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A SKETCH OF THE EARLY DEVELOPMENT OF
ENGLISH CRIMINAL LAW AS DISPLAYED
IN ANGLO-SAXON LAW.¹

HAMPTON L. CARSON.²

We have been so long accustomed in the administration of criminal justice to the essential features of a prosecution instituted and conducted by a public officer in behalf of the public peace and safety and a defence by counsel upon all matters of fact as well as of law, under the control of a judge substantially indifferent to everything except to the voice of legal justice, that we are apt to overlook the slow and painful steps by which this happy consummation of procedure was reached.

The origin of the doctrine of a King's peace, with a right on the part of the sovereign to control the prosecution in the place of a revengeful private prosecutor taking the matter of punishment into his own hands, is far distant from our own day. Criminal justice, as now known, has been slowly evolved from various substitutes for private war.^o Among all the northern tribes the gratification of private revenge was one of the strongest passions. Families and clans were bound by particular laws of honor to resent affronts or injuries offered to any of their members. Retaliation naturally led to bloody feuds, and although the dread of private vengeance acted at times as a partial restraint upon crimes of violence, yet the general condition was one of social anarchy. The efforts to remedy this were crude and halting, and more than twelve hundred years elapsed before England rid herself of scenes of terror and blood in the enforcement of the criminal law.

A German scholar, whose name is not given, but whose remark is substantially stated by Mr. Laughlin in an essay upon The Anglo-Saxon Legal Procedure, has aptly illustrated the distinction between a modern suit, whether civil or criminal, and a proceeding, if such it could be called, of the primitive German period, by comparing the former to a syllogism, in which the body of judicial rules is the

¹A paper read at the Seventh Annual Meeting of the American Institute of Criminal Law and Criminology, held at Salt Lake City, Utah, on August 16th, 1915, in joint session with the American Bar Association.

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major, and the declaration of facts the minor premise, while the latter, lacking all the structural exactness of a syllogism, consisted simply of a stern demand by the injured party upon the defendant for compensation or for blood. Following out this idea, by pushing our analysis so far as is practicable in the light of all that has been done within the last seventy years by the great German, Russian, English, French and American students of the Teutonic origin of Continental and English institutions, we find that under the most archaic German procedure the underlying principle was one of self-help, or, to put it concisely, of self-redress. The injured party took the law into his own hands. He was his own judge and his own avenger. He seized upon the body or the goods of the offender without the intervention of a court. In helping himself to his own share of justice, his sole conception of the wrong done was that it involved himself alone, and hence in dealing with it he assumed and exercised judicial powers in his own case, and was his own executioner. In what we would call the punishment of a crime, or a resort to the civil procedure of distress, he acted without restraint. He was both judge and warrior; for in doing that which we moderns would call levying execution, he exacted blood for blood by virtue of the inherently sovereign power vested in himself as an individual. Siegel has said that the archaic German procedure was essentially and radically characterized by the absolute independence by which the individual enforced his right. Each individual was the protector of his own rights by whatever power he possessed, and was in the same manner the avenger of his own wrongs. Both in civil distress and vengeance for injuries, this was a period of summary action by the individual. Vengeance, arising from the doctrine of self-help, as Schmid has pointed out, was the manifestation of this summary execution in the sphere of criminal law, and could be defined as killing, or an assault with arms resulting in death or wounds, and presupposing a wrong for which retaliation was made. This was the *first stage*.

It is very apparent how much this is to be distinguished from the criminal law of today. Individual right and power have now given way to judicial jurisdiction. Today every breach of the peace is a transgression against the sovereign, whether king, emperor or people. The sovereign power alone can prosecute criminals. The individual or civil side is left to the law of torts. The criminal side is in the interest of the public. No one can presume of his own authority to exact vengeance from those who have wronged him. The sovereign of today—whatever be the form of government—stands in bold contrast to the individual among the ancient Teutons; and the

prosecution instituted today at the instance of the king is strongly contrasted to the "prosecution by appeal" at the instance of a private party, which long existed in English law—a remnant of the earliest polity of the Anglo-Saxons acting on the customs of their Teutonic ancestry.

