TEXT FLY IN THE BOOK

pages are missing

UNIVERSAL
LIBRARY

OU_162673

UNIVERSAL
LIBRARY

OSMANIA UNIVERSITY LIBRARY

Call No. 349.3/D 53 P Accession No. 32973

Author Diamond. A. S.

Title Primitive Law. 1950

This book should be returned on or before the date last marked below.

PRIMITIVE LAW

PRIMITIVE LAW

By

A. S. DIAMOND, M.A., LL.D.

BARRISTER-AT-LAW

WATTS & CO.

JOHNSON'S COURT, FLEET STREET, LONDON, E.C.4

First published October 1935

Second edition 1950

Printed in Great Britain by Phototype Ltd., London, E.C.4,
and published by C. A. Watts & Co. Ltd.,
5 & 6 Johnson's Court, Fleet Street, London, E.C.4

DEDICATED

TO THE MEMORY OF

MY WIFE

CONTENTS

PART I

INTRODUCTORY

CHAP.		PAGE
I.	THE WORK OF SIR HENRY MAINE	1
II.	SOURCES	5
III.	A SURVEY OF LEGAL HISTORY	8
IV.	THE CODE OF HAMMURABI	22
V.	THE ASSYRIAN LAWS	33
VI.	THE HITTITE CODE	39

PART II

LAW, MORALITY AND RELIGION

VII.	THE RELIGIOUS THEORY	49
VIII.	THE CODES AND THE RELIGIOUS THEORY	54
IX.	THE ANGLO-SAXON LAWS	62
X.	FALSE LAWS	71
XI.	THE PENTATEUCH	85
XII.	THE HEBREW CODE	102
XIII.	THE CODE OF MANU	126
XIV.	THE FRAGMENTS OF THE TWELVE TABLES	134
XV.	RELIGION AND THE PRIMITIVE LAW OF HOMICIDE	144
XVI.	PRIMITIVE LAW AND RELIGION IN MODERN TIMES	161

PART III

A HISTORY OF PRIMITIVE LAW

CHAP.		PAGE
XVII.	THE EVIDENCE FROM PRIMITIVE PEOPLES	173
XVIII.	BEFORE THE EVOLUTION OF COURTS	185
XIX.	THE ESTABLISHMENT OF COURTS	194
XX.	THE GROWTH OF THE EARLIEST LAW	202
XXI.	THE CODES	209
XXII.	MARRIAGE	219
XXIII.	INHERITANCE	235
XXIV.	PROPERTY	260
XXV.	CRIMINAL LAW	277
XXVI.	CIVIL INJURIES	301
XXVII.	CIVIL INJURIES (*continued*)	314
XXVIII.	THE CONSTITUTION OF LATER PRIMITIVE SOCIETY	331
XXIX.	TECHNICALITIES	340
XXX.	PROCEDURE AND THE ORDEAL	350
XXXI.	PROCEDURE IN THE DARK AGES	369
XXXII.	CONTRACT AMONG THE TRIBES	391
XXXIII.	CONTRACT IN BABYLON AND ASSYRIA	403
XXXIV.	CONTRACT IN EARLY ROME	420
	INDEX	427

ABBREVIATED REFERENCES

A.C.—Assyrian Code relating to Women (O. Schroeder, Keilschrifttexte aus Assur Verschiedenen Inhalts, 1920, No.1).

Aeth.—The Laws of Aethelberht (Anglo-Saxon Laws).

A.L.—*Ancient Law*, by Sir H. S. Maine, with introd. and notes by Sir F. Pollock (1906).

Argonauts—*Argonauts of the Western Pacific*, by Dr. B. Malinowski (1922).

Bedouin Justice—*Bedouin Justice, Law and Custom among the Egyptian Bedouin*, by A. Kennett (1925).

Burnt Njal—*The Story of Burnt Njal*, transl. by G. W. Dasent (1861).

Cape Commission—Cape Native Laws Commission, Cape of Good Hope Votes and Proceedings of Parliament, Special Session (1883), (Evidence).

C.H.—The Code of Hammurabi.

Clay—Miscellaneous Inscriptions in the Yale Babylonian Collection (1915).

Crime and Custom—*Crime and Custom in Savage Society*, by Dr. B. Malinowski (1926).

D.H.R.—Dareste-Haussoullier-Reinach, Inscriptions Juridiques Grecques, Paris (Vol. I, 1895; Vol. II, 1898–1904).

Durham—*Some Tribal Origins, Laws and Customs of the Balkans*, by M. E. Durham (1928).

E.A.—East Africa Protectorate Law Reports, Notes on East African Native Laws and Customs. Vol. I, 1906, pp. 97–111; Vol. II, 1909, pp. 141–148; Vol. III, 1911, pp. 117–121.

E.L. & C.—*Early Law and Custom*, by Sir H. S. Maine.

Euric—The Code of Euric (Zeumer, Leges Visigothorum Antiquiores, 1894).

Firth—*Economics of the New Zealand Maori*, Firth (1931).

Gai.—Gaii Institutionum Juris Civilis Commentarii Quattuor.

Garstang—*The Hittite Empire*, Garstang (1929).

Germ.—Taciti Germania.

Gold Coast Commission—Report of the Gold Coast Commission on Native Courts, *Government Gazette*, Jan. 31, 1895, pp. 27 to 34.

Heb. C.—The Hebrew Code, Exodus Chapters xxi, 2 to xxii, 17.

Hl. & E.—The Laws of Hlothhere and Eadric (Anglo-Saxon Laws).

Hobhouse, Wheeler and Ginsberg—*The Material Culture and Social Institutions of the Simpler Peoples*, by E. C. Hobhouse, G. C. Wheeler and M. Ginsberg (reprinted 1930).

Hobley—*Akamba and other East African Tribes*, by C. Hobley.

J.A.O.S.—*Journal of the American Oriental Society.*

J.C.L.—*Journal of the Society of Comparative Law and Legislation.*

J.R.A.S.—*Journal of the Royal Asiatic Society.*

J.S.O.R.—*Journal of the Society of Oriental Research.*

Lango—*The Lango*, by J. H. Driberg.

Lex Burg.—Lex Burgundionum (Monumenta Germaniae Historica, Legum, Tom. 3).

Lex Fris.—Lex Frisionum (*ibid.*).

Lex Rip.—Lex Ripuariorum (op. cit., Tom. 5).

L.Q.R.—*Law Quarterly Review.*

Lowie—*Primitive Society*, by R. H. Lowie (1921).

Man—*The Aboriginal Inhabitants of the Andaman Islands*, by E. H. Man (Ed. by A. F. Man, 1932).

M.G.H.—Monumenta Germaniae Historica.

Pactus—Pactus Alamannorum (Monumenta Germaniae Historica, Legum, Tom. 3, pp. 34 ff.).

P. & M.—*History of English Law before the time of Edward I*, by Sir F. Pollock and F. W. Maitland (2nd ed., 1911).

Rattray—*Ashanti*, by R. S. Rattray 1923).

R.S.C.—Rules of the Supreme Court.

Routledge—*With a Prehistoric People*, by W. S. & K. Routledge (1910).

San Nicolò, Beiträge—Beiträge zur Rechtsgeschichte im Bereiche der Keilschriftlichen Rechtsquellen, Marian San Nicolò (1931).

San Nicolò, Schlussklauseln—Die Schlussklauseln der Altbabylonische Rechts-und Verwaltungsurkunden, Marian San Nicolò (1928–1930).

Seligman—*Pagan Tribes of the Nilotic Sudan*, by C. G. & B. Z. Seligman (1932).

Talbot—*The Peoples of Southern Nigeria*, by P. A. Talbot (1926).

Westermarck, *Human Marriage—History of Human Marriage*, by Prof. E. Westermarck (5th Ed.).

Westermarck, *Moral Ideas—The Origin and Development of the Moral Ideas*, by Prof. E. Westermarck (2 Vols, 1912, 1917).

CHAPTER I

THE WORK OF SIR HENRY MAINE

THIS book treats of the beginnings and early history of law, the subject-matter of most of the work of the late Sir Henry Maine, and especially of his book *Ancient Law*. But such a title as *Ancient Law* fails to indicate the important truth that the study of the origins of law must look for its evidence to the beginnings of law both as we know of them in the past and as we see them in the present. The history of law is forever repeating itself, and the same stages that were reached many thousands of years ago in the East, are being reached and passed in parts of the modern world. On the other hand the term "Primitive Law" is not used in this book to signify exclusively the law in force among the most primitive peoples, indispensable as is the evidence to be drawn from that source. The term is used to indicate law from its earliest beginnings until we have emerged into the full light of history. For this purpose, for many reasons, our study ends with the greatest of legal landmarks, the enactment of the Code of Hammurabi about 1914 B.C. That Code represents a stage—reached also in Rome about 160 B.C., in England about A.D. 1250, and in Abyssinia to-day—when the developing law begins to be invested with certain new characteristics which distinguish the mature from the primitive law.

A book covering the field of primitive law must of necessity take up the enquiry where Maine left it. So great has been the influence of his writings, that Maine's theory of the early history of law is the foundation and framework of the opinions upon this subject of both

lawyers and laymen. That theory is chiefly contained in the early part of his work, *Ancient Law*, a work which none can read without feeling the presence of a powerful intellect, a mind of high originality, stored with the fruits of a wide reading. Indeed he is regarded—not altogether without justice— as the founder, if not of a science, as least of a school of learning. But *Ancient Law* is a work ill-adapted by its methods of construction to serve as a starting-point for any enquiry. Only exceptionally does the author supply references to support his opinions. Especially the earlier chapters of *Ancient Law* abound in broad and vivid generalisations as to the course of the development of law amongst all peoples. Knowing, as we do, what sources of knowledge were available in the author's time, it is yet often difficult to imagine what were the considerations which led him to his conclusions ; and often it is certain that there was no real evidence to support them. It is, perhaps, partly for these reasons that in the seventy years and more that have elapsed since the publication of *Ancient Law*, while Maine has enjoyed the veneration of every legal theorist, no lawyer in this country has continued in his tracks, with the exception, perhaps, of Sir Paul Vinogradoff, in the first volume of his *Outlines of Historical Jurisprudence*. In the later chapters of *Ancient Law* and still more in his later books, working upon the limited materials at his disposal, Maine produced in many instances brilliant historical disquisitions which, though generally not supported by more recent research, have stimulated enquiry in the highest degree. But the early chapters of *Ancient Law*—that part of his work which, measured by its scope and influence, must be considered to be by far the most important—consists mainly of nothing more than courageous conjectures. It is a magnificent tribute, however, to the power of the personality disclosed in his writings, and the sureness with which he enunciated

what was vaguely in the minds of men, that these conjectures should still hold undisputed sway, and pass for the acknowledged principles of early law and of its methods of development.

The salient features of this theory are as follows. "Law is derived from pre-existing rules of conduct which are at the same time legal, moral and religious in nature. The severance of law from morality and of religion from law belong only to the later stages of mental progress.[1] So amongst all peoples, when legal rules first come within our knowledge in the form of Ancient Codes, they are found invariably to mingle religious, civil and merely moral ordinances without any regard to the differences in their essential character.[2] Resulting from a later differentiation comes secular law. When law first meets us in any recognisable form, it consists of "themistes", or judgments of kings, which in the course of time give rise to customs.[3] So we reach the epoch of customary law.[4] Meanwhile oligarchies succeed to the government of kings, and, with the invention of writing, Codes of law make their appearance. These are substantially mere enunciations in words of existing customs.[5] As yet there is no notion of a legislature, not even of a lawgiver,[6] and the prevalent conception of a custom or law is that it does not and cannot change.[7] The subsequent development of law takes place, in the first stage, by means of fictions; in the second by equity, and only in the third and last stage of all, by legislation.[8] And throughout this history, ancient law has retained as its fundamental characteristic a love of technicalities and of formalism.[9] In the mind of early man a rule of procedure predominates in importance over

[1] *Ancient Law*, pp. 14, 16 and *passim*.
[2] *Ibid.*, p. 28; *Early Law and Custom*, p. 5.
[3] *A.L.*, p. 4.
[4] *Ibid.*, p. 11.
[5] *Ibid.*, p. 16 and *passim*.
[6] *Ibid.*, p. 7.
[7] *Ibid.*, p. 83.
[8] *Ibid.*, p. 29.
[9] *Passim*, throughout Maine's work.

a rule of substance; so that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.[1] This characteristic of early law, namely, its love of formalism and technicality, determines also the growth of the law of contract. What in early times the law arms with its sanctions is not a promise, but a promise accompanied with a solemn ceremonial."[2]

There is no substance in any one of these conclusions; indeed the contrary can be clearly demonstrated by evidence. In this book an attempt is made[3] to trace the history of early law, and in its course the views of Maine will be fully dealt with. But one of these views is so fundamental, and so serious an obstacle in the way of progress, that before the history of early law can be attempted this theory must be separately examined and disproved in the light of the evidence.[4] This is the theory of the religious origin of law.

First, however, let us review the evidence available for the study of primitive law.[5] Much of this evidence has been recently acquired and is unfamiliar, and since it is unavailable to the English reader and too extensive to be set out in full, it may be convenient to describe at least part of it in some detail.[6]

[1] *E.L.&C.*, p. 389.
[2] *A.L.*, p. 327.
[3] Part III (Chapter XVII to the end).
[4] Part II (Chapter VII to XVI).
[5] See Chapters II and III.
[6] See Chapters IV, V and VI.

CHAPTER II

SOURCES

THE sources available for the study of primitive law are of three kinds. The first is the skilled and accurate observation, by past and present authors, of the life and laws of the primitive peoples surrounding them.[1] For all knowledge of the first beginnings of law, this is the only source; and for the later stages in the development of primitive law, as will hereafter appear, it elucidates and amplifies much that is to be learned from the other two sources.

The second source consists of the written ancient compilations which are commonly referred to as Codes, and which continue the history of the developing primitive law. The term "Codes" is inapt, and derives from a time when little or no study had been applied to such of these documents as survived. The word "Code" properly signifies a complete collection, whether made by a legislative act or not, of existing legal rules. In its essence it does not include an enactment of new rules. If the view had been correct which regarded these ancient "Codes" as consisting exclusively of pre-existing rules, the term might appropriately have been applied to them. It is convenient, however, to continue to use the word "Code" as including in the one expression a body of rules of law stated in written form, whether such body of rules was intended to contain the whole or merely a part of the law in force at the time, whether the rules were laid down by a legislature, a

[1] For a discussion of the question what is the proper use of this evidence, and what weight should be attributed to it, see post Chapter XVII.

judiciary or a jurist, and whether enacted by way of restatement, amplification or amendment of the law.

This source, namely the Codes, because of the tangible character of the evidence they supply, as well as the great extent of space and time covered by them, is of no less value than the first of our sources. It is true that, taking each Code individually, we often know little of the circumstances that produced it, and could not correctly have interpreted its provisions if it stood by itself. It would be a formidable task to attempt to construe an isolated enactment without any knowledge of the state of the law that preceded it, or the evils at which it was aimed. But we are not left to construe any of the Codes without assistance. A very substantial quantity of information is now to hand as to the circumstances in which some were produced, and in one region of the world the fortunate survival of masses of other legal documents, to be referred to presently, shows the true interpretation of the rules of a Code, and the material background in which it found its origin and scope. Where there are no such documents, we have other assistance. The nearer we penetrate to the infancy of law, the greater is the simplicity of each system, the smaller is the number of its rules, and the closer their resemblance to those of other systems. The provisions of different Codes are similar in many respects, and by each Code the difficulties of the others may be overcome. Furthermore the background of each Code, namely, the pre-existing law which we must understand in order accurately to interpret the Code, is displayed to us in the Codes of less advanced nations and in the laws of the primitive peoples around us.

The third of the sources consists of the other legal documents which have come down to us from the past, especially those evidencing or embodying legal transactions. It is impossible to exaggerate the importance and

value of such documents in respect of the late periods in which they are plentiful; and in a system where both Code and legal instruments survive, as in Babylonia and Assyria, the materials are present for a detailed familiarity with the law and its working. More of these instruments come to hand each year from the Near East, at a rapid, indeed too rapid, rate of flow.

These three sources, each of the utmost importance, contain almost the whole of the evidence on which reliance can be put. From the literature of various ages and nations a few fitful gleams are cast from time to time upon early law, but there is little enlightenment here and enormous scope for error.

CHAPTER III

A SURVEY OF LEGAL HISTORY

It is not possible to see, in their true perspective, the two great sources of our knowledge of primitive law in the past, namely, the Codes and legal instruments referred to in the last chapter, without some account of the legal history of the peoples amongst whom they appeared. (In attempting, in this chapter, a brief survey of such a kind, it is not only for the sake of chronological arrangement) that mention must first be made of the Ancient Near East,[1] for thence come by far the most important of our Codes and legal instruments. The latter consist chiefly of clay contract-tablets, of which many thousands have been discovered; and, no doubt, strewn about the area between the Mediterranean, the Caspian, India and the Persian Gulf, many more thousands await the excavator. Their study is extremely difficult. The clay tablet of Mesopotamia is written in cuneiform, and, at the commencement, in the Sumerian language. Cuneiform began as a picture-script, and in these documents was on its way towards becoming a complete syllable-script. Most of the tablets are unpublished, and remain scattered through the world in museums and private collections. Of those published,[2] far the greater part are in the form of mere facsimile copies, which, in order to be read, require first to be transcribed from the cuneiform and then to be translated. These

[1] For a recent reconstruction of the legal history of the Near East, to which I am much indebted in the early part of this chapter, see San Nicolo, *Beiträge zur Rechtsgeschichte im Bereiche der Keilschriftlichen Rechtsquellen* (1931).

