxvi.

[2] Ibid f. 144b.

[3] Ibid ff. 150b, 154b.

[4] Ibid ff. 150b, 137—a man captured, "super mortuum cum cultello cruentato, morte dedicere non poterit, et hæc est constitutio antiqua, in quo casu non est opus alia probacione;" Bracton's Note Book case 138; Borough Customs (S.S.) ii xxi, xxii

[5] f. 147; above 20.

[6] f. 124b.

[7] Northumberland Assize Rolls (Surt. Soc.) 70, "Consuetudo comitatus talis est, quod quam cito aliquis capiatur cum manu opere, statim decollatur, et ipse qui sequitur pro catallis ab ipso depridatis habebit catalla sua pro ipso decollando;" cp. Borough Customs (S.S.) i 73, 74; ii xxxiv; above 101-102.

[8] Bracton's Note Book case 753, "Si aliquis eorum habuerit puerum in fornicacione dabit childwyte, et si aliquis uxoratus habuerit puerum in adulterio erit in misericordia Dom. Reg. de toto mobili suo, et si aliquis eorum effudit sanguinem dabit blodwyte."

[9] Ibid case 1474, "Set dicunt quod talis est consuetudo in Urchinefeldia quod de tali morte, licet aliquis convictus sit, bene potest concordiam facere cum parentibus;" cp. Borough Customs (S.S.) ii xxxiii, xlii, xliii.

[10] Bracton ff. 151, 151b; above 111-114; vol. iii 319-320.

[11] Above 53-54.

[12] Bracton and Azo (S.S.) App.; thus Bracton (f. 120b) follows his model in his mode of treatment, dividing homicide into "corporal" and "spiritual," and saying that it may be committed "facto, præcepto, consilio, et defensione."

is morally imputable will lead us to make refined distinctions—to attach, for instance, some slight guilt to the man who kills by mischance, though we should not dream of holding him to be guilty of murder. From this point of view the doctrines of the canonists may, as Maitland has said, have tended to maintain the rigour of the older system which made a man responsible for acts even though only remotely connected with the damage caused.[1] And in those days to hold a man responsible for killing was to hold him liable for murder.[2] The kinds of homicide and the degrees of punishment are not yet nicely adjusted. But, from another point of view, the insistence upon the element of moral guilt, which, in the eyes of the canonist, varied the penance to be imposed, helped to overthrow the older system. Bracton lays stress upon this element of moral guilt. He would hold that homicide is not committed unless the will to injure be present, for it is the will and the intent which create the offence;[3] and thus neither the infant nor the madman can be held criminally liable.[4] Ideas such as these will prevent us from holding a man liable for those very remote consequences of his acts which the older system sanctioned. It may be that only inevitable necessity, only accident in doing a lawful act in which there is no element of negligence, will excuse; for it is only in these cases that there is no moral guilt.[5] But the idea that moral guilt of some kind must exist begins to introduce a new phraseology, using the language of morals, which tends to discredit the older rules. The older rules, it is true, still live on. "The man who commits homicide by misadventure or in self-defence deserves but needs a pardon."[6] The deodand[7] was thought unreasonable by Bracton;[8] but it had many centuries of life before it. In spite, however, of these survivals the new phraseology which uses the language of morals will play a great part in the development of the criminal law. Moral distinctions will supply a rough test which will help us to draw a wavering line between the spheres of crime and tort, and between crimes of varying degrees of gravity.

[1] Above 51-52. [2] Bracton and Azo (S.S.) 235.

[3] f. 136b, "Crimen (homicidii) non contrahitur, nisi voluntas nocendi intercedat, et voluntas et propositum distinguunt maleficium, et furtum omnino non committitur sine affectu furandi."

[4] Ibid, "Cum alterum innocentia consilii tueatur, et alterum facti imbecillitas excusat."

[5] Bracton ff. 120b, 121; P. and M. ii 476, 477; vol. iii 377-382.

[6] P. and M. ii 477-482; Bracton ff. 132b, 134; below 359; vol. iii 312-313.

[7] Above 47.

[8] f. 136b, "Recte enim loquendo, res firma sicut domus vel arbor radicata, quandoque, non dant causam nec occasionem, sed facit ille qui se stulte gerit, nec equus multotiens."