In tracing 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 rulers; and, in the course of time, the assumption by the king of what Mr. Allen, in his *Inquiry into the Rise and Growth of the Royal Prerogative*, calls the "ideal attributes of absolute perfection, absolute immortality and legal ubiquity," we reach a *second stage*, which I may state as follows:

In the gradual development and organization of the state, vengeance while still abroad as a crude method of executing law, was not allowed unless clearly used by the individual as an instrument of law. Wilda has shown, in discussing the sources of northern law as contrasted to those of Rome, that vengeance in time was used in the sense of an enmity which caused the injured party to seize, bind and bring his foe before a court; or to pursue his suit unrelentingly until outlawry was imposed. Folk-courts were established, and it became a rule, at first more honored in the breach than in the observance, that vengeance must be authorized by previous permission of the court; or, if it preceded the judgment, it must be justified afterwards before the same tribunal; vengeance, therefore, could not legally be an act of pure free will, since the avenger could be brought to answer for his deed, and show reason why he slew his foe. Sir Henry Maine, in his *Early History of Institutions*, declares that "there is much reason, in fact, for thinking that, in the earliest times and before the full development of that kingly authority which has lent so much vigor to the arm of the law in most Aryan communities * * * courts of justice existed less for the purpose of doing right universally than for the purpose of supplying an alternative to the violent redress of wrong."

Then came a *third stage*; the establishment of a relationship between the fact of accusation and the *form* of procedure. It became a regular characteristic of Teutonic law to insist rigorously upon the strict observance of forms and a minute attention to external observances. In this we may discern the germs of the comparatively modern doctrines as to what present day critics denounce as the technicalities of indictments. The free judgment of the court was limited within such narrow bounds as were set by the forms and maxims

of the old procedure. Thus the original independence of the individual in the sphere of self-help became gradually controlled by the severe constraint of procedural forms. It was in no modern sense a trial. It did not involve a judgment based either on opinion or even conscience. It aimed at no analysis of law. It was simply a preliminary to the further prosecution of the case. The introduction of the matter lay in the hands of the injured party, and he was required to summon his opponent with prescribed formalities. He declared the subject-matter of his complaint in solemn words directed not to the court, but to the defendant; and on the defendant's answer depended the further procedure. The burden of proof, as we would call it, was put either upon the plaintiff or the defendant according to the method of statement; most frequently upon the defendant. There was no presumption of innocence in his behalf, such as was known in later days. A thief, an adulterer or a murderer caught in the act was exposed to vengeance. Side by side with the effort to control private vengeance stood the fact of feud; or rather a condition of feud as an existing fact. I put it this way, because there was no right of feud. Feud was outside of the law and in opposition to it, springing inevitably out of passions common to untamed human nature. A wrong done to a man was a wrong done to his kinsmen, which his kinsmen were prompt to resent. If A killed B, B's kinsmen sought to avenge his death. The kinsmen of A rallied to his support and a private war arose which could be strictly called feud, a condition of warfare perilous to the state and destructive to life and peace, but nevertheless in consonance to the wild spirit of freedom. So strongly was this spirit supported by family pride, that when an accuser brought an offender to court, each brought with him such numbers as to ensure a bloody conflict in the effort to enforce or to resist a judgment of outlawry. The feud, as chronicled by Tacitus, held its position even in England long after the Norman Conquest.