[2] The total of clay tablets published may amount to over 50,000, the majority of which are not of legal interest.

steps are the proper province of Assyriologists trained in the Law; but with the exception of Koschaker and some others in Germany, there are none such. In this country scarcely any translations have appeared since Johns' *Assyrian Deeds and Documents*, a work which covers only a small number of tablets, and, in the rapid march of events in this field, has become out of date. Of the ancient Eastern Codes there are scarcely any easily available translations, especially in English.[1]

The legal history of the Near East is to be divided between the two spheres of Babylonia (Southern Mesopotamia) and Assyria (Northern Mesopotamia), both perhaps sharing to some extent a common heritage, and each no doubt influencing the other and its own neighbourhood.

The Babylonian history of law is commonly separated into three eras, the Old, Middle and Neo-Babylonian periods. The Old Babylonian period comprises the third millenium B.C. and the first quarter of the second millenium. From the early part of this period few documents survive; but when the important Third Dynasty of Ur is reached (about 2300 to 2180 B.C.) they become numerous and valuable, and the same period gives us our first fragments of written (Sumerian) laws.[2]

So far, the tradition is substantially Sumerian, and the documents hail chiefly from Sumer in the south of Babylonia. With the commencement of a Semitic dynasty (2050 to 1750 B.C.), the first dynasty of Babylon, the legal history of the Old Babylonian period reaches its culmination. The Sumerian language, no longer in common use, yet remains for a considerable length of time in the formal phrases of the contracts. The latter

[1] For recent English translations of the Codes, see footnotes on p. 2 (Code of Hammurabi), p. 33 (Assyrian Laws), and p. 40 (Hittite Code) German and French translations of the Codes are chiefly hidden in learne periodicals.

[2] See *post* p. 23.

are very plentiful, and by means of them and of the great Code of Hammurabi[1] (enacted about 1914 B.C.) we are enabled to obtain a detailed knowledge of contemporary law and commercial practice. Before the discovery of the fragments of Sumerian Laws, referred to above, it was already plain from the documents that the Code of Hammurabi owed its origin partly to earlier laws of Sumerian peoples; and the similarity in content and phraseology between the Sumerian fragments and portions of the Code is marked, though with certain exceptions the Sumerian laws are not literal originals of any laws of the Semitic Code.[2]

With the fall of the dynasty of Hammurabi, the Old Babylonian period ends, and a dark age sets in. An invasion of mountaineers from the north-east establishes Cassite rule in Babylon for some 600 years (1750 to 1170 B.C.) after which the government for a time falls into the hands of native rulers. Some legal continuity is shown in the very few surviving documents of this, the Middle Babylonian period. But for our knowledge of the law of the Near East at this epoch we must look elsewhere, and chiefly to another Semitic empire, that of Assyria.

Though the Assyrian remains are not perhaps of the same value as those of Babylonia, at intervals they supply very ample and important information. The earliest Assyrian documents date from about 2000 B.C.; they are the Cappadocian tablets, that came into existence among Assyrian colonists in Eastern Asia Minor. But it is in the so-called Middle Assyrian period, of the middle of the second millenium B.C., that the Assyrian remains are of the greatest value. At a time when our knowledge of Babylonia is of the scantiest, Assyria yields not only a plentiful harvest of clay contract-tablets, but

[1] See the next chapter.
[2] See Professor Langdon, *J.R.A.S.* (1920), p. 489 f.

also (about 1500 B.C.) a very substantial body of Assyrian laws,[1] including one of the most valuable of the Codes. Of similar date is a large group of tablets from the neighbourhood of Arrapha, some seventy-five miles to the east of Assur.

Very little later in date, and also contemporary with the same dark period in Babylonia, is information from a source of a very different kind. In Central and South-Eastern Asia Minor the Empire of the Hittites was then in the flower of its prime.[2] To judge from linguistic considerations, the population appears to have been a mixture of local and Indo-European-speaking stocks, perhaps a conquering Indo-European element ruling a native Caucasian population. Official Hittite is certainly an Indo-European language. From the palace of the Kings of Hatti at Boghazkoi comes a law-book which has been published in translation,[3] and other documents. Those documents, which have been so far read, relate to public administration; but it is to be hoped that contracts and other private-law instruments will be unearthed here, as elsewhere in the Near East. Hittite civilisation, however, was far simpler than the Mesopotamian culture of the Old Babylonian period, and Hittite law represents a far more primitive stage than that which appears in the Sumerian fragments, the Code of Hammurabi, or the Assyrian Laws.[4]

A substantial gap in our history brings us to the next Assyrian domination, the Neo-Assyrian period, which extends from the middle of the eight century to the fall of that Empire soon after 700 B.C. The contracts and other private-law documents of the time are very plentiful; but it is in the ensuing Babylonian supremacy (the

[1] See *post* Chapter V. [2] See Garstang, *Hittite Empire* (1929).
[3] See *post* Chapter VI. It was first read by Hrozny, *Code Hittite* (1922).
[4] Of the same period as the *Hittite Code* are the famous Tel El Amarna tablets, containing correspondence between the Egyptian Pharaohs and the princes of Canaan.

so-called Neo-Babylonian period) that our familiarity with the life and law of the Near East reaches its height. In the century that witnesses the fall of Jerusalem in 587 B.C., the capture of Babylon by Cyrus in 539, and the end of the reign of Darius in 485, we have so detailed a picture in Babylon as is unequalled in the history of the ancient world. From the tablets of the day, the names and indeed the fortunes are known of many of the most important families and industrial houses of Babylon; and fragments of a Neo-Babylonian Code are also extant.[1]

As we shall see later, one of the most impressive facts in this legal history of 2500 years, beginning with the earliest of the Sumerian documents, is its continuity. Over a space of time greater than that which has elapsed from the traditional date of the Roman XII Tables to the present day, the forms of the contract-tablets which are extant undergo little change. And although certain alterations in the phraseology begin to show themselves from the early part of the fifth century B.C., it is abundantly plain that the Persians took over the Babylonian law of contract and its forms, and that the continuity of which we have spoken did not end with Persian times. It is only when the third millenium of the known legal history of Mesopotamia is approaching its end that it becomes appropriate to consider the possibility of an influence exerted by other legal systems.

As yet the information available as to the laws in force in Ancient Egypt is scanty indeed.[2] It may one day become necessary to acknowledge the effect of

[1] British Museum, 82, 7-14, 988. See Meissner, *Preuss. Akad. der Wiss.* (1918), p. 280, where they are also translated into German and annotated. The first 5 clauses consist of rules relating to land; §§ 6 and 7 are miscellaneous; § 8 is described as being unfinished and therefore not included; and §§ 9 to 15 are a group of clauses relating to dowries. The document would appear to be the incomplete draft of a Code.

[2] We are definitely told in Egyptian records that there were written Codes of law, but none survive. See *Cambridge Ancient History*, vol. II, p. 210.

Egypt upon the law of the ancient Sumerians, but at present there is no evidence of Egyptian influence throughout the legal history of Mesopotamia. There are scarcely any Egyptian contracts earlier than the Neo-Babylonian period. The reason may partly be found in the material used, namely, papyrus, but the want is better explained by supposing that contracts among the Egyptians were not as a general rule evidenced by writing.[1] In Persian times the so-called Demotic papyri are abundant, but the evidence shows more the influence of Persian Babylon upon the law of Egypt than the contrary.[2] Of Greek law[3] it can be said with equal probability that its influence upon the law of Mesopotamia must have been little or none. Documents survive in sufficient number to show that the continuity of the Babylonian legal tradition remained unimpaired through the succession of the Seleucid period and the Parthian rule. Indeed under the later Parthian and the Sassanid rulers of Babylon, though the clay tablets disappear giving place to parchment and papyrus, an Oriental reaction against Greek influence extends beyond the bounds of Mesopotamia, and through it the law of Babylon wielded in all probability some influence on the private law of the contemporary Roman Empire. Only recently it has begun to be manifest that in the compilations of Justinian we see the results of an attempt to harmonise the existing with the older Roman law, with a bias towards the classical and even pre-classical. In the Digest and In-

[1] Papyrus contracts do survive, but the transactions to which they bear witness are unusual by reason of the status of the parties or the character of the transaction, San Nicolo, *Beiträge*, p. 33.

[2] Compare the Elephantine papyrus, with its documents illustrating the life of a settlement of Hebrew mercenaries, Cowley, *Jewish Documents of the Time of Ezra* (S.P.C.K., 1919).

[3] For a selection of Greek Papyri from Egypt, containing contracts and other legal matter, with an English translation, see *Select Papyri*, A. S. Hunt and C.C. Edgar (1932), vol. I. For a general study of the papyri from a legal point of view, see L. Mitteis, *Grundzüge der Papyruskunde* (1912).

stitutes the Oriental affinities of the contemporary law are well concealed.[1]

Here let us leave what we have called the legal tradition of the Near East, and return upon our traces to the time, some 2000 years earlier, when the Hittite Empire flourished in Asia Minor, at the North-Western corner of the civilised world. At that time, in the fourteenth century, Achaeans and other Indo-European-speaking peoples, were pressing from Europe by land and sea to the south-east, ravaging even Cyprus and the coast of Egypt. Troy fell and the Dardanian vassals of the Hittites were swept away.[2] Ultimately the Hattic power itself was overthrown, and so far as we know anything of these peoples in biblical times, they are broken groups, inhabiting districts to the south, many centuries later. Here the Hebrews, once a loose federation of tribes of mixed origin, partly of Semitic, partly of Hittite, partly of Philistine and partly of other Indo-European stock, have left us, embedded in the Bible, an invaluable Code of early law,[3] probably influenced in its last days (400 B.C.) by contact with Babylon.

The migration that destroyed the Hittite Empire was part of a great series of movements that, wave upon wave, during more than two thousand years, established populations speaking Indo-European languages in India on the one hand, and throughout Europe on the other. With them the various groups brought similar legal conceptions, the common stock of primitive tribes. In India, the earliest written law of the conquering Aryans, produced long after their settlement in that country, is to be found hidden and overlaid in the Code of Manu.[4] In Europe, commencing in the early part of

[1] For an illustration in English of modern thought in Germany on this topic, see Pringsheim, Animus in Roman Law, *L.Q.R.*, vol. XLIX (1933), pp. 43–60, 379–412.

[2] Garstang, p. 9 *et seq.*

[3] *Post* Chapters XI and XII.

[4] *Post* Chapter XIII.

the seventh century B.C., first in the Greek colonies and then in Greece proper, each Greek city-state produced written law by the hand of a famous legislator; but almost all of it is lost. Special mention must however be made of the later but valuable fragments of legislation from the Cretan city of Gortyn.[1]

Further to the West, in Rome, one of the three most powerful legal influences in the world's history begins its written record (according to tradition) in a Code of 450 B.C.[2] The wonderful century commencing about 350 B.C. saw Rome transform herself from a congeries of local tribes into a world power. Before the end of that century the native law had begun to take a shape of its own; and in the next century (from 250 to 150 B.C.), following the continued and rapid growth of the Empire, Roman law reached and passed a stage of development that had hitherto only been attained by Babylon. Henceforth the Roman law was of a character and structure previously unknown in the world's history; and when, in the second century A.D., it was enjoying a brilliant maturity, it possessed (in spite of all its technicalities) a depth and richness of principle unequalled by any system since.

But the seeds of the decay of the Roman Law had been sown when Rome ceased to be free. Towards the end of the second century A.D. began the decline of the Roman Empire, and the decline of the Roman law followed close behind. In the fourth and fifth centuries the law had become sterile and chaotic. The population of the Empire had long ceased to be Roman, and its political constitution and social structure had been indeed transformed since the days of Augustus. The law had absorbed foreign elements from Europe, Africa and Asia; and these, together with sporadic legislation in the form of Imperial Constitutions, were the chief sources of

[1] See *post* p. 54. [2] See Chapter XIV.

new law. In 438, when a collection of these Constitutions was made in the Theodosian Code, the Roman Empire was rapidly breaking up, both from within and from without. Britain had already been abandoned. Within the Empire, apart from the age-long infusion of barbarian stock that had for centuries given it many of its rulers and magistrates and much of its population, whole Teutonic peoples had from time to time been settled as foederati or allies in this or that province, and had been presented with part of the lands and serfs of the occupants. The Roman colonials continued to live under the Roman law of the province; the barbarians ruled their subjects of their own race under native rules. Yet the prestige of Rome was still such that the barbarian kings were often content to own her over-lordship. From time to time, however, they waged war against Rome and were sometimes resettled, largely as the price of peace, in the same or another part of the Empire. In the latter half of the fifth century the West Goths and the Burgundians, who had established themselves, or had been established, as foederati within the Empire (the former in Southern Gaul and Spain, the latter in certain cantons of the Sequani and in Upper Germany) emerged as independent states. These peoples had adopted much of Roman civilisation as well as Christianity, and when they produced written law it was law much influenced by contact with Rome. An impressive fragment survives of a version of a Code of laws of Euric[1] (King of the West Goths, A.D. 466–485); not the first Visigothic King to legislate in writing. The Code applied between Gothic and Roman, and between Gothic and Gothic subject, within his dominions. Relations between Roman and Roman continued to be governed by Roman Law, and for them Euric's successor, Alaric II, produced a Breviarium of Roman Law. Among the Burgundians,

[1] Zeumer, *Leges Visigothorum Antiquiores* (1894).

at the commencement of the sixth century, King Gundobald appears to have enacted an excellent Code of written law, of which a ninth-century version containing later additions is extant.[1] Gundobald's Code, again, was in force between Burgundian and Burgundian, and between Roman and Burgundian; for the Roman subjects of Burgundy a Code of Roman Law (the Lex Romana Burgundionum) was subsequently promulgated.

The Salic Franks, who had lived for a time on the coast between the Meuse and the Scheldt, and had for a brief period owned themselves as Roman allies, were little touched by Roman civilisation. It was not till the latter part of the fifth century that they adopted Christianity. Under the conquering Clovis (about 480 to 510) the whole of Gaul, except Burgundy and Provence, became a Frankish kingdom. The kindred Ripuarian Franks in the middle of the fifth century occupied part of the left bank of the Rhine, and in the ensuing years spread rapidly to the south. When they chose Clovis as their King, the dominions of the Salic and Ripuarian Franks were united. Towards the end of his life Clovis appears to have produced for his enlarged dominions some written, primitive legislation which was wholly unaffected by the law of Rome.

It was this eventful century when men's minds were so full of interest in the law—the century of the Theodosian Code and the Codes of Euric, Clovis and Gundobald—that produced the greatest of all legal compilations. The scene of these labours was the Empire itself, where the old glories of the Roman law were the subject of a new and intense study. Under the Emperor Justinian were compiled, in A.D. 527 and the following years, a new Code of Imperial legislation, a text-book for students, namely, the Institutes, and above all the Digest of Roman law, based chiefly on the classical law of the

[1] *Monumenta Germaniæ Historica* (Hannover, 1875-89), Legum Tom. 3.

second century A.D. But half a millenium was to elapse before these works had any direct influence on the primitive peoples of Europe. The Roman dominions had shrunk so far that Justinian was legislating for an Empire east of Italy. Italy itself was under the power of the Ostrogoths, for whom Theodoric (about 493 to 526) had issued a book of native law.[1] Justinian recovered Rome in 552, but his triumph was short-lived. Within a few years the Lombard invader was in Italy, and, from Rothar onwards, Lombard princes produced a continuous flow of native legislation.[2]

Meanwhile, under its Merovingian rulers the Frankish kingdom grew at the expense of territory of the neighbouring barbarian kingdoms of the West Goths and the Burgundians (the latter of whom became a province of the Franks) and of the peoples beyond the Rhine. Under Frankish suzerainty the provinces retained their native legal rules, which, except for Burgundy resembled closely those of the Franks. The Frankish rulers, between the sixth and eighth centuries, issued, with the consent of their subjects, sporadic legislation, in the form of Capitularies,[3] for the government of their dominions; but in the general intellectual blight that enveloped the Continent between A.D. 600 and 750, the law, too, and especially the written law, underwent a widespread deterioration. Our texts, which date from the period following the close of this Dark Age, show plainly what had occurred and was occurring. Of the latter part of the eighth century are the Lex Alamannorum,[4] a document of ecclesiastical authorship which pretends to contain the law of the Alamanni; and the Lex Baiuvariorum,[4] which purports to set forth the

[1] *M.G.H.*, Leg., Tom. 5 (Edictum Theodorici).
[2] Op. cit., Leg., Tom. 4.
[3] Op. cit., Leg., Tom. 1. In Spain, in the middle of the seventh century, the West Gothic King Recesswinth enacted laws for all his subjects, irrespective of race.
[4] Op. cit., Leg., Tom. 3.

laws of the Bavarians, but is largely a verbatim copy of parts of the Code of Euric and of the Lex Alamannorum. From the eighth century comes also that crude collection, the earliest extant version of the Lex Salica, or Laws of the Salic Franks. In it the old legislation of Clovis, of the commencement of the sixth century, has been piecemeal, through the succeeding 200 years and more, extended and overlaid with later materials, partly drawn from the capitularies, partly from tradition and partly from the imagination; the whole couched in a barbarous Latin.

Meanwhile, towards the close of the eighth century, by the genius of Charlemagne the Empire of the Franks was being enlarged till it reached from Saxony to the Pyrenees, and from the Baltic Coast into Italy. The revival of learning and letters that now took place extended to the field of law. Of the end of the eighth century is the earliest manuscript containing the Lex Ripuariorum,[1] or Code of the Ripuarian Franks. In this again can be seen the traces of old legislation of Clovis, together with more recent accretions. At the commencement of the ninth century documents come into existence setting forth, or rather describing, the legal rules of other provinces of the Frankish Empire—the Lex Saxonum[2] and the Lex Frisionum,[3] the Lex Anglorum et Werinorum[4] and the Lex Francorum Chamavorum.[4] In 827 a collection of Capitularies was made by Ansegisus, Abbot of St. Wandrille.