A fourth stage was reached in the effort to limit vengeance and its consequent feuds by the creation of a system of compositions for injuries by pecuniary compensation, and its extension over cases of killing. In support of this it was provided that not until compensation had been withheld could vengeance be taken. Full opportunity was to be given to the wrongdoer to make compensation before he could be handed over to outlawry. Thus, two opposing currents met before commingling; the one, vengeance and feud out of harmony with the peace of the state, yet allowed to exist *sub-modo*; the other, an effort to legalize an act of private vengeance by turning the wild-

est of passions to the support of law. This was done by extending the support of the court to the act of the accuser in bringing his accusation to a judicial hearing before attempting private vengeance. If the accused, as was frequently the case, could not discharge or release himself he was pronounced an outlaw. He was a peace-breaker, who was an enemy of the king and all of the king's friends, *inimicus regis et omnium amicorum ejus*. He was put out of the pale of the king's peace and of the folk-peace. No one could harbor or support him. This, if done, was in itself a crime. He was to be hunted down and slain like a wolf. In all of this we have none of the elements of a conception of punishment as such. It was simply the pursuit of an *ex parte* proceeding based on a breach of the peace to the bitter end of outlawry in an effort to maintain the peace. It substituted the state for the kinsmen of the accuser in the pursuit of vengeance. It put the state, as Maurer says, in an attitude of war in regard to the offender, as it would have done against a foreign enemy.

Then came a *fifth stage*, which was a notable advance: the classification of offenses deserving of outlawry, and those which did not call for such severity, and we at once perceive the germ of the much later distinction between felonies and misdemeanors. Wilda calls the graver crimes, such as killing, arson, house-breaking and theft of cattle, involving decided breaches of the peace, *causae majores*, and those which were accidental, or free from premeditation or wilfulness, *causae minores*. The number of offenses falling within each category would vary from time to time, but the principle was there. The slighter crimes could always be compounded for money; some of the graver ones also, not excluding killing, except where especially aggravated. And thus arose generally the distinction between offenses which were expiable or emendable, and those which were inexpiable, unpurchasable or unemendable. And here we perceive the germ of the rule that a felony could not be compounded.

Then came a *sixth stage*. Particularly disgraceful or heinous crimes, such as treason to a king or to a lord, desertion from service, secret murder, followed by flight or the hiding of the body; adultery, where the offender was caught *in flagrante delicto*, and wholesale stealing and driving off of cattle, called for treatment to which neither outlawry nor compositions applied. This led to the true idea of punishments. The state appeared not as a belligerent against a member of society, but as a castigator, and the unlimited right of the community to hunt down and slay the offender was converted into the duty to catch and deliver the offender to the state for

punishment by the state. Not unless he resisted capture or escaped from custody could he be slain with impunity.

Bearing in mind the features of these successive stages, and observing particularly that the earliest positive knowledge extant in regard to Anglo-Saxon law dates from about 600 A. D., when the dooms of Æthelbert of Kent were written, we can fix the date of the Anglo-Saxon criminal law, so far as we know it and can trace it, as occurring during the period of transition between the third and the fourth stages just described, a period marked on the Continent by the codes of the Ripuarian Franks, the Burgundians, the Visigoths and the Lombards.³

³From the foregoing review of the results of the labors of the profound modern students of our institutions, which were quite unknown to the learning of Coke, Hale, Blackstone, Reeves and Crabb, we are entirely prepared to agree with the remark of Mr. Laughlin that "to justly estimate the Anglo-Saxon law, appeal must be made to the German law of the Continent and to other German codes; and the primitive German procedure must be kept clearly in view." We are also prepared to agree with him in the further remark that "Thorpe is, of course, in error when he says that the original institutes of the English were 'little beyond that portion of the laws of Æthelbert which contains the penalties for wounds and other bodily injuries.'" In fact, I find, on reading Mr. Thorpe's introduction to his edition of "Ancient Laws and Institutes of England," published by the Record Commissioners in 1840, that his statement is not to be taken too strictly, for what he said as just quoted was by way of an argumentative disposal of the question as he put it: "When did the earlier of these institutes originate? for if brought by our forefathers from their German home we ought apparently give to them credit for a degree of civilization beyond that usually ascribed to them." It is quite clear, I think, that the credit can be safely extended without detracting from the value belonging to the conclusion by Thorpe that "what we now possess of Anglo-Saxon law is but a portion of what once existed, and, therefore, without claim to the title *The Anglo-Saxon Laws*, which has usually been bestowed on it. Of the laws and kindred documents no longer extant, the names of some, together with fragments worked into other codes, have been transmitted to us, such as the Mercian Laws of Offa, from which Alfred, in framing his body of laws, selected such portions as were suitable to his purpose; the South Anglian Laws, the Fridgewritu," etc. Upon this he shrewdly and significantly remarks: "We ought not, perhaps, to suppose that among our Saxon forefathers, any more than among ourselves, there ever existed a complete *Corpus Juris Anglici*, but that theirs was also a Customary or Common Law; and that what we still possess, and also the portion that has perished, were either the records of decisions to serve as precedents for the future, or enactments passed in the Witena-gemots for the repeal, confirmation, amendment or completion of the law as it then stood." Mr. Allen, who was one of the Commissioners of the Public Records of the Kingdom to assist Mr. Thorpe, and who had the assistance of the distinguished constitutional historian, Mr. Hallam, and the profoundly learned lawyer, Mr. Baron Parke, suggested in an independent work the division of Anglo-Saxon laws into customary or common law; statutes; and *domar* or adjudged cases or precedents. This is applying the classifications of the old Common Law writers, such as Coke, Hale and Blackstone, to the rude materials of the Anglo-Saxon age, but yet it seems to be justified, for a glance at the laws themselves, particularly those of the Kentish Kings, discloses support to the classification in the preambles to many of the Statutes, and in numerous cases, the occurrence of which no human foresight could ever have contemplated, while the entire absence of definitions of crimes, but the free use of terms as if clearly and commonly understood, argues the pre-existence of a customary law. All reasonable doubt, however, will be dissipated

We now proceed to consider the substantive Anglo-Saxon Criminal Law.

A comparison of the Laws or Dooms of the twelve kings from Æthelbert to Edward the Confessor, adopted by the monarchs with the aid of bishops and other wise men, reveals a close resemblance, many being in large part re-enactments, with occasional additions or variations, mixed with moral precepts, the Ten Commandments, extracts from Exodus and the Acts of the Apostles. This was the manner, especially, in which Alfred the Great improved upon the work of his predecessors. Taken as a body, the dooms covered a period of nearly five hundred years, and present a strange medley of acts and scenes without order or arrangement. Slayings, stealings, house-breakings, drinkings, bone-bitings, nose-piercings, shoulder-lamings, toe-cuttings, eye-punchings, abduction of maidens, selling of daughters to servitude, buying new wives in place of faithless ones at the expense of the paramours as a compensation to outraged husbands, oppression of strangers, neglect of baptisms and offerings to devils, whether occurring in churches, dwelling-houses, markets, ale-houses, or at open graves, are so mixed in the texts with fines, *botes* to the injured party, *wites* to the king, or sometimes both, atonements and admonitions as to make analysis difficult. By careful attention, however, to the section headings of the Record Commissioners and their very learned notes, by turning to the chapter headings of Sir Matthew Hale's analytical History of the Pleas of the Crown, and by

in the mind of anyone who will read understandingly and wittingly the Introduction to Pollock and Maitland's History of English Law, where, after stating that they ought to say that in their opinion the law which prevailed in England before the coming of the Normans was in the main pure Germanic law, they come to the solid ground of known history, and find that English laws have been formed in the main from a source of Teutonic customs, with some additions of matter, and considerable additions or modifications of form received directly or indirectly from the Roman system. This they think, however, was at a much later date; hence they take, first, the Germanic material of English laws, and begin with the customs and institutions brought in by the English Conquest of Britain, or rather by the series of conquests which led to the foundation of the English Kingdom. This they call "the prime stock," but they assert that it by no means accounts for the whole of the Germanic elements. A distinct Scandinavian strain came in with the Danish invasions and was secured by the short period of Danish sovereignty. To some extent, but probably to no great extent, the Norman law and practice of William the Conqueror may have included similar matter.