But the "Codes" of law to which we have referred show clearly that, though the law is changing and developing, it continues to deteriorate. The decaying authority of the Frankish rulers, the increasing wealth and power of the Church and its widening functions in the field of law, the growing independence of the landed

[1] *M.G.H.*, Leg., Tom. 5.
[2] Op. cit., Leg., Tom. 5.
[3] Op. cit., Leg., Tom. 5.
[4] Op. cit., Leg., Tom. 5.

nobility, the extension of trial by oath of purgation and the introduction of trial by battle, the growth of technicalities and the increasing importance of procedure—these things hindered and distorted the growth of law. And now, with the death of Charlemagne, the light of learning was quenched once more and the process of legislation ceased on the Continent.

In England, except for some difference of date, the history of the law was not dissimilar. The Germanic invaders who spread over the country in the fifth and sixth centuries had been little affected by Roman civilisation. According to tradition the issue of written law[1] commenced with Aethelberht of Kent about the year 600, when the Continental culture of the sixth century had crossed the Channel. A collection of old laws bearing his name, but made at a much later date, commence the series known as the Anglo-Saxon Laws. The later collection that follows, called the Laws of Hlothhere and Eadric, show traces of a process of deterioration not unlike that which is seen on the continent of Europe. The rest of the so-called Anglo-Saxon laws date from a period when legislation had come to an end.

Among the Celts of Gallia and Britannia no tribe had succeeded in obtaining an empire among its fellows, nor had committed legal usage to writing when native tradition gave way to Roman rule and Roman law. Ireland, however, at no time under the sway of Rome, began in the fifth century A.D. the building up of a lively civilisation that exercised a wholesome influence on the Continent throughout the darkness of the seventh century. When the so-called Brehon Law Tracts[2] appear in Ireland many centuries later, they are seen to evidence an age-long development of legal thought that, tainted as it was with the vices of legal treatises of the Middle Ages,

[1] See, for the Anglo-Saxon Laws, *post* Chapter IX.
[2] See *post* Chapter X.

betokens a healthy origin and some native genius for law. In Wales the Codes of the Ancient Welsh Laws,[1] the direct product of the literary revival of the twelfth century in that country, present many features shared with the Brehon Law.

But before this date, Law as a living and growing organism had been recreated in Europe. A theoretical interest in Law was manifest as early as the eighth century, but was confined to the ecclesiastical orders and found its scope in the building up of the Canon Law by strange and devious means. In the eleventh century, at the close of the second Dark Age, the study of law had spread to laymen, and the peoples of Central Europe had advanced sufficiently to understand some of the virtues of the Roman Law. Hence the Institutes and Digest of Justinian, now newly discovered, began to transform the legal conceptions of Europe, and ushered in the systems of law of the modern world.

[1] *Post* Chapter X.

CHAPTER IV

THE CODE OF HAMMURABI

Of the Codes referred to in the last chapter, the Code of Hammurabi[1] takes pride of place, whether estimated by its completeness or the extent of its influence in space or time.[2] Of the authenticity of the text we possess there can be no question. The stele of black diorite some eight feet high, upon which it was engraved, was carried away to Susa in the twelfth century B.C. and there discovered in A.D. 1902, the text complete save for some thirty-five sections[3] erased to make way, no doubt, for the boasting inscription (never inscribed) of an Elamite conqueror. In a lengthy prologue and epilogue to its provisions, Hammurabi, third king of the first (Semitic) Dynasty of Babylon, sets forth his titles and exploits, his reverence for the gods, his solicitude for his subjects, and the purposes of the Code; and concludes, in traditional fashion, by invoking blessings on those who should respect the monument, and curses on succeeding kings who should alter or annul its provisions. On the obverse is a picture of the King receiving the laws from the sun-god and god of law, Shamash.

[1] About 1914 B.C. First edited by Scheil *Mémoires de la Mission Archéologique de Perse*, IV (1902), p. 11 *et seq.* The English translation by C. H. W. Johns, *The Oldest Code of Laws in the World* (1903) can still be used. An improved translation into English is that of R. W. Rogers, *Cuneiform Parallels to the Old Testament* (1912, 2nd Edition 1916). The literature dealing with the Code is enormous, but very little is in English. For up-to-date references, see San Nicolo, *Beiträge*, p. 80.

[2] In Assyria, and in the Near East generally, from Elam to the Syrian coast, copies seem to have been used for some 2000 years thereafter, some of which were studied in the schools, and some had their own history of development.

[3] Between §§ 65 and 100, according to the numbering of Scheil, which is generally followed in references to the Code. This lacuna has been only partly filled from old copies of the Code.

The purpose of the legislator was the production, in the official, that is the Semitic, language, of one body of law which should be applicable to the whole kingdom,[1] and should at the same time reconcile the differences between the laws of his Sumerian and Semitic subjects. That purpose is stated in the prologue and epilogue of the monument, and sufficiently appears also from the examination of earlier legal instruments and legislation, and from the provisions of the Code. The earlier legal instruments speak often to the existence of similar rules of law. Earlier legislation, both of certain Sumerian city-states and from Semitic sources, is still extant, and it is plain from the contents of Hammurabi's Code that he adopted with emendations and worked into his compilation laws and collections of laws from Sumerian cities (of which those of Erech and Nippur[2] may be taken as examples) and from Semitic origins.[3] It also appears that in some instances he included this legislation without verbal change;[3] but the essence of his undertaking and of its greatness consists mainly in this, that whilst continuing in the line of the traditions that had preceded him, he made a fresh start in the legal history of the ancient Near East, creating a unity out of legislative fragments of diverse dates and places; and out of two or more moulded one system that should suit the needs of the two races which chiefly made up the population of his realm.

The Code contains some 282 clauses, including the lacuna of about 35. The language of the Code is uniform. Each clause consists as a rule of one conditional

[1] See C.H., Col. V, 20 ff. "I have set right and law," he says, "in the speech of the land."

[2] The fragment (of 9 clauses) from Erech is Clay, No. 28, in *Miscellaneous Inscriptions in the Yale Babylonian Collection* (1915). This fragment, and those (of 17 clauses) from Nippur, are translated and compared in detail with C.H. by Professor Langdon, *J.R.A.S.* (1920), pp. 489 ff.

[3] For example, a provision of King Lipit Istar of Isin (about 2090 B.C.); reproduced, C.H., § 7. See Boissier, *Babyloniaca*, 9 (1926), p. 19 *et seq.*

sentence in the third person, introduced by "if"[1]; containing one set of facts in the protasis, and the legal result in the apodosis, which is almost invariably couched in the equivalent of a future tense or imperative mood. The language is vigorous and terse, and certainly clear, but not generally technical.[2] "If," says clause 1, "a man have accused a man and laid a capital charge upon him, and have not justified it, he that accused him shall be put to death."

In the arrangement of the sections, too, there is no technical system. The Code consists of groups of clauses, each group dealing with some common subject-matter. But this statement is only roughly true; in a few instances, here and there within a group, are included one or two clauses which are connected with some of the group by a common subject-matter, which is not, however, the common subject-matter of the whole group.

The first five clauses deal with certain offences concerned with the perversion of justice (e.g. the offence of bringing trumped-up charges, and perjury). Clauses 6 to 25 relate to charges of theft and the receiving of certain kinds of property. Of this group, §§ 15 to 20 deal with slaves; § 16 concerns the offence of harbouring runaway slaves; and § 17 specifies the reward or compensation payable to a man who brings back a runaway slave to his master—but this, it will be observed, is not concerned with a case of theft, although it occurs in the group treating of theft.[3]

[1] Summa, "given that." The same word introduces the clauses of the Assyrian Code. The Sumerian fragments of Erech and Nippur are introduced by a somewhat similar expression. The Neo-Babylonian fragments of the early sixth century B.C. commence: "The man (or woman) who, etc."

[2] But the style, on the whole, is not original, but traditional, and even the phrases are often derived from earlier Sumerian and Semitic legislation (see Langdon, *J.R.A.S.* (1920), p. 489). [3] The reason for the inclusion of § 17 in this group is this, that the question usually arose in practice where the owner of the runaway slave alleged that A (who brought the slave back) had stolen him, and A was at the same time claiming a reward. Compare the position of I,

Next comes a lengthy group (§§ 26 to 65) relating to land. Of this group, §§ 26 to 41 provide for the case of a soldier or constable leaving the land which was held by him on terms of performing his service to the Crown. Clauses 36 to 41 are concerned with the rule that land held by a soldier, constable or tax-gatherer[1] is unassignable. But § 35 deals not with land, but with cattle or sheep given to a soldier by the King; and § 33 deals with an offence of a governor or magistrate quite unconnected with land. Of the remainder of the group relating to land, §§ 42 to 58 contain smaller groups of provisions all relating to corn-land, and §§ 59 to 65 deal with gardens. There follows the lacuna already referred to.

Clauses 100 to 107 govern the relations between a merchant and a mercantile agent with whom he has invested money in a commercial venture; §§ 108 to 111 deal with wine-merchants (they concern the price of wine, riotous houses and so forth). Clauses 113 to 119 are a group of provisions relating to execution for debt (including distress, and the topic of child debt-slaves). The contract of deposit is the subject-matter of §§ 120 to 126. Clauses 127 to 194 are a long group devoted to Family Law, and include such diverse subjects as adultery, desertion, repudiation of a wife, marriage of concubines and second wives, incest, dowries, marriage portions, succession on death, settlements on women by husbands and fathers, and sonship (which includes adoption).

The group from § 196[2] to § 214, which deals with assaults and bodily injuries, leads naturally to the subject

§ 23 of the Hittite Code (*post* p. 41). Similarly the clauses in the C.H. as to vouching to warranty a predecessor in title (§§ 9 to 13) occur in the same group relating to theft; for the reason that the matter arose in practice where A alleged that B had stolen A's property, and B alleged he had bought it from C.

[1] The meaning of the word is not clear—perhaps it should be "tributary" or "feudal tenant."

[2] § 195, which relates to an assault by a son upon his father, is the connecting link between this and the previous group.

of doctors (§§ 215 to 225) including their negligence and the amount of their fees.[1] Clauses 228 to 233 are divers provisions relating to builders (their fees and their negligence); and §§ 234 to 240 deal with the same matters in regard to boatmen. Clauses 241 to 268 relate to oxen, that is to say, the hire of oxen, goring oxen, ox-drivers, and (§§ 261–267) the fees and wrongdoing of herdsmen and shepherds. Clauses 268 to 277 contain tariff-rates for the hire of oxen[2] and other animals, of agricultural equipment and of boats. Finally comes a small group (§§ 278–282) dealing with slaves, and chiefly their sale.

This account of the contents of the Code will suffice to show that to the legislator's eye the similarity or dissimilarity of the different provisions in relation to one another depended upon the similarity or identity of the circumstances with which they dealt, and not the similarity or identity of underlying principle. If one may use the expression with precisely this significance, it is the *external*, not any *internal*, similarity which the legislator recognises. Indeed it is apparent that the Code is a stage in an external development of law. Hammurabi has adopted rules contained in earlier Codes, and perhaps even whole Codes or considerable parts, amending the individual rules where he thought fit, and extending the operation of individual rules by added phrases or added rules. But the completed work is homogeneous; the legal inconsistencies between different clauses are very few; and though the order of groups is often without significance, within the groups there are few clauses which are out of place. This and other reasons suggest that the arrangement of clauses and groups is largely new. Certainly it is a practical and non-technical arrangement.

[1] In other words, the matters commonly raised in claims by and against doctors. §§ 226, 227 concerns wrongs by branders of slaves (doctors).

[2] § 268. This clause is the connecting link.

Is the Code of Hammurabi a Code in the modern sense, that is to say, was it intended to embody the whole of the existing law? The question must be answered in the same practical, non-technical spirit. The Code is impressive in the broad variety of its scope; but there is, for example, no rule which prescribes a punishment for murder; no rule which expressly provides a general sanction for theft; there is no group of clauses relating to sale, though one or two disputes in regard to certain sales are dealt with under different headings; and yet there is a substantial group dealing with a far less common transaction, namely, deposit. The answer to the question is, that the Code is not a codification of *law*, but a codification of *laws*, that is, of statutory legislation. Its predecessors are similar but briefer collections of laws, such as are contained in the Sumerian fragments from Nippur and Erech. These collections plainly do not pretend to cover the whole law; they contain a few laws on sundry topics, and these laws, like those in the Code of Hammurabi, are grouped together according to their subject-matter. From such earlier collections, Hammurabi has picked clauses that seemed good, and, where necessary, has amended them, and added others. Because of the great number of the provisions, and of the subjects covered, his Code presents the delusive appearance of constituting a system of law. Certainly it was intended to deal with all disputes of difficulty which had arisen—and its exhaustive character was one of its chief titles to fame in succeeding millenia—but it is important to notice the essential difference between the method of its compilation and that of the compilation of a modern Code. An English lawyer, for the purpose of embodying in one document all extant law relating to a particular topic (such as sale of goods, or partnership) seeks to gather together the underlying principles which are stated or implied in judgments or academic writings, and

which (in either case) are built up by a substantial volume of litigation. But this was an age when, as appears from the Code and the contemporary tablets, legal principle had not evolved sufficiently to be regarded as the common foundations of the law. To a certain limited extent, in the field of contract and property, there were probably a very few well-recognised principles,[1] but apart from these there was really nothing. Now, except upon the thread of underlying principle, it is impossible to collect all extant law (even if it had occurred to anyone to try) except by stating the sanction applicable to every conceivable set of facts; and this would be a futile task for anyone to attempt. What Hammurabi does set out to do is to draft a compilation which shall contain solutions for the problems of difficulty which have come and will continue to come before the judges. Partly, as has been said, he or his advisers derive these solutions from earlier compilations; partly they are new productions or amendments. Are we then to regard the clauses of his Code as representing judicial legislation, the decisions of judges? By no means; they are essentially statutory legislation, both in form and in substance. There is undoubtedly a close inter-relation between the clauses of the Code and contemporary litigation[2]; the needs of litigation are their origin and their aim, and the clauses represent, in effect, instructions to the judges. No doubt, when judgments have differed widely on certain questions, the Code may sometimes set out the decision that is to be taken in future; but for the most part it contains, not decisions that are commonly given, but a new decision that ought to be taken in future. We can now see why, for example, the Code of Hammurabi does not prescribe the sanction for murder, or for ordinary theft,

[1] And there is in the Code a group relating to the transaction of deposit, whatever the subject matter.

[2] See the instances already given.

or contain a group of rules relating to sale, as it does in regard to deposit. As for murder, the explanation, in all probability, is that the rule had not been altered by legislation, and there was therefore no occasion to mention it. Everyone knew that the recognised sanction for malicious killing was death; but manslaughter (to use an English term) committed in various sets of circumstances, is specifically provided for.[1] So, too, in regard to theft; thefts of certain special types of property, in defined sets of circumstances, are expressly dealt with,[2] and we are also told, by inference, that the proper punishment for theft—at least of valuables—is death.[3] As for sale, this was essentially, as shown by the tablets,[4] a ready-money transaction, a sale of specific goods, in which the payment of the price and delivery of the goods were concurrent events; nor was there an agreement for sale as distinct from a sale; nor was there any implied warranty of quality. Hence few problems could arise in regard to sales; but, in the sale of slaves, the position as to warranty had been altered, and the Code (§ 278) tells us so: "If a man has bought a male or female slave, and he has not fulfilled his month, and the 'bennu' sickness has fallen upon him, he shall return him to the seller, and the buyer shall take the money he paid." On the other hand, in any system of law where deposits of valuable property are common, new problems will arise; the depositor must be able to look to the Courts for the recovery of his goods; and there will be other problems, to be mentioned later.[5] Hence the Code contains a large group of clauses devoted to the subject. Not only has legislation much busied itself with this

[1] e.g. killing in a quarrel (§§ 207, 208); death caused by a doctor (§ 218) or by a builder who has constructed an insecure house (§ 229).

[2] e.g. §§ 6, 8, 259, 260.

[3] §§ 9, 10.

[4] See *post* Chapter XXXIII.

[5] Where the thing has been lost or destroyed while in the possession of the depositee; see *post* Chapters XXX, XXXI.

topic, but it has even thought it necessary to prescribe a statutory formality for the contract. "If a man have given to another on deposit silver, gold or anything whatever, all whatever he shall give he shall show to witnesses and draw up a contract and then make the deposit" (§ 122). "If without witness and contract[1] he has given on deposit, and where he has deposited they keep disputing him, this case has no remedy" (§ 123).

In the Code of Hammurabi there is no sign of any internal *development* of law, that is, of a development of law by means of applying the principle of decided cases to new facts. The ruling internal principle (if it can be called such) is that justice should be done. So too Urukagina of Lagas,[2] centuries before, boasts that he has restored the decisions of aforetime, and brought freedom to the land. "The mighty man does no ill to the orphan or the widow," he says in language so redolent of the Old Testament. The chief constituent of justice is apparently the notion of equality. For example, the punishment for false evidence is the punishment that the conviction of the wronged person would have entailed for him (§§ 3, 4 and 13). Hence the talio is prominent in the Code, not in the sense that a limited vengeance is permitted, but that the prescribed punishment is frequently identical with the wrong done. Hence, too, a considerable number of "sympathetic" punishments. "If a man has struck his father, his hands shall be cut off."[3] But the notion of equality only applies to the parties to the litigation, not, for example, to their children. "If a builder has built a house for a man, and has not made his work strong, and the house he built has fallen, and he has caused the death of the owner of the house, that builder shall be put to death"

[1] i.e. the ordinary witnessed clay deed.