In a most interesting work, written from a totally different point of view, but based upon a minute examination of the ancient records, Mr. Pike, in his History of Crime in England, declares: "there is no doubt that the settlers who crossed the German Ocean, and gave the name of England to Southern Britain, brought with them certain customs which, with little modification, constituted for many centuries the criminal law of the country. * * * It seems impossible that the rules for detecting and punishing crime which the Normans found in England, and from which a portion of our modern law has painfully emerged, can have come to us from any but a Teutonic source."

confining one's attention to the portions of the text which relate to Anglo-Saxon times, Coke's Third Institute by comparison being quite disorderly, by picking one's way through Reeves and Crabb in their histories, and, lastly, by reading and re-reading the refreshing chapters of Stephen, Pollock and Maitland, and Holdsworth, it is possible to segregate the Saxon matter from the Norman, although it is impossible in dealing with so dark and distant an age to be exact in chronology. Then, too, we must constantly bear in mind the warning of both Maitland and of Holdsworth that we must rid ourselves of modern notions as to the meaning of words and be careful not to read modern ideas into ancient rules.

Thus, in what we would call offenses against the government, the great and lasting definition of treason not being reached until the reign of Edward III (A. D. 1352, Stat. 25th Edw. III), we find Alfred the Great calling them: "Plotting against the king's life," "Plotting against a lord," "Fighting in the king's house," "Breaking the king's peace." False coinage was known as "false moneying," and false coiners were known as "moneyers," the terms being used without definitions, but as if well understood. In offenses against public justice we have the germ of the crime of perjury referred to as "a false compurgation." Offenses against the church were "heathenism," "the worship of idols, of the sun, the moon, fire or rivers, water-wells, stones or forest trees," as well as witchcraft and "making offerings to devils." Adultery, incest and fornication were dealt with ecclesiastically, though mentioned in secular statutes. Offenses against individuals, as we would call them, consisted of homicide, wounds, rape and assaults and batteries. Definitions were assumed. The distinction between murder and manslaughter, as Hale knew and defined it, was unknown. At the same time there were very just and intelligent discriminations between homicides that were wilful, justifiable and accidental. A killing that was secret, or treacherous, or in violation of fealty, or accompanied by a concealment of the corpse or by sorcery or sacrilege was of an aggravated type. A killing of an outlaw, or an adulterer taken *in flagrante delicto*, or in defense of one's lord or a kinsman, or the killing of a thief, provided a declaration of the fact and the circumstances was at once made, was justifiable. A killing resulting from the felling of timber, or from a man staking himself upon a spear carried carelessly on the shoulder of another, or from fright or violence in dangerous games and exercises, was viewed as accidental.

Of what we would call offenses against the person, resulting from batteries, there were thirty-six instances given with particularity

from head wounds, hair wounds, ear wounds, eye wounds, nose wounds, limb wounds, hand wounds, nail wounds, feet wounds, belly wounds, and rib wounds to the rupture of great sinews, small sinews, or of the tendons of the neck. Rape was forbidden, whether of adults, infants or slaves.

Offenses against property included house-breaking, house-burning, setting fire to woods, and the various forms of theft, robbing and stealing, cattle-taking being the commonest.

The consequences of most of these acts, aside from the features of feud and vengeance, upon which I have already dwelt sufficiently, were almost entirely pecuniary. Every man had his price or value according to his station in life, and every part of the body, however minute, had its value nicely adjusted to a scale or tariff of compensation. This was also true of property.