[2] Thureau-Dangin, *Sumerische und Akkadische Königsinschriften* (1907), pp.47 *et seqq.*

[3] C.H., § 195.

(§ 229). "If he has caused the son of the owner of the house to die, one shall put to death the son of that builder" (§ 230). Nor does the notion of equality apply as between the three different classes of the population (the patrician, the plebeian and the slave) which figure here, as in other Codes.[1] For a wrong done to a plebeian or a slave, the punishment is less than for that done to a patrician[2]; but he who assaults one who is of a higher class than himself, is punished more severely than if an equal had committed the wrong.[3]

The punishments prescribed by the Code are severe indeed. The death penalty is exceedingly common, and "sympathetic" mutilation is not infrequent. The doctor who causes death or loss of an eye to a patrician whom he treats, has his hands cut off.[4] But for most wrongs the punishment (or compensation—the one thing serves both purposes) is of a pecuniary nature; and it further seems probable from the tablets that the punishments in fact inflicted were commonly less than the severe sentences specified in the Code. It has been said that the provisions of the Code are in effect instructions to the judges; but, since the clauses do not lay down principles, but only decide the judgment to be given upon a certain, simple set of facts, what is to be the decision when (as usually occurs) the facts contain some extenuating circumstance or other element absent from the brief clause in the Code? This consideration helps us to appreciate how the provisions of the Code of Hammurabi are to be understood. They are, as it were, general principles, not in the legal sense of that expres-

[1] For example, in the Gortynian, but not in the Hittite or Hebrew, nor the Assyrian fragments that remain. Some of the Leges Barbarorum (see the Lex Frisionum) and the Laws of Aethelberht refer to four classes: the noble, free, litus and slave.

[2] On the other hand, the plebeian pays the doctor a smaller fee than the patrician, and if the patient is the slave of a patrician, his owner pays still less.

[3] See C.H., §§ 202, 205.

[4] C.H, § 218.

sion, but in an entirely popular sense—they are not hard-and-fast rules (for even the advanced primitive law remains always elastic and variable), but rules which it is good to follow in a general way, and unless there is some special reason to the contrary. Again, even Hammurabi's laws were not always obeyed; administrative machinery was still simple, and some of these clauses might be fairly described as mere "pious aspirations." So, for example, in §§ 268 to 277, the Code contains tariff-rates for the hire of cattle, workmen and boats[1]; but it appears from contemporary documents that the prices in fact paid were lower. However, even in our days, the difficulties inherent in any scheme to regulate prices are formidable indeed.

[1] The phraseology is "its hire is so much"; or, "he shall give so much."

CHAPTER V

THE ASSYRIAN LAWS

THE Assyrian fragments date from the period of the Middle Assyrian Empire, and were discovered in excavations at Assur and published in 1920.[1] They are not, as is that of Hammurabi, a complete Code. Apart from a few disconnected provisions, they consist of three tablets.[2] No. 1 is made up of some sixty clauses (828 lines), clearly intended to be a Code of the Assyrian Law relating to Women, and the text is substantially complete. No. 2, not so well preserved, consists of some eighteen clauses dealing with Land Law. The third tablet[3] contains a few mutilated provisions, and concerns (partly, at any rate) the wrongful sale of property pledged. The date of the tablets is not long after 1500 B.C. On legal and linguistic grounds the third and shortest tablet is thought to be the earliest, and perhaps the first and longest is the latest of the three. These documents, therefore, unlike the Code of Hammurabi, do not constitute a survey of the whole law, nor are

[1] O. Schroeder, *Keilschrifttexte aus Assur verschiedenen Inhalts*, 1920.

[2] *Ibid.*, Nos. 1, 2 and 6. For text, English translation and commentary, see *The Assyrian Laws*, by G. R. Driver and Sir John Miles (Oxford University Press, 1935). German translation by Ehelolf and Koschaker, Ein Altassyrisches Rechtsbuch (Mitteil. aus der vorderasiat. Abt. der staatl. Museen zu Berlin, I, 1922). French translations: Scheil, Recueil de Lois Assyriennes (1921), and (containing useful references to the others) Cruveilhier, Recueil de Lois Assyriennes (Extrait du Muséon, 1926–1929). The chief studies upon the laws and the true nature of the documents containing them are those of Koschaker, Quellenkritische Untersuchungen zu den altassyrischen Gesetzen (Mitteilungen der vorderasiat. Gesellschaft 26, 3, 1921) and G. R. Driver and Sir John Miles' *The Assyrian Laws* (supra). In the text of the present book I have used Cruveilhier's translation.

[3] Schroeder (*op. cit.*), No. 6.

they all part of one compilation, although the earliest tablet and an earlier edition of the law contained in the later ones may well have formed part of one Code.

The language of the Assyrian fragments, like that of the Code of Hammurabi and the Sumerian remains, is not technical, and uniformly consists of conditional sentences in the third person. In other respects the style of the provisions, especially in the Code relating to Women, differs somewhat from that of the Code of Hammurabi and the collections of Erech and Nippur. The Babylonian and Sumerian legislation all make use of much the same phraseology, speaking with the same terseness and vigour, and generally providing in each clause for one set of facts. In the Assyrian laws the phraseology is different, the style diffuse, and the clauses mainly composite,[1] consisting commonly of sub-clauses which provide for variations in the facts.

Of the largest document, the Women's Code, clauses 1 to 6 relate chiefly to thefts by women; and clauses 7 to 25 treat of sexual offences by or against women. In the latter group two clauses[2] concerning sexual offences between men are included, perhaps because this was thought to be the most convenient place for them, or perhaps because they are later additions.

After clause 25 follows a group (from § 26 to about § 39) which can be described as Marriage Laws, and is chiefly concerned with the position of widows and deserted and divorced women, and with marriage gifts, and their devolution on death. More often than not, the species of marriage here dealt with is matrilocal; the wife, that is to say, continues to live in her father's house.[3] The Women's Code ends with a final group of

[1] The clauses are separated by dividing lines, and the first line of each clause juts out from the rest.

[2] §§ 19, 20.

[3] Referred to in the Code under the words "if a woman lives in the house of her father." The patrilocal type of marriage is referred to in the Code by the

laws (from about § 40 to the end) most of which traverse again the ground of laws contained in the previous groups, and are usually different from and inconsistent with those laws. The type of marriage referred to here is invariably patrilocal, that is, the wife lives in her husband's (or father-in-law's) house. It seems to me necessary to conclude from these and other phenomena in the Code that this final section consists of later accretions.

Indeed, the true character of the document under examination is not in any real doubt. There is no reason to suppose that in Assyria, at the time in question, there was a legal profession; but, as in other countries, after Codes of written laws first appeared, they were copied out from time to time by scribes. I know of no Code that has come down to us from the country where it was in force, which, unless it survives upon the stone on which it was originally published, has not been altered under the hands of successive copyists. At the end of their copies they have added further laws; occasionally also they have made additions at the commencement of the Code; often they have also made alterations or additions to individual clauses. So in the Assyrian Code: in the period of perhaps a couple of hundred years through which it was copied by several hands, the laws have been added which are to be found in the last group (about § 40 to the end). In the clauses of the earlier and original portion of the Code (§ 1 to § 39) matter has been added by way of gloss and interpolation, explaining the scope of those clauses, and other matter has been incorporated with a view to reconcile those laws with the later laws or otherwise to amend them. The scribe or scribes who produced the document in question were probably, like most of their fellows, taught to write at a temple school, and may have been

words "if a woman enters the house of a man"— a term also used in the C.H. (e.g. §§ 173, 176, 177) and in the Neobabylonian fragment (§ XIII).

ecclesiastics of sorts; and their interests are shown in a few clauses of an unusual character which appear in the Code, and which sometimes raise a doubt as to whether they really represented the law.[1]

The tablet dealing with land law consists first of five clauses concerning the undivided estates of brothers, who have jointly succeeded to an inheritance. Clause 6 is an interesting statutory enactment, providing for written transfers of land. Three public proclamations, over a period of a month, are made of every intended transfer, and the title of anyone not claiming is barred. Clauses 7 to 15 deal with wrongs committed against a person in respect of his land, and clauses 17 and 18 are (later ?) additions, akin in subject-matter to §§ 1 to 5.

These Assyrian remains are not of the same interest or value as the Code of Hammurabi or even the Hittite Code—the circumstances in which they were produced are unknown; the draftsmanship is inferior; there are a considerable number of contradictions; the text is in parts uncertain, and the provisions are of a more limited scope. But the Women's Code, especially, has interesting features of its own. Firstly, it devotes a large proproportion of its clauses to the law of property; and, secondly, it includes quite a number of provisions of the criminal law. Examples of the latter may be found in the curious group of clauses prescribing the right or duty of wives and daughters of freemen, and also of the concubine and the espoused temple-prostitute, to go veiled in the streets, and prohibiting the common prostitute to veil herself. "The prostitute shall not be veiled, her head shall be uncovered. He who sees a prostitute veiled, shall seize her, shall call witnesses, shall bring her to the palace gate. Her ornament (?) shall not be taken; he who has arrested her shall take her garment. She shall be beaten with 50 strokes of the rod, asphalt

[1] See especially §§ 41 and 47 (*post*).

(presumably hot liquid asphalt) shall be poured on her head. And if a man sees a prostitute veiled, and lets her go, and does not bring her to the palace gate, that man shall be beaten with 50 strokes of the rod, and he who has arrested him shall take his garment, his ears shall be pierced, a cord shall be passed through, and he shall be bound by it behind and shall do a month's forced labour for the King."[1] One wonders whether the man was ever proceeded against or convicted.

On the whole, perhaps the most impressive feature of the Assyrian Laws are the sanctions provided. They include death,[2] mutilation (by cutting off lip, nose or ears, piercing of ears, and castration), impalement upon a stake, deprivation of burial, pouring of asphalt, strokes of the rod, payment of so many minas of lead; and a sentence of so many months' royal corvée.[3] Certainly brutality was a feature of Assyrian civilisation; but, on the other hand, it is to be said that these were probably maximum punishments, not necessarily inflicted, and, as appears above, the sentence by asphalt was probably intended as a deterrent[4] and but rarely executed. And although a husband might mutilate his wife and might put her to death for many offences (as, for stealing from his house and for adultery), yet the concern for the lot of the widow is remarkable. "If," says § 47 of the Women's Code, "a woman, whose husband is dead, has not left the house (i.e. has not re-married) from the time of her husband's death, if her husband has left her nothing in writing, she shall live in the house of her son, wherever convenient; the sons of her husband shall feed her; and for her

[1] § 41. [2] Very frequent.

[3] A sentence of strokes of the rod, together with payment of money and forced labour, is frequent.

[4] As I think, was the same penalty in the Assyrian contract-tablets, see *post*, p. 417. This provision of the Code, at any rate, is criminal, and the sentence is a maximum sentence. The charge is tried in the King's Court (see the words "palace gate") and the King can of course always remit the whole or part of the sentence.

food and drink they shall be as considerate as towards a betrothed whom they love."

What has been said about the general absence of any evidence of internal development of law in the Code of Hammurabi applies also to the Assyrian fragments. It is also true to say of these fragments that the ruling internal principle is that justice may be done, and that the notion of equality is the chief constituent of justice. This is curiously prominent in several sections of the Code dealing with wrongs against a man (namely, theft and adultery) committed between his wife and a male associate. The husband may take vengeance on his wife and the third person up to the infliction of the death penalty, but no greater punishment can he impose on the man than he visits upon his wife, and if he acquits the latter he must acquit the former.[1] Similarly, in a case where a man's wife is, with her consent, procured by a woman to be violated by a man who knows the wife to be a married woman, the wronged husband may inflict any punishment he wishes on his guilty wife, and the same punishment, and no more (it is provided) shall be inflicted on the procuress and the adulterer.[2] This is one of the ways in which the Code guards against trumped-up charges.

[1] See the Women's Code, §§ 3, 4, 15 and 16. See also Hittite Code, II, § 84.

[2] § 24.

CHAPTER VI

THE HITTITE CODE

In the Hittite Code, the Code of the earliest Aryan-speaking nation of whom we know, the reader finds himself amidst a far simpler civilisation and in a different world. As in the law of most primitive peoples, money payments constitute the sole sanction for almost all wrongs. Mutilation is only imposed upon slaves; and the death penalty is confined to certain offences by slaves, offences against the dignity of the King, and some other criminal offences of a sexual nature (namely incest of certain kinds, and sodomy with some animals). The talio is absent; a murderer is required to give, by way of compensation, four persons[1] (presumably wives or children, or more usually slaves). That the money or persons specified must be accepted in discharge of guilt, whether the wronged person wills it or no, is made clear by a phrase frequent in the Code: "He shall pay (so much), then he discharges his liability."[2] The money-payments are moderate in amount, and it appears by statements in the Code that they have been decreased, usually by about half. It is indeed manifest that we have left Babylonia and Assyria, and the sphere of the Babylonian and Assyrian systems of law, with their obvious common legal elements and their fierce puritanism, and are standing upon the outskirts of the then civilised world. The

[1] H.C., I, § 1.

[2] An earlier extant edict of the Hittite King Telepinus appears to provide that in a case of homicide it should rest with the lord of blood (next of kin of the deceased) to say whether a composition should be accepted or not, see Keilschrifturkunden aus Boghazköi herausgegeben von der vorderasiat. Abt. der staatl. Museen in Berlin, XI, 1, Col. IV, 19 *et seq.* For the phrase "lord of blood" compare the "zoti i gjakut" of Northern Albania (Durham, p. 67).

reader will not conclude that, because the sanctions of Hittite law are pecuniary, Hittite notions of right conduct are enlightened. For example, according to Hrozny's translation, §§ 35 and 37 read as follows: "If a slave gives the (bride) price to a (free) woman, he can take her for his wife, no one can prevent him" (§ 35). "If a slave gives the (bride) price to a free youth, he can take him for his pleasure-boy, no one can prevent him" (§ 37). Sexual intercourse of a man with mother, daughter or son is not punishable if committed by consent.[1] Sodomy with a horse or mule disqualifies for the priesthood, but is not otherwise punishable.[2] These matters are necessary to a proper appreciation of the place occupied by Sumerian and Semitic conceptions of right in the history of civilisation.[3]

The Hittite Code[4] comes from the palace archives of the Kings of Hatti at Shattushash (Boghazköi). It is obviously intended to cover the whole law in the same sense in which the Code of Hammurabi does so.[5] It is a lengthy compilation, consisting of two parts, each of some 100 clauses, and each containing as a heading the first words of the first clause. But the two parts plainly constitute one document, for the subject-matter of the end of the first continues in the second. The Code dates in all probability from the hey-day of the Hittite Empire,

[1] II, §§ 75, 76. Contrast A.C. §§ 19 and 20, where castration is the punishment for an indecent offence between males, and a false charge of such an offence is punishable by one month's royal corvée, mutilation, and the payment of a talent of lead. In the Code of Hammurabi (§ 154 *et seq.*) death and exile are the sanctions for incest. [2] II, § 86.

[3] As a further aid to a proper appreciation of the Assyrian outlook, compare with certain well-known practices of Ancient Greece (e.g. 1st Gortyn Code, § 4) and some modern English criticisms of the law of abortion, the following enactment (§ 54) of the Assyrian Women's Code: "If a woman of her own accord causes to fall what her womb holds, she shall be tried, convicted and impaled upon a stake, and shall not be buried. If she died in committing abortion upon herself, she shall be impaled upon a stake, she shall not be buried."

[4] First translated (into French) by Friedrich Hrozny (*Code hittite provenant de l' Asie Mineure, Ire Partie, Geuthner*, Paris, 1922); and into German by Zimmern and Friedrich, *Hethitische Gesetze* (Der Alte Orient [1922], 23, 2; and [1925], 24, 3). The best translation is into English by Walther in *The Origin and History of Hebrew Law*, by J. M. P. Smith (Univ. of Chicago Press, 1931), App. IV.

[5] See *supra*, p. 27.

perhaps the middle of the fourteenth century B.C. There are also fragments of another edition of the Code.

The clauses of the Hittite Code, like those of the Code of Hammurabi, consist of conditional sentences[1] in the third person, are terse in language, and generally deal with one set of facts. Clause 1 of the first tablet, for example, reads: "If anyone slays in anger a man or woman, he must hand over the latter and must give four persons, whether men or women, then (or so) he discharges his liability." The clauses are arranged in large groups according to their external subject-matter, but one or two miscellaneous clauses usually follow the end of each group. Of the First Part, §§ 1 to 24 concern injuries to persons (namely, in order: intentional homicide, unintentional homicide, wounding, stealing of men and of slaves[2]); and §§ 25 to 27 are miscellaneous. Clauses 28 to 38 deal with marriage, and §§ 39 and 40 are miscellaneous. Clauses 41 to 57 are, or rather originally were, a group of rules relating to holdings of land on the terms of service to the Crown. Into the midst of this group has been introduced a number of clauses (§§ 43 to 46) of miscellaneous subject-matter. Of these, §§ 43 and 44 seem to be of religious import, especially § 44, which relates to the watering of oxen (the sacred animals of the Hittites).

Then comes a very large group of some 80 clauses (I, 58–101, and, continuing in the second tablet, II, 1–35). This group is concerned with injuries to property, i.e. stealing, damage to property, and arson. The arrangement within the group is interesting. Firstly, domestic animals are dealt with. Clauses 58–74 prescribe punish-

[1] Except, of course, historical statements, and lists of prices, etc., which are statements in the third person.

[2] The few clauses relating to the stealing of slaves are put in here because their subject matter is akin to what immediately precedes, namely the stealing of men. Among the clauses relating to the stealing of slaves is included one (§ 23) providing a reward for anyone who brings back a runaway slave, precisely as in C.H., § 17 (see *ante*, p. 24, note 3).

ments for stealing oxen, horses, rams, goats, mules and asses; and then §§ 75–78*b* deal with offences of injuring the same animals (i.e. oxen, horses, mules and asses). So far the Code has been concerned with draught animals; then comes a little miscellaneous matter out of place (§§ 79–81), and, next, §§ 82–87 deal with the stealing and killing of swine; and §§ 88–91 with the killing of dogs.[1] Having disposed of domestic animals, the group then goes on, secondly, to deal with offences of stealing from, injury to, and arson of premises and land (I, § 92 to II, § 16). Thirdly, in II, §§ 18–34, the group turns its attention to the stealing of sundry kinds of moveable property. At the end of the whole group are tacked on three clauses (II, §§ 35–37) which provide for injuries *from* the land and animals of others.

Then we reach another great group of clauses (II, §§ 39 to 72) laying down tariff-rates for the *hire* of workmen, animals and equipment (II, 39 to 46, and 61b, 62) and the *prices* of animals, produce, clothes and land (§§ 63–72). Into the middle of the group of sections relating to hire (in §§ 47 to 61a) has crept or been inserted a miscellaneous medley of clauses on sundry matters, including a few rules for performing certain sacrifices of a magical nature of interest to agriculture.

Finally, after the group of tariff-prices, comes a group (II, §§ 73 to 84) concerning sexual criminal offences, at the end of which have crept in two clauses, much out of place (§§ 85, 86) which include a rule about a sexual offence, a religious-historical clause, an ecclesiastical clause, and a tariff-rule.

About the true nature of the document embodying the Hittite Code there can be no great doubt. It has been expanded under the hands of successive scribes

[1] The last clause of this group (§ 91) may be a royal judgment, incorporated here by the scribe: "If (or "when") a dog eats lard, and the owner of the lard catches him, he may slay the dog and recover the lard from his inside; no compensation is payable."

(ecclesiastics) who have copied it out. It had chiefly consisted of the following large groups of clauses: offences to the person, the bride-price, land held on feudal service, offences to property, and tariff-rates for hire and sale. In some earlier edition the Code was probably written not upon two tablets but four, of which the first ended about I, § 43, the second at the end of I, the third about II, § 46; and the Code (which then ended at about the present II, § 72) also ran into a fourth tablet. At the hands of successive copyists one or two miscellaneous clauses have been added at the end of various groups, and a more substantial number of miscellaneous clauses have crept in at I, § 43 to § 46 and II, §§ 46 to 62 (where two tablets ended in the middle of groups) and at the end of the Code, where a new section has been added (II, §§ 73–86) dealing with bestiality, incest, adultery and rape, the levirate (succession) and (in § 85) sacrifice.[1] In each of these three places, and nowhere else, occur a number of religious rules, obviously inserted by a scribe and cleric who was interested and anxious to preserve them.

There are also other characteristics of the document which show it is not an official edition of a Code of laws, or an enactment of laws. The drafting—especially of what seems later parts—is in places verbose and poor, and different in style from the rest, and sometimes specifies no sanction. Clause 46, for example, of the First Part provides: "If a man takes (certain) implements, he must return them to the owner; if he does not return them, he makes himself liable." Secondly, there is much historical matter, which usually consists of a record of the amendment of a rule. The following is an example (I, § 7): "If anyone wounds a free man, or knocks out his teeth, formerly he had to pay a mina

[1] These subjects were all of special interest to the ecclesiastical order, among the Hittites as in England; see *post*, under each of these topics.

of silver; now he need only pay 20 half-shekels of silver, then he discharges his liability." Or, I, § 9: "If anyone injures a person in the head, formerly he had to pay 6 half-shekels of silver; the injured person received 3 half-shekels, and 3 half-shekels of silver used to be taken for the palace. And now the King has abolished the payment to the palace, and the said injured person takes 3 half-shekels (only)."

The fragments, mentioned above, of another edition of the laws cover most of the first fifty clauses. They appear to be of about the same date. Although for the most part they correspond clause by clause with the Code, the clauses often differ much, and show how little was the respect paid by the scribes to the texts they copied. But, so far as it goes, the fragmentary edition contains no historical matter,[1] no religious rules[2] and no clause without sanctions.[3] If, as seems probable, these two documents had a common ancestor, several copyists must have intervened.

Rules of criminal law are very clearly separated in the Code. As is general among primitive peoples, the operation of the criminal law is chiefly confined to certain sexual offences and offences against the dignity of the King.[4] The Code also informs us of the abolition of the payments formerly made to the King[5] by those guilty of certain other wrongs, apart from the sum payable to the injured party.

Rules of property law are almost entirely absent from the Code, and little is said of contracts. Apart from the tariff-list for sales and hirings and a few marriage rules, the Hittite Code consists entirely of laws of wrongs,

[1] Compare § V of the fragments with I, § 7.
[2] There appears to be nothing in the fragments corresponding to I, § § 43, 44.
[3] Compare § XXXV with I, § 46.
[4] Witchcraft, the other criminal offence of primitive peoples, is not mentioned here.
[5] Cf. Tac. Germania, c. 12.

civil and criminal. This, as we shall see, is one of the marks of its more primitive character, as compared with the Codes of Assyria and Babylon. As to any conception of underlying legal principle, there is even less evidence here than we found in the two previous chapters.

PART II

LAW, MORALITY AND RELIGION

The underlying basis of the theory, and the explanation of its general appeal, is that rules of religion, of morality and of law appear to have this much in common, namely, that each of the three bodies of rules, in their modern, developed condition, seem to contain certain rules of a quasi-ethical nature governing the conduct of man towards man. It does not follow, however, that in their beginning this was true of law or of religion, or that rules of morality of this kind then existed. The theory purports to find an origin for one unknown quantity—namely, early law—in two other unknown quantities, namely, primitive religion and primitive morality. It rests, therefore, on three assumptions. As to "morality" in particular, some difficulty might be experienced in any attempt to ascertain the sense in which the term is used by Maine in this connection; but for the purposes of the present enquiry, it must suffice to attribute to that expression some vague connotation of an Austinian nature, namely, that it consists of rules prescribing conduct between man and man, not being rules of law or of religion.

It is not to be expected that no mention should be found in the Codes of the religious as well as other institutions of each community. Temples and gods have their property, which is capable of theft. References to religious institutions constitute no evidence that a mixed rule of religion and law was ever the parent of a rule of law. There is, however, one type of such reference, which is found generally throughout the Codes, except the most primitive, and which must be mentioned here in order to put it aside. This is the ordeal, an institution in which the early legal procedure makes use, for its own purposes, of the current belief in magic or religion. Little need be said here of the ordeal, for two later chapters are devoted to its history.[1] It will be

[1] Chapters XXX and XXXI.

seen that this institution, as we know it in its developed form in the Middle Ages, so far from yielding evidence of a religious origin of law, is the final product of a long period of growth and change. The most primitive trials were by unsworn evidence alone, and ordeals were only resorted to in default of evidence. Furthermore, as first employed, though they embodied the use of magic to a certain extent, ordeals contained no appeal to religion, and it is only among advanced tribes and in the Codes that the religious element becomes manifest, chiefly in the form of the ordeal by oath. The latter is at first (like other ordeals) a method of trial, and is applied only to the defendant, who, upon stating his defence on oath, obtains his acquittal. It has finally been extended to both parties and witnesses; but in the process it has lost much of its force, and now the oath does not clear the swearer from liability but merely gives force and effect to his evidence. This extension, however, is entirely contrary to primitive notions, and there have been cases among the tribes where the application of the oath to witnesses by the European has been much resented by them, on the ground that they were not defendants.[1]

Reserving the ordeal for separate treatment, we shall see, in the following examination of the Codes, that they contain no evidence to support a religious theory of the origin of law. (In the least advanced and in the most advanced of the Codes of primitive law there is never any trace of religious or moral rules, but there are Codes of an intermediate stage of legal development,[2] in which religious rules are to be found.) The last-mentioned Codes consist of two classes; firstly, genuine Codes of law to which rules of a religious character have been later added by ecclesiastical hands; and, secondly, ecclesiastical compositions which are not laws. After

[1] See *E.A.*, Vol. I, p. iii.

[2] These Middle Codes will be defined later in Part III. See Table, p. 218.

this examination of the written law of the past, it will be seen in regard to the unwritten law of the tribes that here, too, there is no evidence to support the theory under discussion, but that all the evidence is opposed to it. When this examination has been completed, the way will have been made clear for an effort to trace the true history of primitive law.

CHAPTER VIII

THE CODES AND THE RELIGIOUS THEORY

THE surviving legislation of the Cretan city of Gortyn[1] may be taken as marking, by its stage of legal as well as economic development, the end of the period of primitive law and the commencement of mature law. Apart from smaller fragments, it consists of two bodies of legislative clauses (to be referred to later as the First[2] and Second[3] Gortyn Codes) both of which date from the middle of the fifth century B.C., and survive without alteration on the very stone upon which they were published. They do not cover the whole field of law, but are statutory legislation amending prior written law on various topics; and they include much in the way of detailed laws of property, enacted to comply with the needs of an advanced mercantile civilisation. In their language, form and arrangement of topics they are of the same general character as the earlier legislation which has already been examined. For the present purpose it is unnecessary to say more of their contents than that they are purely secular and comprise no rules of religion or morality. Some of

[1] See *D.H.R.*, I, 352 ff, where these laws are translated into French with a commentary; also Comparetti, Le Legge di, etc., Cretesi (Monumenti antichi, III, Milan, 1893). There is a translation of the First Gortyn Code into English (not so good) by Roby, in *L.Q.R.*, Vol. II (1886), pp. 135–142.

[2] The longer Code, of fourteen lengthy sections, each treating of a separate subject-matter in some detail. Found in 1884 on the left bank of the Lethæos, engraved on part of a circular wall of a theatre of the first century A.D. It was probably published (450 B.C.) on the wall of a temple which was used, 500 years later, in building the theatre.

[3] Only part of a few columns survive, engraved on the North wall of the same theatre, which was also taken from an older building.

these fragments begin with the word "Gods!"[1] but that is because they were published in the Greek fashion by being engraved on the walls of a sacred edifice, much as public notices are still affixed to church doors in this country.[2] Nor do any other Greek fragments of law contain any evidence supporting the religious origin of law.

Of our Codes of primitive law, the most advanced is the Code of Hammurabi. Throughout the whole of this Code there is no rule of morality and no trace of any such rule. As in the Gortynian and all other ancient Codes, each of the rules consists of conditional sentences in the third person,[3] the protasis consisting of the set of facts supposed, the apodosis containing the legal consequences or sanction expressed in a future tense or the imperative mood; and the sanction is in all cases specified and secular. "If a man have stolen the son of a patrician, he shall be put to death."[4] Furthermore, there is no religious rule[5] in the Code. True, on the obverse of the monument is a representation of Hammurabi receiving his laws from the seated Shamash, god

[1] *D.H.R.*, Textes divers de Crète, fragment E, begins: "Gods! The Gortynians have voted and decreed as follows." This comes from the main façade of the temple of the Pythian Apollo.

[2] As they were in the Middle Ages. The First Gortyn Code, § 14, contains a provision of a not unfamiliar kind, depriving of the right of succession a son who fails to fulfil the civil or religious duties of his deceased adoptive father. This provision, which is of a kind never found in primitive law, sheds no light on the present question. For the ordeals in the Gortynian legislation see post, pp. 364-7.

[3] The following purely verbal exceptions should be mentioned. In the Neo-Babylonian fragment the introductory words are not "If a man" but "the man who," otherwise the construction is the same. Such phraseology is obviously not suitable for every law. In part of the Hebrew Code an idiomatic construction is employed. The introductory word is a participle, e.g. "[A man] Striking a man, and he dies, shall be put to death" (Ex. xxi, 12). And in *C.H.* and certain other Codes, lists of tariff-prices, etc., are expressed as simple statements in the third person. These are the only exceptions that occur to me.

[4] *C.H.*, § 14.

[5] In the term "religious rule" I include any rule whose sanction, express or implied, is religious. In the term "rule of morality" is included any rule governing the conduct of man towards man, other than a rule of law or a religious rule.

of the sun and of law, the "judge of heaven and earth." But this has no more relevance to the theory under discussion than the traditional passage which concludes the Speech of the King to the legislature in this country: "May the blessing of Almighty God rest upon your labours." Hammurabi no doubt sought to convey that in his great task he was divinely inspired: but neither in the Code of Hammurabi nor in any other primitive legislation is there to be found a command or prohibition in the second person, or any other rule purporting to be the words of a god.

"God" is referred to in several places in the Code. In two passages that expression is used, as in other ancient Codes, with precisely the sense of the word as used in the phrase of English law, "act of God." "If in a sheepfold a stroke of God has taken place or a lion has killed" is the phrase of § 266, and § 249 provides for the case where a man has hired an ox and God has struck it, and it has died. The word is used with the meaning of, firstly, a natural event as opposed to an act of man; and secondly, an accident. So, too, in English law: "The 'Act of God' is a natural necessity and inevitably such, e.g. winds, storms, etc."[1] In all the other passages where it occurs in the Code, the word "god" has reference to an ordeal, either the ordeal by the "river god," or the ordeal by oath, which is to be taken (in the phraseology of the Code) "before the god" or "by the name of the god."[2]

Similarly there are no rules with religious sanctions, or without sanctions, in the other remains of written law in Babylonia, neither in the Sumerian nor in the Neo-Babylonian fragments. Nor is the nature of the Assyrian Code or other Assyrian fragments at all different

[1] Per Mansfield, C. J., Trent Navigation *v.* Wood, *cited* in Forward *v.* Pittard, 3 Esp. 131, 1 T.R. 28, 4 Doug. 290.

[2] See *post*, Chapters XXX, XXXI, for the clauses of the Codes relating to ordeals.

in this respect: they contain neither rules of religion nor of morality.

With the Hittite law-book we turn to Codes of a more primitive character than those hitherto referred to in this chapter. Yet again in the Hittite Code no rule of a moral or religious character is to be found in the nucleus that consists of a Code of Laws. As we saw, however, in a previous chapter,[1] matter has been later added by one or more ecclesiastical scribes, and included in this are some half-dozen rules of a religious nature,[2] and one or two other rules (perhaps religious) in which no sanctions are specified.[3] Apart from these additions, there is one clause of the Code which contains a reference to the "act (hand) of God" and the ordeal by oath,[4] but there are no rules of a religious nature and no rules of morality.

In these Eastern Codes of primitive law, we have seen that the most advanced Codes contain no religious matter whatsoever; but the Hittite Code,[5] which is far less advanced than the others, though in its original form it was entirely secular, contains a few religious rules in the later additions. Now let us turn to an age, far later than this in point of time, when we find our most primitive Codes, and when a period of continuous materials enables us to watch the changes that take place.

During the fifth century A.D. the Roman Empire in the West had contracted and dissolved, and the barbarian kingdoms, established in its place, consolidated their new dominions by the issue of written law. The Visigothic Code of Euric (466–485), whose kingdom was situated in Southern Gaul and Spain, is represented by a surviving fragment of excellent law. The Visigoths,

[1] Chapter VI.
[2] *H.C.*, II, §§ 49–54 (rules for the due performance of sacrifices appropriate to various occasions), I, § 44, and II, § 85.
[3] See *H.C.*, II, §§ 81, 82.
[4] I, § 76.
[5] Later referred to as one of the Middle Codes.

as has been said, had for some time been settled as fœderati within the Empire, and had adopted Christianity and some of the civilisation of Rome. The extant portion of the Code (which treats chiefly of contracts and family law) shows that the Code consisted of groups of clauses arranged according to subject-matter. The fragment is couched in a good Latin, and both form and substance are those characteristic of Codes of primitive law. The provisions embody native law which has reached a comparatively advanced stage of development and has been influenced by contact with Rome. There are no rules of morality and no religious rules or rules with religious sanctions. The Burgundians had also been established for some time within the Empire, and had also adopted Christianity and been influenced by Roman culture. The Code of Burgundian law issued by Gundobald to his kingdom at the commencement of the sixth century survives in a form much extended by later additions.[1] In the whole of this lengthy collection no moral or religious sanctions are to be found. Although there is some deterioration of quality and increasing evidence of ecclesiastical authorship and outlook in the additions, and although the additions are, generally speaking, not statutory enactments but rules of existing law, nevertheless the whole is of great value and interest. Here again the form of the clauses is that familiar in other primitive Codes.

But the Salic Franks had not lived within the Roman Empire, but on the coast of Belgium and Holland, and their law was unaffected by that of Rome. About the year 500, Clovis enacted written law for his kingdom, and by the time of Charlemagne[2] that kingdom had ex-

[1] The text is of the early ninth century. The additions contained are chiefly Tit. 1 and the titles from Tit. 42 onwards, but the intervening, older titles have also been brought up to date in places. The Code as a whole represents substantially the same stage of development of law as the Hittite Code.

[2] A.D. 769–814.

panded into the Frankish Empire. The same reign formed a brief interval of enlightenment and letters between two dark ages, and from these years date the earliest manuscripts of our numerous Codes of the peoples of the Frankish Empire. The most important of these is the Lex Salica,[1] the Code of the Salic Franks themselves, and the old laws of Clovis are represented in Chapters II to XXXVI of this compilation.[2] These chapters constitute the most primitive collection of laws in existence. They are statutory law, couched in rude Latin, but containing nothing of religion or religious sanctions and no rules of morality. The chapters of the Lex Salica from Chapter XXXVII to the end are accretions of later date (say, from 650 to the second half of the eighth century). By now the process of legislation on the Continent was drawing to an end, for the Church and the landed nobility gained every day in power. In these later chapters of the Salic Law are a considerable number of rules which are not statutory but descriptive; yet throughout the Code there are no religious sanctions or religious rules. Contemporary with these chapters are the surviving fragments of the so-called Pactus Alamannorum, which are of much the same character and contain no rules of religion or morality..