The *wergild* was the price or value of the man killed, and must be paid to his kinsmen; the *bote* was the compensation to the injured party for the wrong sustained; it might be due to the king if the injury affected him in his private capacity; the *wite* was the penalty or fine due to the king in his public capacity. Regarding these provisions as steps forward in support of the royal efforts to persuade men to resort to a court as an alternative to force, we readily perceive that the *wer* and the *bote* dominated the code. As Holdsworth says: "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." That the spear might be finally resorted to appears from the 42nd Section of Alfred's laws, regulating the conditions under which the feud might be prosecuted, "That the man who knows his foe to be homesitting fight not before he demands 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." This was followed by the law of Ine, the immediate successor of Alfred, which imposed a penalty if revenge was taken before justice was demanded. And thus the

stage was reached when compensation, at first optional, became obligatory. This system of compensation had a curious feature which developed in an unexpected but very human way. As soon as the criminal jurisdiction through the *wites*, or fines due to the crown, became a source of profitable revenue, the king granted to prelates and thegns manorial rights to fine and punish just as he would grant land. Canute, the Dane, finding that his jurisdiction was extending, asserted boldly that certain crimes and the profits of their administration belonged to him, and thus came the first list of what in later days were known as pleas of the crown.

There were certain acts, however, which defied restraint, and the Kings, instead of attempting coercion, wisely defined the occasions upon which physical force could be used. Alfred provided that if a man be slain, the slayer must show that his victim was attacking either himself, his kin, or his lord, or that he was wronging his wife, mother, sister or daughter. Athelstan, that he was in the act of carrying off stolen property, and Ine, that he was resisting capture under circumstances which made capture proper. The inference is plain that if the circumstances justified it, the execution might be summary. "It is," says Stephen, "a single step, but still a step, however short, from private war and blood feuds, when people are invested by law with the right of inflicting summary punishment on wrongdoers whose offenses injure them personally." We have heard much of late about "the law of nature," or "the unwritten law," from the lips of counsel who had forgotten, or who more probably did not know, what was contained in the Saxon dooms. A particular case of summary execution was the law of *Infangthef*. In the laws of Edward the Confessor, who was the last of the Saxon law givers, and whose code, being a summary of the work of his predecessors, earned for him the title of *Restitutor*, there is express recognition of a right which was centuries old even in his day—the right to slay a thief "handhaving," or, as later, taken "with the mainour," or, as we would say, "caught with the goods." Later it was converted into a franchise of the right to hang, and was made the subject of royal charters long before the Battle of Hastings, when the Norman conquered the Saxon, and existed even as late as the 13th century. The private gallows of a manor was an object so common as to excite no surprise. *Infangthef* was the right to hang a thief if taken within one's own house or territory, and *Utfangenethef*, wherever caught, provided in both instances the thief was taken in possession of the thing stolen. We have the authority of Mr. Pike for stating that the Lord set great value upon his privilege of holding his own Court, and not less upon

his privilege of hanging his own thieves. Even when the offender had committed a theft without the limits of the land held by his Lord, it seems to have been in some places an established custom that he was to be brought back and hanged upon the gallows which his Lord had provided for him. The cattle ranges of our own day will supply us with modern illustrations.