But now a new feature appears in these Leges Barbarorum. The Code known as the Lex Alamannorum[3] is not a codification of statutory law, but consists chiefly of a great number of rules which are ideal rather than real,[4] and a considerable number of rules with religious sanctions. The Lex Baiuvariorum, which is little later

[1] See *post* Chapter XXXI, for a more detailed examination of this and the following Codes.

[2] It must remain very doubtful how much of this dates from the time of Clovis.

[3] Described in further detail, p. 74, *post*. Its rules are more recent than those of the Pactus Alamannorum.

[4] For example, the prodigious tariff-list for injuries to every portion of the body (see Tit. 59 *et seq.*).

in date, consists largely of clauses copied from the Lex Alamannorum, and clauses taken from the Visigothic Code of Euric. These two compilations are indeed of a strange character.[1] On the other hand, the rest of the Codes of the period are secular. The Lex Ripuariorum, the Code of the Ripuarian Franks, contains some of the old laws of Clovis with additions from various sources, and many of the rules are descriptive rather than statutory; but though the ecclesiastical outlook and authorship are often very obvious in the later parts,[2] the Code is secular. About the same date (800) were prepared at the court of Charlemagne a number of documents setting forth the rules in force in various provinces of the Frankish Empire—the Lex Frisionum,[3] Saxonum, Francorum Chamavorum, and Anglorum et Werinorum. They are in no sense legislation, for the process of legislation had ceased; they are the work of commissioners whose task it was to compile the legal usages of the peoples in question. They too are secular.

Summing up these Leges Barbarorum of A.D. 500 to 800, we see that they represent different stages in the development of law from the Salic, the most primitive Code we possess, to the Burgundian, which is as advanced as the Hittite Code; and that as we take in order of date the Codes of the Frankish Empire which were uninfluenced by Roman culture, we see religious sanctions appearing for the first time in compilations of the second half of the eighth century,[4] when the Church had attained great influence at the expense of the monarchy, and the process of secular legislation was just coming to an end. But religious sanctions are confined to two Codes[5] which consisted not of genuine law but of rules

[1] See *post*, p. 74. [2] See e.g., Tit. 58.
[3] See e.g. the end of this Code for an ecclesiastical addition.
[4] The beginning of the Middle Codes of Mediæval Europe (other than the Code of Euric and the Burgundian Code).
[5] Lex Alamannorum and Lex Baiuvariorum.

which their ecclesiastical compilers and authors sought to put in force, using to that end the sanctions which they had the power to wield, namely, religious sanctions.

If we now turn to the laws of Anglo-Saxon England we shall see a similar picture, but one far easier to recognise.

CHAPTER IX

THE ANGLO-SAXON LAWS

THE Anglo-Saxon laws,[1] which commence the written tradition of the law of England, consist of lengthy collections of rules found in manuscripts dating chiefly from the eleventh and twelfth centuries. The first group of these laws consists of the three bodies of Kentish Laws, namely, those attributed to Aethelberht (who was reigning in Kent in 597 when the mission under Augustine arrived in this country, and who died about 616), those of Hlothhere and Eadric[2] (who reigned about 673 to 686), and those of Wihtred (who reigned from 692 to 725). The second group of the Anglo-Saxon Laws, namely, the Wessex group, consists of those of Ine (who reigned from 688 to 725) and Alfred the Great (871 to 900). Thereafter most of the English kings in turn contribute a body of laws.

In examining the Anglo-Saxon Laws upon their face, one fact of supreme importance cannot fail to be noticed, and that is the difference between the first two bodies of this legislation and what follows. The laws of Aethelberht are among the most primitive Codes which survive. They are couched in brief and simple language, consisting of conditional sentences in the third person, and they consist entirely of rules of true law with purely secular sanctions. The second body of the Kentish

[1] Edited by Liebermann in his monumental work, *Die Gesetze der Angelsachsen*, Halle, 1903–1916. For excellent editions of the laws with English translations briefly annotated, see (for the laws from Aethelberht to Aethelstan) *The Laws of the Earliest English Kings*, F. L. Attenborough (1922); and, for the rest of the laws, *The Laws of the Kings of England from Edmund to Henry I*, by Miss A. J. Robertson (1925).

[2] This is one body of laws attributed to these two kings.

Laws, namely, that attributed to Hlothhere and Eadric, is similar in form and substance, except that the clauses are longer and deal with a more detailed subject-matter, and there is a considerable amount of procedure,and technicalities relating to the application of the oath. When we reach the third body of Kentish laws, namely, those attributed to Wihtred, a complete transformation is seen to have taken place. These laws, and the following (Wessex) laws of Ine (who reigned at the same time as Wihtred) and the whole of the rest of the Anglo-Saxon Laws[1] consist of a mixture of rules of a secular subject-matter and rules of a religious subject-matter; rules with secular sanctions, rules with religious sanctions, rules with sanctions both secular and religious, and rules with no sanctions at all.

In other words, the Anglo-Saxon laws, so far from giving any support to the theory that early law is confused with religion, show a clear picture of true primitive laws gradually giving way, in the course of time, to rules of mixed law and religion. For the purpose, therefore, of the present examination of the religious theory in the light of the available evidence, it is not necessary further to describe the Anglo-Saxon Laws; but the task is well worth while, firstly, so as to render more accurate the preceding account, and, secondly, to show the close correspondence between the history of the Codes of the Frankish Empire and the history of the Anglo-Saxon Laws.

The first body of Anglo-Saxon Laws bears the following heading: "These are the laws[2] which King Aethelberht established in the days of Augustine." These words, like the introduction to the body of laws that follow, are agreed to be a later addition. We may notice, however, the remarkable statement that this lengthy

[1] That is to say, about 95 per cent of the total.
[2] The word is "dooms."

piece of legislation was enacted in the lifetime of Augustine, who died probably only seven years after the Conversion.[1] The introduction to the second body of laws states that " These are the dooms which Hlothhere and Eadric, Kentish kings, established. Hlothhere and Eadric, Kentish kings, extended the laws which their predecessors had made, by the dooms hereinafter mentioned." But these two kings, so far as is known, did not reign or legislate together. The two bodies of laws are only preserved in the Textus Roffensis of the early twelfth century; and while the constructions, especially in the Laws of Aethelberht, are of a very early character, the language of the Kentish Laws, as a whole, contains forms dating from various centuries up to the twelfth. As to their matter, there can be no doubt that tradition is correct in regarding the Laws of Aethelberht as earlier than the Laws of Hlothhere and Eadric, and both these Codes as earlier than the rest of the Anglo-Saxon Laws; but is it correct in assigning these two Codes, as they stand, to the kings whose names they bear?

The form of the clauses of the Laws of Aethelberht is, as has been said, the form which is so familiar in all ancient laws: but the method of arrangement of the clauses is exceedingly strange. They are all arranged, not according to the external subject-matter of the rule, that is to say, the circumstances out of which the rule arises, but according to the social class of the person against whom the wrong is committed. This arrangement is almost unique in the Codes[2]; it betokens an all-pervading and fundamental theory of the social structure of the people, an intense feudalism which, so

[1] Augustine probably died in 604. Some authorities, however, place his death as late as 614.

[2] In the *C.H.* and elsewhere the few rules relating to e.g. assault specify in turn the compensation payable to each class of victim; but this natural and necessary arrangement is very different from an arrangement of the whole of the law under half a dozen groups, each dealing with various offences against a particular social class.

far as is known, cannot be five centuries earlier than the Norman Conquest. It belongs to an age when every man, like the king himself, has his own "peace" for breach of which compensation is payable to him. It seems extremely probable, therefore, that this arrangement dates from round about A.D. 900, or is even as late as the early twelfth century, which is the date of our text. Only one other early Code has a similar structure, and this is the oldest Scottish Code, namely, the Leges Inter Brettos et Scottos,[1] which probably dates from the thirteenth century, when this extreme type of feudalism reached Scotland. In brief, then, our text of the Laws of Aethelberht is a collection, made no earlier than Alfred's time, of old laws of various dates, all attributed to Aethelberht. Furthermore, in the order of the social classes, it is not the king that comes first, but the clergy. The importance of this is not merely to show that the authors of the collection were clerical—the ecclesiastical order had, of course, a monopoly of letters—the important thing is that, at the date of the collection, the Church had grown so powerful and organised that it placed itself first in the state. Indeed, in these laws theft of the king's property is compensated for at a rate not only lower than the goods of the Church, but even lower than the private property of a bishop, and equal to that of a priest.[2] It is obviously impossible, therefore, that even the matter of all of these laws dates from the time of Aethelberht.

The structure of the Code is as follows. Clause 1 deals with offences against the Church and the clergy; clauses 2 to 12 with offences against the King; and clauses 13 and 14 with offences against noblemen

[1] See *Post*, p. 79.

[2] § 1 provides "God's property (i.e. theft of it) and the Church's (shall be paid for) 12 fold. A bishop's property 11 fold. A priest's property 9 fold. A deacon's property 6 fold, etc." § 4 provides: "If a freeman steals from the King, he shall pay 9 fold."

(eorls). Clauses 15 to 31 consist of rules of the general law, that is, sundry wrongs by and against freemen,[1] but wounds and assaults are excluded. From clause 33 to clause 72 there is a tariff-list of payments for wounds and assaults, of which more will be said later. Clauses 73 to 84 are a collection of rules relating to women, and treat of such topics as the bride-price, the division of property on separation of husband and wife and on succession by death, the sanction for rape, and the offence of taking a widow who does not belong to one. Clauses 85 to 88 concern wrongs against servants; and clauses 89 and 90, which deal with offences against and by slaves, terminate the Code.

In a number of places in the Code are to be found features, in addition to those already mentioned, which could not have been found in laws of A.D. 600. The tariff-list of payments for personal injuries, which occupies no less than forty clauses, and constitutes a half of the Laws of Aethelberht (§§ 33 to 72), furnishes the chief example. It provides a pecuniary sanction for injuries to every part of the body in turn, beginning with the hair and ending with the toes. The following is the last of these clauses: "If the nail of the big toe is knocked off, 30 sceattas shall be paid as compensation; and 10 sceattas shall be paid as compensation for the loss of each of the other toe-nails." No parallel to such a monstrosity is to be found outside mediæval Europe. In the law of any tribe of the modern world[2] or in any ancient Code (except those of mediæval Europe) the provisions on this subject never amount to more than half a dozen clauses; and even in Europe tariff-lists of

[1] § 26, however, is concerned with the homicide of a fourth class of the population, the laet, a class found elsewhere in the "litus" of the Salic Law, and corresponding to the lower class of freemen (i.e. perhaps freedmen and descendants) frequently found in primitive law. But here it is astonishing to find the status of "laet" elaborated into three classes. The "laet" is not found elsewhere in the A.-S. laws.

[2] Except that in such a case the rules are only reduced to writing by observers.

this kind were produced only within a limited period of time and in certain special circumstances. Statutory legislation had practically ceased, and its place was taken by compilations of rules, prepared of course by ecclesiastics, and constituting ideal systems of law, although they were often intended to represent law of the time of the authors or of a past time. Abstract, underlying principle had not yet been arrived at; and hence a superficial education and acquaintance with letters, added to a speculative interest in law, produced an elaborately detailed table of payments for every conceivable personal injury. Such a table was, however, of little or no practical utility, for the sanctions must, in fact, have varied according to the surrounding circumstances of each offence, and therefore most of the detail was wasted. On the Continent such tariffs are not found except among the non-statutory collections made in the time of Charlemagne,[1] contained in manuscripts of his time, and purporting to represent contemporary law. Allowing at least a century for the later development of Kent as against the Frankish Empire, we shall not be far wrong in attributing the tariff-list in the Code of Aethelberht to the period of the reign of Alfred (871–900). The accuracy of this estimate is confirmed by the fact that the Laws of Alfred, which are found in a tenth-century document,[2] contain a list which is almost identical, and the spurious Laws of William I[3] contain a much briefer example.

[1] At the end of the eighth century and a few years later. They are perhaps at their worst in those remarkable documents known as the Lex Alamannorum (Tit. 59 ff.) and Lex Baiuvariorum (Tit. 3, c. 1); and in the Lex Frisionum (Tit. 22).

[2] Corpus Christi College, Cambridge, No. 173. Liebermann puts the date of this document at A.D. 925, but this is probably too early. The table is contained in Alfred, §§ 44 to 77 (the end of those laws). The payments are on a somewhat higher scale.

[3] Leis Will. §§ 10, 11. The H.C. and Lex Burg., which correspond with the law of the date of the Norman Conquest in their stage of development, contain nothing of this kind.

No other English laws contain a tariff-list of this kind.

There are a number of other laws of the Code, which, judged by the standard of the Continental Leges Barbarorum, must date from about 900 or later. Clause 31 provides that the sanction for adultery with the wife of a freeman is a sum equal to her wergeld—that is to say, the same sum that would be payable if the defendant had killed her.[1] This clause shows a very considerable advance as compared with the law of the generality of the tribes, and similar rules are found on the Continent in two of the Codes which have just been referred to as containing tariff-lists for personal injuries, namely, the Lex Baiuvariorum[2] and the Lex Frisionum.[3] This clause of the Laws of Aethelberht must also date from Alfred's time or later, but it can hardly be much later, for at the Norman Conquest adultery was in some circumstances a capital offence.[4]

The Women's Code (§§ 73 to 84) is strikingly late in language and in matter. Clause 77, for example, provides that "if a man buys a maiden, the bargain shall stand if it is properly (honestly) done; if it is improperly done, she shall be brought back home, and he shall have his money returned." The meaning of this strange clause becomes clear when it is compared with II Canute, § 74[5]; and if, as is probable, the two provisions are of much the same date, this clause of Aethelberht cannot be earlier than the eleventh century. Both show an attitude of the Church directed against the bride-price marriage;

[1] It also provides that the adulterer shall buy the husband a second wife with his own money. It is difficult to believe in a law which imposed both these sanctions; and it is more likely that § 31 contains two versions of an old law put side by side.

[2] viii, 1, 10.

[3] Tit. IX, De Farlegani, which provides that a woman guilty of fornication shall pay the amount of her wergeld to the King.

[4] See *post*, p. 326.

[5] "And neither woman nor maiden shall ever be forced to marry a man whom she mislikes, nor shall she be given for money unless the suitor of his own will wishes to give something."

and certainly the clause of Aethelberht is not couched in the language of law, primitive or modern.

The laws of Hlothhere and Eadric begin with the topic with which the Laws of Aethelberht end,[1] and it seems very possible that they originally formed part of the same collection, to which they were late additions, and that some scribe, recognising their more recent date, separated them from the rest in the middle of a topic, and assigned them to later kings of Kent.[2] Their subject-matter is not unlike that of the Continental Leges Barbarorum of the latter part of the eighth century, and they probably date from between A.D. 900 and 1000. They end with a lengthy clause which is not a law of Kent, and was no doubt included here merely because Kent is mentioned in it.

This examination of the matter of the Laws of Aethelberht produces much the same results as the examination of their language. While they undoubtedly contain the oldest English laws and the oldest English language extant, they contain also linguistic forms and constructions of later periods, and laws of later periods. It seems likely that Aethelberht enacted a few laws; that while the kingdom of Kent existed (that is, till Alfred's time) they were continually added to, amended and brought up to date by the Kentish Kings; and that in Alfred's time (a period of literary revival), when the kingdom of Kent had come to an end, the Kentish scribes, mindful of past glories, made a compilation of the laws of Kent, attributing them to the first convert and legislator,[3] Aethelberht, but, in fact, the bulk were later than his day and represented contemporary Kentish law. From about A.D. 900 (a century later than the

[1] Offences by servants.

[2] See *ante*, p. 64. The Lex Salica affords a parallel. Here Chapters II to XXXVI (like the Laws of Aethelberht) contain no rules relating to procedure and the oath. These are only found in the later part (Chapters XL to the end) just as in the Laws of Hlothhere and Eadric.

[3] i.e. the first king who legislated in writing.

corresponding event on the Continent) the ecclesiastical order began to take a practical and active interest in the law, but the secular character of the Laws of Aethelberht was permanently established, and though some laws of a later date were added, no religious sanctions appear. After the Norman Conquest a number of collections were made of law of the good old times of Saxon independence, and one of these is our text of the laws of Aethelberht and of Hlothhere and Eadric.

But the period of activity in letters, that followed the mission of Augustine in 597, came to an end a century later; and hence, though Wihtred of Kent (692 to 725) and Ine of Wessex (688 to 725) probably enacted a few laws, most or all are lost. We may be sure that other kings, too, legislated between 725 and 870,[1] but this was a Dark Age from which nothing survives. When, therefore (in the tenth to the twelfth centuries), the process of legislation had ceased, and the priests, now active in the secular law, produced from time to time collections of rules attributed to various legislators, including Wihtred and Ine, these were compilations of a very different character from the true, secular laws contained in the Code of Aethelberht. But they form part of a series of phenomena which is not limited to England, and must be considered as a whole.[2]

[1] The introduction to the Laws of Alfred refers to laws of Offa, King of the Mercians (reigned 757 to 796).

[2] If this account is correct, the correspondence between the history of the Frankish and Kentish law is impressive:

	Frankish Empire.	*Kent.*
Conversion to Christianity.	Shortly before A.D. 500.	A.D. 597.
A century of literary activity.	500–600.	600–725.
A century of legislative activity.	500–600.	600–725.
A Dark Age.	600–750.	735–870.
Literary revival.	Reign of Charlemagne, 769–814	Reign of Alfred. 870–900.
Compilation of national laws attributed to the first royal convert and legislator.	Lex Salica (Clovis) late eighth century.	Laws of Aethelberht, late ninth century.
Legislation ceases.	Early ninth century.	Early tenth century.

CHAPTER X

FALSE LAWS

No one can fail to be astonished at the extent to which the history of law is disfigured by documents which untruly purport to be legal enactments or to contain rules of existing or past law. Law lends itself peculiarly to this situation; it commonly grows of itself by imperceptible degrees without the aid of statutory legislation. Judgments profess to follow one another, and yet, after a sufficient period has elapsed, a new rule of law is found to have sprung up, and an old rule has been radically altered or perhaps reversed. It is not surprising, therefore, that in days when written records were few, the bulk of the contemporary law was regarded as having existed from an age long past, and that the first national legislator whose name is remembered was considered to be its author. Such an error is pardonable and should blind no one to the truth. But in the legal remains of mediæval Europe there are far more serious errors and causes of confusion, arising from circumstances which, while they were probably universal in the Middle Codes, were accentuated at the period referred to.

In the changed circumstances in which the Franks and the people of Kent found themselves, when they had built up kingdoms amid the ruins of the Western Empire, and when Christianity and the use of writing had been brought to them by the missionary, a short period of legislative activity ensued.[1] This legislation was no doubt reduced to writing by members of the religious

[1] From A.D. 500 among the Franks, and from 600 in Kent.

order, who alone had learnt and had a use for the art of writing. They had as yet no standpoint of their own in regard to the secular law, and probably recorded with accuracy what it was their duty to record.[1]

In the following two and a half centuries[2] great changes ensued. The growing strength and independence of the landed nobility took away a considerable amount of power from the Crown, and brought about the birth of feudalism as we know it. The religious orders had advanced, by the lavish gifts and religious devotion of the people, to wealth, power and solidarity, and below the king they were supreme. They alone could write and were in sole custody of all texts, and the mass of the populace—ignorant beyond anything we can easily imagine— venerated them as the sole depositaries not only of religious but of secular learning. For some centuries there had been slowly growing a body of ecclesiastical law which sought to govern the relations between the members of the Church, and from the seventh century onwards it rapidly increased in bulk. Through it the clergy was deriving a growing interest and experience in legal matters. Even in the secular courts, by reason of their knowledge and prestige, the religious order was active in the administration of the law, and the rapid spread of the ordeal by oath increased the extent of their interest and participation.[3] In matters of State they were among the chief advisers of the civil authority.

When the power of the Church and landed nobility had grown to these heights, the process of legislation by the king necessarily came to an end. In the feudal age

[1] This is to be inferred from the fact that the documents containing the earliest legislation, though they also contain much that is later, are genuine collections of laws.

[2] A.D. 500 to 770 in the Frankish Empire, 600 to 870 in England.

[3] The last collections of laws of this period contain much that relates to ordeals; see the collections of laws of the provinces of the Frankish Empire (A.D. 800) and the laws of Hlothhere and Eadric (900 and later).

the jurisdiction of the King's Court was limited to a scanty list of criminal offences,[1] apart from disputes between his own tenants. At first the interest of clerics in legal matters found its scope in compilations of the legal usages of various peoples, but even these documents already consisted to a considerable extent of rules that were ideal rather than real.[2] These collections soon came to an end; but such legal literature as continued thereafter to be produced was still entirely the work of persons of ecclesiastical training, and the ecclesiastical order had now a definite and pronounced standpoint and purpose of its own, namely, the advancement of the interests of the Church.

It would have been strange if in these circumstances the clergy had not intentionally or unintentionally abused their position. We cannot expect from people at this early stage of progress such intellectual integrity or respect for the authorship of texts as will comply with modern standards. Partly from ignorance and partly for other reasons, the custodian of a text did not hesitate to add matter which he expected it to contain—did not, for example, hesitate to add to the written legislation of past kings, laws which were attributed to him. This is a phenomenon not confined to legal documents; indeed, it seems to be characteristic of the earliest extant literature of all peoples of the past that it consists of the work of various hands.[3] As early as the middle of the sixth century, Cassiodorus, in his *Institutiones Divinarum Lectionum*, setting out a plan of study for the monks of Vivarium, advises them that emendations in the sacred texts should be as well-written as the originals, "that they may rather be thought to have been written by the ancients."

[1] Chiefly treason, including violence done to his family or servants.

[2] See, for example, the tariff-lists of payments for personal injuries. This change from the recording of legislation to the setting-down of ideal laws is, of course, from one point of view an advance in legal thought.

[3] E.g. the Homeric poems, Icelandic sagas, and books of the Old Testament.

On the Continent it was apparently towards the end of the eighth century that these phenomena first appeared in the law. Many were the forged charters, in the possession of monasteries, conferring upon them rights they did not possess. Many were the false decretals which went to the building of the Canon Law, and often they were additions made to documents of authority, by which authority they sought to secure acceptance. The Hispana of the seventh century was finally expanded in the middle of the ninth century into the fraudulent compilation of the Pseudo-Isidore, and, accepted by the Popes, formed the foundation of a great legal structure. Similarly the collection of Capitularies, made about the year 827 by Ansegisus, was expanded some thirty years later by Benedictus Levita, by the addition of three further books containing fragments of the law of Rome, canons of church councils and such forged provisions as are found in the contemporary production of the false Isidore. To the same series of phenomena belong the Lex Alamannorum and the Lex Baiuvariorum, the two composite bodies of Leges Barbarorum which make use of religious sanctions.[1] In the opening clause of the Lex Baiuvariorum[2] it is provided that "whenever a free person makes a will and gives his property to the Church for the redemption of his soul, let him have leave to do so with his own share, after he has made the division with his sons. Let no one prevent him; let neither King nor Duke nor any other person have power to prevent him.[3] And whatever he has given, houses, land, slaves or any other property, whatever he has given for the redemption of his soul, let him confirm by writing with his own hand, and let him bring six witnesses, or more if they are willing, and

[1] *M.G.H.*, Leg. Tom 3. See *ante*, p. 59.
[2] *Ibid.*, p. 269, of which the above is a translation.
[3] A rule that the secular authority shall or shall not have power to do a thing is a useful criterion of false law.

let them put their hands on the writing and mark their names at his request. Then let him put the writing on the altar, and so let him hand over the money in the presence of the priest who serves in that place. And thereafter let him have no power over it, neither he nor his posterity, unless the defender of the Church be willing to grant him the favour, but let the things of the Church be defended by the bishop, whatever is given by Christians to the Church of God." In the following clause it is provided that if anyone desires to defraud the Church or abstract property of the Church, whether he who has made a gift, or his heirs, or anyone else, " first let him incur the judgment of God and the offence of the holy Church, and let him pay to the earthly judge three ounces of gold, and let him return that property to the Church and add other like property under compulsion of the King or the Prince who is judge in that region." In another clause,[1] relating to the privilege of sanctuary attached to the Church, it is provided that no refugee is to be dragged away until he has appealed to the presbyter or bishop. " Let there be no fault so heinous that life be not granted, for fear of God and reverence of his Saints, for the Lord God has said, ' Qui dimiserit, dimittetur ei. Qui non dimiserit, nec ei dimittetur '." Fines are imposed for dragging a refugee by force from the Church " ut sit honor Deo et reverentia sanctorum et Ecclesia Dei semper invicta sit." Elsewhere is a description of the ideal judge ; and the language of the " Code " is full of the phraseology of the Bible. These extracts are sufficient to show the character of the clauses of the two Leges Barbarorum in which religious sanctions are to be found.

In England, after true legislation had ceased in the same circumstances but a century later, its place was

[1] *Ibid.*, p. 273 (tit. 1, cap. 6).

taken by a series of documents of the eleventh and twelfth centuries purporting to contain the laws of Anglo-Saxon Kings.[1] Probably, however, all these documents (and certainly all the surviving texts) came into existence some time after the death of the kings to which they respectively refer, and probably all are the work of a number of different hands. They contain little evidence of progress in the law, and some of the later documents are fairly described as sermons. To sum up the whole heterogeneous mass, they contain scarcely anything that can possibly be supposed ever to have been enacted, at least in its present form. It is not necessary or right to conclude that these Anglo-Saxon Laws were, as a whole, fraudulently devised. At the best their authors probably believed that these laws had been issued and observed in a better time, and longed to see them in force again; at the worst there were perhaps a few conscious fabrications in the interests of religion, good order, and the Church. As a whole, these compilations belong not so much to the domain of law as of history—crude, ignorant and biassed attempts to write the legal history of a past reign.[2] Certainly these and the like productions of mediæval Europe are inferior in quality to anything that can be found among more ancient documents of legal interest.

Let us take one or two examples. The first compilation, the Laws of Wihtred, contains a heading which runs as follows: "These are the dooms of Wihtred, King of Kent. In the reign of Wihtred, most gracious King of Kent, in the fifth year of his reign, the ninth Indiction, the sixth day of Rugern, in a place which is

[1] Beginning with the Laws of Wihtred of Kent and Ine of Wessex. The Laws of Ine always appear in the texts as an appendix to the Laws of Alfred, and the language of these two bodies of laws is of the same period. If Liebermann is right, the earliest text of the Laws of Alfred and Ine dates from A.D. 925.

[2] But the various contributors to each compilation had no doubt different objects, and the nature of all these documents is not the same.

called Berkhampstead, there was gathered together a consultative Council of the notables. There was Berhtwald, Archbishop of Britain, and the above-mentioned King; also the Bishop of Rochester, who was called Gefmund, was present; and every Order of the Church of the Province spoke in unanimity with the obedient laity. There the notables with the consent of all drew up these dooms and added them to the laws of the people of Kent, as is hereafter stated and provided." This picture of the ecclesiastical organisation of Britain at the end of the seventh century is at first somewhat surprising, as is the fact that here, and generally throughout the laws, the leaders of the Church are mentioned before the King. But the first of these Laws of Wihtred is even stranger: "The Church shall be free from taxation. The King shall be prayed for, and they shall honour him freely and without compulsion." Clause 2 fixes the fine payable to the Church for breach of its protection at the same sum as that payable to the King. Clauses 3–15 deal with religious offences of various kinds,[1] and clauses 16–24 contain elaborate formalities for the taking of oaths of purgation. Finally come four clauses of a legal and secular nature, but only one (§ 25) is familiar in primitive law.[2] The laws of Ine, which follow, provide in the first clause: "In the first place we command that the servants of God heed and duly observe their proper rule. After this we command that the law and dooms affecting the whole people be observed as follows." These laws are of great length, and there is no sort of order. They deal with a miscellaneous list of subjects religious and secular, and often the sanctions are also religious. They contain manifest inconsistencies and much nonsense. One clause (22) is even drafted in the second person; and clause 41

[1] § 4 is also found in II Canute, § 55.
[2] The last clause (§ 28) is also found in the laws of Ine (§ 20).

solemnly provides that "A man may repudiate bail (which he has given for another) if he knows that he is doing right." The laws of Alfred commence with an introduction of forty-nine chapters containing sundry passages from the Pentateuch, including the Ten Commandments, followed by a summary of apostolic history with quotations from the Acts of the Apostles, and a brief account of the rise and growth of ecclesiastical law. In a passage that follows, the King declares that these laws are a collection of the most just of the laws that were in force in the time of his predecessors (including Aethelberht and Ine), except that he has annulled or changed those of which he did not approve. "For I did not dare to presume to set down in writing many of my own, for I do not know what will please those who will come after us."[1] The first clause of these laws runs as follows: "In the first place we enjoin you as a matter of the greatest importance, that every man hold scrupulously to his oath and pledge. If anyone is wrongfully compelled to make one of the following promises, to betray his lord or to assist in an illegal project, then it is more just to be false than to perform it."

But it is impossible within the scope of this book to go into the details of the Anglo-Saxon Laws, and they must be read for themselves. The conquest of England by the Normans gave a considerable impetus to such works, and in the twelfth and thirteenth centuries the series is continued by other documents, which, though secular after 1200, do not otherwise differ essentially from what precedes. Now it becomes easier to check their accuracy as records of law, and the Leges Edwardi Confessoris, the Leis Willelme, Leges Henrici I, Constitutiones de Foresta, Rectitudines Singularum Per-

[1] In substance, therefore, they are a late, ecclesiastical version of older laws; and a comparison with the Laws of Aethelberht shows the change in the point of view of the compilers.

sonarum, De Veteri Consuetudine Promotionum, Mirror of Justices and other documents are regarded by all legal historians as totally untrustworthy.[1]

The written records of the law of Scotland begin at a much later date than those of England. Here the traditional legislator is King David I (1084 to 1153), and the earliest extant Code of Scottish laws, which is attributed to him, is, like the Laws of Aethelberht, of a purely secular character. This is the *Leges inter Brettos et Scottos* (the laws in force among the Brets and Scots).[2] It is a very brief Code, and substantially does no more than specify, in terms of cows, the payments due for homicide and wounding. First is stated the amount of the Cro (wergild?) of the King, of the King's son or an earl, of an earl's son or a thane, of a thane's son, and so on down the social scale, ending with a villein and a woman. Next it specifies the sum payable by a man who kills someone in the peace of the King, of the King's son or an earl, and so on.[3] In regard to wounds, the Code provides the compensation for drawing the blood of the head, and blood of the breast. Besides the Cro and the Kelchyn other payments are mentioned by their technical Celtic names.[4] In its details the Code is not wholly intelligible, but its general resemblance to that of Aethelberht is clear. It purports to be the legislation of a past king, but it is in fact a composite work, partly of a theoretical character.[5] Though its origin might seem open to suspicion, it would appear to have been known in Scotland, England

[1] Even as late as 1291, Britton's serious treatise on the law of England, though largely based on Bracton, is put into the mouth of a king.

[2] Printed in the *Folio Scots Acts*, Vol. I, App. III, pp. 663 ff.

[3] Next the Code fixes the kelchyn of the King, King's son, etc.; but the kelchyn can hardly mean anything other than the payment just mentioned, that is, the sum payable to the person in whose protection the victim lived.

[4] The Gallnes (see the "Galanas" of the Welsh laws) and the Enauch.

[5] As we go down the social scale, the sum payable for the same offence usually diminishes by one-third, even to the appropriate fraction of a cow. All this is unique in primitive law, so far as I am aware.

and France; and "customs of the Brets and Scots" were practised among the mixed population of Galway at the beginning of the fourteenth century, for their use was prohibited by an Ordinance of Edward I in 1305.[1] In their Latin version the Code also appears as the final chapters of the Regiam Majestatem,[2] but that strange document can hardly confer authority upon it, for while it pretends to be a compilation of law prepared by the author at the order of King David I, it is substantially a copy of the *De Legibus et Consuetudinibus* attributed to Glanville.[3]

The later Scots law went through much the same tortuous history as the later Anglo-Saxon Laws. At the commencement of the fifteenth century legal treatises and compilations of the most doubtful character were to be found current, and enjoyed some general credit even in the Courts. In 1425 James I sought to remedy this "fraud and guile" by the appointment of a commission "to examine the books of law of this realm, that is to say Regiam Majestatem and Quoniam Attachiamenta, and mend the laws that need amendment." Nothing came of this or the next attempt, in 1469, which was apparently regarded by the then committee as hopeless. The close of a long story of much the same character was that the Record Commissioners of 1800 ordered H.M. Printer for Scotland to forthwith print the Parliamentary Records and Ancient Royal Charters of Scotland, under the superintendence of sub-commissioners. In the result, a volume was prepared in 1804 and went through the Press, professing faithfully to give the Parliamentary Records of Scotland in the

[1] "Ordinacio facta per Dominum Regem Super Stabilitate Terre Scotie," Vol. I, *Folio Scots Acts*, p. 119.

[2] Printed in Vol. I, *Folio Scots Acts*.

[3] The latter's fourteen books, in which the subject-matter is arranged in order, are converted into four books in which the passages are re-arranged in no order. The Regiam also includes a few of what may be old Scots laws, besides the Leges inter Brettos et Scottos.

General Register House, Edinburgh, from 1240 to 1571. Having seen the volume, the Record Commissioners promptly suppressed it, and it was never published.[1]

The Ancient Laws of Wales (or the Laws of Hywel Dda[2]) and the Ancient Laws of Ireland (or the Brehon Law Tracts)[3] also date from that stage in the development of law, when the written law has become largely theoretical and ideal, but there is hardly as yet any admixture of religious sanctions or provisions directed against religious offences. More accurately, while the Welsh Laws, the less developed of the two compilations, are entirely secular, the Irish Laws, in a very few places,[4] contain a religious passage which has been written in with other miscellaneous matter. But the tradition of the origin of both Welsh and Irish laws is that it was secular, namely, that both arose out of a collection of existing laws,[5] amended or abrogated in individual cases where appropriate,[6] and confirmed[7] because there was nothing in it that militated against the law of God. Though, however, the Codes are, with the exceptions mentioned, of a secular character, they are not couched in the language of primitive laws, namely, in short conditional sentences in the third person; and therefore

[1] See *Folio Scots Acts*, Vol. I, Preface.

[2] Edited for the Record Commissioners by Aneurin Owen (1841). The Laws are found in three versions, the earliest of which cannot long ante-date the year A.D. 1200. There are also three shorter Latin versions which may possibly be translations or adaptations from older Welsh versions.

[3] Published by the Record Commissioners, six vols., Dublin (1865–1901).

[4] In a small compass towards the end of the Senchus Mor (see Vol. III of the *Tracts*, e.g. p. 31).

[5] In Wales, made by a Commissioner appointed by Hywel Dda or Howel the Good, between A.D. 914 and 941; in Ireland recited by Dubthach to St. Patrick about A.D. 438, and revised by a committee of nine. But these traditions do not show the true origin of the Codes; they constitute an attempt to explain the final form of the Codes.

[6] The Welsh Laws also say that some new laws were enacted.