It is now in order to turn our attention to the Courts. We must divest ourselves of modern notions, and even of those which belonged to the days of the Normans. We must grope our way back to a time when jurisdiction was not established, when process, as we know it, was unknown; when methods of trial and rules of evidence did not exist. We must deal with legal protozoa. There were little assemblies of men held in the hundreds, and in the counties, and about the person of the King, which exercised judicial functions in dealing with deeds of violence; these were the germs from which, in later days, sprang the proud and orderly establishments of the English Judiciary. The judicial unit, so to speak, was the hundred Court, and the hundred was a sub-division of a county. The hundred Court was composed of the freemen of the hundred, presided over by the earldorman, the reeve, or other specially chosen head. A Court was sometimes attached to a manor, and exercised its functions by virtue of a royal grant or by custom, and exercised both criminal and civil jurisdiction. It was provided by ordinance of Edgar that the hundred Courts should be held every four weeks, and that poor and rich alike were entitled to have right done to them. The County Court was of greater importance and dignity, and was appointed to be held twice a year, and was presided over by the Sheriff of the County. Besides attending to larger business, it reviewed the acts of the hundred Courts, though we must be cautious about using the adjective appellate. Above them was the King, listening to the complaints of his subjects from whatever source arising. But it is to be remarked that Pollock and Maitland have twice emphasized the statement that the notion of all jurisdiction and public justice proceeding from the King did not belong to the Anglo-Saxon period. It is asserted by Asser, the annalist of Alfred the Great, that the King inquired into the correctness of the decisions of his judicial officers, and threatened them with removal for their ignorance or disregard of law. Baker, in his chronicle, attributes a stricter control to Edgar, the grandson of Alfred, in severely punishing his judges if found to be delinquents, and we are told in the *Mirror of Justices*, which Lord Coke calls "a very ancient and learned treatise of the laws and usages of this Kingdom," that Alfred hanged forty-four justices in a single year for having falsely

saved men guilty of death; for sentencing men who had been acquitted; for disregarding irregularities in jury service; for usurping jurisdiction; in short, who "had falsely hanged any man against law on any reasonable exception." I do not think that we can give credence to the tale, not alone because it has been discredited by such scholars as Maitland and Stephen, but because the offenses attributed to the Judges were in many particulars unknown to any condition of law prior to the reign of Edward I, and particularly because Jury Trials and jury service were unknown.

The only forms of Trials known to the Anglo-Saxon, if trials they could be called, were by Compurgation and the Ordeal. Compurgation, which was not peculiar to the Anglo-Saxons, but which reigned from Southern Italy to Scotland, can be traced, as the profound American scholar, Henry C. Lea, tells us in his work on Superstition and Force, to the principle of the unity of families. As the offender could summon his kindred to resist an armed attack of the injured party, so he took them to Court to defend him with their oaths. This was not a defense upon evidence based on knowledge of the facts; it was a denial by the accused in these words: "By the Lord, I am guiltless, both in deed and counsel of the charge of which N— accuses me." And the compurgators simply swore: "By the Lord, the oath is clean and unperjured which he hath sworn." This amounted to an acquittal. The principle survived in Wager of law, in an action of debt, which was not finally abolished until 1833 by the Sta. 3 and 4, Wm. IV, c. 42, 5, 13, and it still exists in the practice of summoning witnesses to good character upon the defense of a modern criminal trial.

Then followed the Ordeal. If it were not a first offense, or if the accused was unable to command the necessary number of compurgators; or if the compurgators were not of the necessary rank to overcome the lack of numbers, the appeal was made to God's judgment of fire or water. Of these judgments the ordeal of fire and hot iron was applied to noblemen, thanes and freemen, as being more honorable and easy; the ordeal of water was reserved for husbandmen or persons beneath the rank of freemen.

The rite was a religious one conducted by priests in a church and the intervention of Providence was assumed to be secured to the innocent. After three days of prayer and fasting, the accused plunged his naked hand, or his arm to the elbow if the offense was grave, into boiling water, and picked up a stone at the bottom of the vessel. The hand or arm was then bound in cloths, which were removed at the end of three days. If there were traces of scald, he was held to be

guilty, if none, then Heaven had worked a miracle to declare his innocence. In the cold water ordeal, the accused, after three days of prayer and fasting, was tied with his thumbs to his toes, and thrown into deep water. If he sank he was innocent; if he floated he was guilty. There were other forms, such as carrying of red-hot iron a distance of nine feet, or of walking with bare feet over red-hot ploughshares, and in the case of priests there was prescribed the swallowing of the *corsned*, or morsel of execration, which in the case of guilt would choke the accused through the paralyzing effect of fear upon the salivary glands, but the principle was the same, that God would work a miracle in behalf of innocence.

Punishment consisted of fines, death, mutilation or flogging. Imprisonment was unknown. As to fines, prices were set upon a man according to his rank. If he was killed, the fine was to be paid to his relations according to a tariff of compensation. If he was convicted of theft, he had to return the article or its value, and in some cases pay a fine to his lord or to the king. Most first offenses were punished by fine alone, but housebreaking, arson, open theft, secret murder and treason against a lord were by the laws of Alfred and Canute punished by death or mutilation. Upon a second conviction, every minor offense was followed by death or mutilation. The sentence in the case of death was "Let him be smitten so that his neck break"; in case of mutilation, "Let his hands be cut off, or his feet, or both, according as the deed may be. And if he have wrought yet greater wrong, then let his eyes be put out, and his nose and his ears and his upper lip be cut off, or let him be scalped." We read also of burnings and floggings. The distinction between felonies and misdemeanors, so much dwelt upon in later days, was unknown. In fact, the word felony was supposed by the learned Spelman to be of feudal origin, because for every felony a man forfeited his fee, although Lord Coke derived it from the Latin *fel*, gall or malignity, signifying that what was done was out of a malignant spirit. But these are far later-day refinements.

If we take a steady but comprehensive look at the phenomena of Anglo-Saxon law, arranged in groups according to their characteristic features, and assign each to its proper epoch in the various stages of successive development, we find that the original Teutonic doctrine of self-help or of private vengeance had passed in an appreciable though very incomplete degree into the control of the courts determining, primarily, the lawfulness of the intended act, and, secondarily, the formulæ by which justice might be sought, and, as a consequence, securing compensation for almost every wrong, in place

of impulsive bloodletting and savage acts. We find also judicial efforts—crude, barbaric and superstitious though they were—to settle controversies by the oaths of the parties and their friends, instead of by their spears and staves; and failing by human means to reach a conclusion, to call on high Heaven to work a miracle in behalf of innocence.

It is noticeable also that the work of the courts, in hundreds, in manors, in counties and in the presence of the king, was irregular, conflicting and decentralized. To bind subordinate tribunals, either to uniformity of action or to subjection to a central and final authority, was the task of far later times. The effort was not made, not simply because it would have failed, but because there was and could be no conception of its necessity. There was no king's peace in the sense of extending to all men and to every corner of the kingdom. There were certain limited and partial jurisdictions proclaiming peace, which centuries later became consolidated. There was the king's peace, the peace of the church, the peace of the sheriff, the peace of the lord, the peace of the household. The king's peace was not for all men, nor for all places. Originating in the special sanctity of the king's house, or the king's highway, or the king's presence, it extended its protection solely to the king's attendants and servants, and later to those whom he admitted to the same footing. The peace of the church extended to its own members in priestly office, or to its own sacred territory of buildings or manorial holdings, in which a hunted fugitive sought sanctuary. The peace of the sheriff as a county judge was based on the frank pledges by which each hundred and tithing sought to secure and to answer for the good conduct of its inhabitants. The peace of the lord in his manor was a reflection of that of the king, repeated in every barony. The peace of the household was personal and individual, and for every fight around his table atonement had to be to him. The time had not yet come for all these to coalesce and run into the notion that the king's peace would be general, exclusive, eternal and cover the land. It suggests to me the action of drops of quicksilver upon a table—little by little the smaller drops approach and become merged into the larger ones, until the largest one absorbs all the rest, but as yet the drops were separate and in many places far apart.

On the whole, it is clear that we cannot use the term criminal law in a technical sense in the Anglo-Saxon period. As Holdsworth says: "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." He adds: "Even when we have attained to these technical distinctions, the criminal law will retain some traces of the processes by which these distinctions have been evolved."

It has been the effort of this paper to give a concise and comprehensive account of these origins and processes in Anglo-Saxon days.