[7] In Wales only the Dimetian Code says that the laws were confirmed (by Pope Anastasius). In Ireland, the Senchus Mor declares that its rules were confirmed "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."

a word must be said about the peculiar circumstances which gave rise to them.

They are not rules resting on any legislative authority, for there were few if any periods at which anyone had power to legislate for Ireland or Wales,[1] and no reason to suppose that at those periods any laws were enacted. Beginning, however, with a few genuine rules of law in force in the territory of one or more of the war-racked petty princedoms of Wales and Ireland respectively, they grew, as we are told in the laws, by an expanding tradition of ancient glories and by an increasing and devoted study of law, into a system of mixed history and theoretical law which claimed authority over the whole country. This was made possible by the growth of a sense of common Welsh (and Irish) nationality among the disunited tribes, and it can hardly be doubted that the period of the common struggle against the English invader largely enhanced the native devotion to these books. They became a species of university, a school-book for the general education of the student who aspired to become a lawyer. In Wales, he hoped to become the judge, or legal assessor, remunerated by fees, sitting in the Court of a local lord.[2] In Ireland, he would become a Brehon, a jurisconsult who, if appointed by the lord, would similarly officiate as legal assessor and clerk of the Court, and keeper of the lord's records. Brehons also advised private clients, from whom they received fees, and they acted as arbitrators when appointed by the parties.

In the course of the growth of these Codes—especially in the more developed Irish laws, which have a longer written history—generation after generation of

[1] There is, however, a tradition in the Welsh Codes that Howel was King of all Wales; but this is probably incorrect, for the Gwentian Code (which should be right in this) says he was not King of Gwent.

[2] See Venedotian Code, Bk. iii, Preface; and Dimetian Code, Bk. iii, Chapters III, VI, XV.

students and teachers have written into the texts their perplexities and their suggested explanations. The chaos is amazing; the rules date from all ages and places. The cases discussed are very often such as could never have occurred, the injuries described are sometimes trivial and incredible. Contradictions are everywhere. Legends of the past greatness of the country, stories of old life and habits, flights of Celtic imagination and humour abound.[1] "The Senchus of the men of Erin. What has preserved it? The joint memory of two seniors, the tradition from one ear to another, the composition of the poets, the addition from the law of the letter, strength from the law of nature; for these are the three rocks by which the judgments of the world are supported."[2]

It is impossible to regard even the legal rules found in these books, at any rate in their subtle niceties, as being rules that found a practical application. Such laws as were in force in the chieftainships of Wales and Ireland could only have been very few—a few rules of compensation for homicide, injuries, adultery and theft and a rule or two of property. If the legal assessor took his seat well-grounded in the Law of Hywel Dda or Cain Patraic, yet he must have had little opportunity of practising it. The Welsh Codes look above and beyond the law actually in force, and sometimes dissent from it[3]; and the Irish laws rely upon their intrinsic moral authority to induce the chiefs to adopt them.[4] But ultimately the simpler of the legal rules contained in the Welsh and Irish law must have been applied in actual fact, together with some of the familiar devices evolved to take the place of

[1] Occasionally also flights of prurient fancy, a characteristic of fictitious codes of law; cf. Lex Baiuvariorum, Tit. 7, Lex Alamannorum, Tit. 58.

[2] *Senchus Mor*, Vol. I, p. 31.

[3] See Venedotian Code, Bk. ii, Chapters I, II; Dimetian Code, Bk. ii, Chapter VIII, 11.

[4] The Corus Bescna says of the chiefs: "They remove foul weather by their good customs of cain law and right, of good bescna and cairde law."

executive power, a system of distress to enforce obedience to summonses and a system of fasting upon the doorstep of a debtor to secure payment of a debt.[1]

It was, then, in part these special circumstances, in which they had grown, that gave their character to the Welsh and Irish laws. Among the tribes of the modern world, other instances can be seen of the legal usages of different tribes being gathered together into one system[2]; but the idiosyncrasies of the Celtic laws are probably derived from three causes: firstly, the use of writing; secondly, a native Celtic genius for law; and thirdly, perhaps the influence of the new study of Roman law that spread over Europe from the eleventh century. Indeed, with all their nonsense, fabrications and myths the Celtic law books are probably more akin in spirit to the law of the early Romans than is any other system. Roman law, too, begins with a school- book, the traditional origin of which is not unlike that of the Laws of Howel and the Senchus Mor.

[1] e.g. as in India, and in Fanti practice (W. Africa).
[2] Especially in W. Africa; see *post*, Chapter XXVIII.

CHAPTER XI

THE PENTATEUCH

It was seen in Chapter VIII that the most advanced Codes of primitive law (namely, the Assyrian, Sumerian and Babylonian legislation) are free from commixture with religious writing or religious sanctions, but that the Hittite Code, a more primitive compilation, though secular in its origin contains a number of additions of a religious character. Turning then to mediæval Europe, it was found that there the most primitive Codes (which are also the most primitive of all that survive) are again entirely secular, but that from a time when a theoretical interest in the law first appears (namely, in the later eighth century on the Continent and the late ninth century in England) documents of a partly legal and partly religious character appear. These latter documents represent various stages in the advance of law which, in the Burgundian Code, reach approximately to the stage of progress of the Hittite Code. Now let us leave the legal literature of mediæval Europe, and turn to some ancient Codes intermediate in development between the Hittite and the Assyrian, namely, the Hebrew Pentateuch, the Hindu Code of Manu, and the Roman Code of the Twelve Tables. In each of these collections religious sanctions are to be found.

The Pentateuch is not, I think, referred to by Maine as one of the ancient bodies of rules thought by him to yield evidence in support of the religious theory. It is possible, however, that he regarded the Pentateuch in that light; and it is probable that lawyers and laymen, consciously or unconsciously, derive their belief in the

theory for the most part from that compilation. For this reason, and because of the unique place of the Pentateuch in the history of religious and moral, if not of legal, thought, it is of exceptional interest and importance to subject those writings to the process of analysis, to which we have subjected other ancient documents. The examination of the Pentateuch affords a signal example of the value of this comparative analytical method in ancient law, and of its fruitfulness in the solution of historical problems.

The book of Genesis, and that of Exodus up to the end of the nineteenth chapter, contain a narrative which serves as an historical introduction to the body of religious and legal rules which follow. These rules are expressed as having been issued by Moses to the children of Israel at the command or inspiration of God, and they occupy the rest of the Pentateuch. They fill the book of Exodus from the twentieth chapter, and the books of Leviticus and Numbers; and a separate tradition of the issue of these rules, or a great part of them, is contained in the last book, that of Deuteronomy. The name by which these rules are generally called in the Old Testament is that translated in the English and other modern bibles by the word "law." The ubiquitous use of this word has no doubt done something to create the existing impression of the function and purpose of these rules and of the light in which they were regarded by the Hebrews. The word "Torah" which is so translated appears to be derived from a root[1] meaning to "point" or to "show the way,"[2] and signifies "direction" or teaching."[3]

[1] יָרָה

[2] The verb is used in this sense in Gen. xlvi, 28. Closely akin is another meaning of the word, to "shoot" or "throw" (in which the hand or missile is "pointed" or aimed).

[3] See Isa. ix, 15, where the verb is used of a prophet "teaching lies." In Deut. xxiv, 8, it is used of priests "teaching." See also 2 Kings xvii, 28, "And

The part of the Pentateuch which contains the Torah begins in Exodus, Chapter xx, with the Ten Commandments. They commence by setting forth by implication the sanction attached to them, in the words: "I am the Lord thy God, which brought thee out of the land of Egypt." The sanction consists in this, that an all-powerful God has declared these rules,disobedience to which will incure His displeasure. There is no other sanction attached to any of the commandments, and none can be implied. The tenth commandment does not even partake of the subject-matter of laws. The first four commandments are rules for the conduct of man towards God, the fifth to the tenth for the conduct of man towards man; and all the rules are couched in the second person singular. After the Ten Commandments, from the eighteenth verse to the end of that chapter, follow a short narrative and a rule or two of a religious and ritual character.

Then follows a startling change in the language and matter. From Exodus, Chapter xxi, 1 to Chapter xxii, 17 is nothing less than a true Code of ancient law.[1] Its rules are generally terse and simple, and expressed in precise and skilful language. They are couched in conditional sentences in the third person singular, introduced by the word "if." The sanctions are always expressed, and are definite and secular. The topics dealt with are those of true law, and the rules are systematically arranged according to their external subject-matter, in the manner of early Codes. Indeed, apart from the Code of Hammurabi (which contains the laws of a more complex civilisation) this is the finest extant specimen of a primitive Code. It has gone through a process of development, in the course of which some

there came one of the priests whom they had carried away, and he dwelt in Bethel, and he was *teaching* them how they should fear the Lord." See also Exod. xxiv, 12.

[1] Referred to hereafter in this book as the Hebrew Code.

additions have been made; but these, owing to the care taken of the text, and the late date of the interpolations, can be easily seen and separated. It is, in fact, possible to write at great length on the changes from one legal stage to another, as displayed in these provisions. At two or three points in the Code may be seen words which may appear inconsistent with the description just given, but these only occur in the late additions.[1] There is no other body of true law in the Pentateuch.

Not only are the rules of the Code true law, but they were plainly so understood by the editors who placed the Code in its present position. The words by which the Code is introduced are: "Now these are the 'mishpatim' (plural of 'mishpat') which thou[2] shalt set before them." No other group of rules in the Pentateuch is so introduced. The word "mishpat," which is here and elsewhere in the English Bible translated as "judgment," clearly was the Hebrew word in ordinary use with the meaning of "law" or "a law."[3] Among the Assyrians and Babylonians the word used with the meaning of a "law" (namely "dînu") also signifies a "judgment," and the expression used by the Sumerians bears a similar meaning.[4] Among many other early peoples one and the same word is used with the meaning of both "law" and "judgment," as, for example, the word "dom," which introduces the true Anglo-Saxon laws attributed to Aethelberht and Hlothhere and Eadric, and is used generally to signify a provision of legislation as well as a judgment.[5] Perhaps the more colourless term "legal decision" may be used as translating both

[1] For details, see the next chapter.

[2] i.e. Moses.

[3] It also signifies "just conduct," "custom" and "order."

[4] Namely, "a judgment made known," Langdon, *J.R.A.S.* (1920), p. 489. Compare with "dînu" the Hebrew "din" (law) and "dayyan" (judge), but these are later than our period.

[5] See also the Homeric "themis" which bears the same meanings as "mishpat"; see *post*, Chapter xv.

these meanings of "dînu," "dom" and "mishpat."[1] In truth, the substance of the words introducing the Code at Exodus, Chapter xxi, 1, is that these are the rules of law, or legal decisions (as distinct from the religious and moral rules) which Moses is called upon to set before the children of Israel. Again, in a passage a little later,[2] referring to the Ten Commandments and the Code, it is related that "Moses came and told the people all the 'words'[3] of the Lord, and all the 'judgments.'"[4]

The Ten Commandments and the Code are contained in a part of the Pentateuch (namely that extending from Chapters xx to xxiii of the Book of Exodus) which is referred to by scholars as the Book of the Covenant,[5] and is generally regarded, on linguistic and other grounds, as containing the oldest or some of the oldest rules of the Pentateuch. As the reader continues to read from the Code through the rest of Exodus, and the books of Leviticus and Numbers, he will find that the atmosphere becomes more, rather than less, religious in tone—or, to be more precise, that an increasing proportion of these writings consists of religious ritual.[6] The rules of the Code of law, and the other

[1] A word from the same root as "mishpat," namely, "shophet," is the word which is translated as "judge" in the Book of Judges. "Shophet" is also, as is well known, the name of the ruling magistrates of the kindred communities of Tyre and Carthage, and is used indiscriminately in the Old Testament to signify "ruler" and "judge." In all these cases the use of the word shows a clear appreciation of the fact that the giving of law and decision of disputes is a function of government. Many more instances, in England and elsewhere, will occur to the reader.

[2] Exod. xxiv, 3.

[3] The expression the "ten words" refers to the Ten Commandments; cf. Exod. xxxiv, 28. The expression "commandments" is strictly a mistranslation; "words" must signify short and pithy sayings, or maxims.

[4] See also, for "mishpat" as used in the Pentateuch in the sense of secular law, Exod. xxi, 31. See also Deut. xix, 6, "whereas there is no capital law applying to him" (lit. "there is no law, or judgment, of death for him," cf. Jer. xxvi, 16).

[5] A phrase by which these chapters are described in Exod. xxiv, 7.

[6] The last book, Deuteronomy, as the embodiment of a separate tradition of the giving of the law, stands by itself.

rules of legal interest contained in the Pentateuch will be analysed in the next chapter. It will be seen that the explanation of the present form of the Pentateuch is that it was produced by a succession of circumstances closely similar to those that produced the Anglo-Saxon Laws and the other ancient collections of mixed rules of law and religion. The Pentateuch is a quasi-legal history of the Hebrews contained in a compilation made by ecclesiastical editors and authors at a late date[1] out of materials of various periods. After the historical introduction to the giving of the Torah, the Pentateuch contains, in the first place, true secular, statutory legislation, namely, the Code. This (like the Laws of Aethelberht in the Anglo-Saxon collection)[2] contains the oldest part of the Pentateuch, but it also includes later legislation, added from time to time and showing a normal course of secular legal development. The last of these additions are the work of priests. Secondly, the Pentateuch contains a larger body of rules, which consist only in part of statements of existing laws, but are for the most part theoretical and speculative rules of conduct of a very high order of morality, which their religious authors believed to have once been ordained by Moses, and desired to see again in force. Their sanctions (where there are sanctions) are religious, and on the whole these rules are best described as moral or prophetic. They begin at an early date, but not so early as the earliest parts of the Code, and they, too, continue through a course of development until the date when the Pentateuch was issued in its present form. They are chiefly represented in the book of Deuteronomy, which (like inferior collections of rules of a similar stage of progress

[1] In the fourth century B.C. before the Samaritan schism of about 330.

[2] The Hebrew Code forms about 2 per cent of the total volume of the Pentateuch, a proportion similar to that of the A.-S. laws occupied by the secular law with which it begins, excluding the ideal tariff-list which takes up half the Aethelberht collection.

elsewhere) constitutes the book of a school. Thirdly and lastly, the Pentateuch consists of a very large body of priestly rules of ritual and religion, governing the conduct of priests and laity and beginning at a later date than either the legal or moral compilations.

In our examination of the Leges Barbarorum and the Anglo-Saxon laws, the successive changes that appear in the course of those two collections were described as being the following, namely, that the ecclesiastical order steadily grew in wealth, power and influence, and that at a time when a theoretical interest in law first appeared,[1] and when ordeals by oath first entered the written law,[2] the ecclesiastics (who were already building up a body of canon law)[3] began to try disputes of a religious character and also to take part in the administration of justice in the secular courts; and that soon after this had occurred, written rules of a quasi-legislative character, written by the hands of priests, first made their appearance in the secular law.[4] Let us now examine the historical and prophetic books of the Old Testament, with a view to elucidate the course of Hebrew history on these same matters, dividing our enquiry into two parts: the first, as to the jurisdiction to try disputes, and the second, as to the increase in the wealth and power of the priests. In the next chapter will be examined the written secular law itself and the changes that appear in it.

It is plain from the historical writings that throughout recorded Hebrew history until the so-called First Exile,[5] the power to try cases belonged to the civil rulers. Continuously throughout this period it was exercised in the

[1] In the Leges Barbarorum: Lex Salica, Chapters XXXVIII to end, and the collections of A.D. 800. In the A.-S. Laws: the Laws of Aethelberht (§§ 33 ff).

[2] Lex Salica, Chapters XXXVIII to end, and collections of A.D. 800. A.-S. Laws: Laws of Hlothhere and Eadric.

[3] Especially from the seventh century onwards.

[4] Leges Barbarorum: not in Lex Salica; but in Leges Alam., Baiuv. and a few clauses of the other collections of A.D. 800. A.-S. Laws: Only from Wihtred onwards.

[5] Commencing 587 B.C., with the fall of Jerusalem to the Neo-Babylonians.

country and in the towns by the local "princes (or nobles) and elders," namely, the local chiefs sitting with their council of elders, who were mainly the heads of the families within their territory. From time to time local military champions are specially mentioned by name as judging and ruling Israel—in the earliest times the Judges[1] of the Book of Judges—but the jurisdiction of the "princes and elders" was continuous. If the Book of Ruth, which purports to describe incidents in the time of the Judges, is to be trusted, the elders tried disputes in the cities at the city gates. When the Kingdom was established the King developed a Court of his own, and sometimes deputed a son[2] or other representative to be "over his household" and to try on his behalf cases that came before him "for judgment,"[3] but both in the country and in Jerusalem the "princes and elders" continued in fact to try cases, perhaps acting in theory as his deputies[3] in some matters. The story of Naboth[4] shows them exercising these powers in the provincial towns in the eighth century. It must not be forgotten that these historical writings were written by ecclesiastical authors from earlier records,[5] and that they wrote with religious motives, yet they make no reference to trials by priests. On the eve of the First Exile occurs the vividly described criminal prosecution of Jeremiah in Jerusalem for prophesying the destruction of the State.[6] He was arrested by priests, prophets and laymen and brought before the "princes of Judah" sitting in the entry of the new gate of the Temple. The priests and prophets prosecuted; he was tried by the princes

[1] =rulers. See *ante*, p. 89.

[2] 2 Kings xv, 5.

[3] See 2 Sam. xv, 1–6.

[4] 1 Kings xxi, 8 f.

[5] Often mentioned by name in 2 Kings, e.g. the "Chronicles of the Kings of Israel."

[6] Jer. xxvi, 8 f., obviously based on a contemporary account; perhaps in the document which, we are told, was dictated by Jeremiah to Baruch and later expanded by various hands (Jer. xxxvi, 32).

of Judah[1] (with a large gathering of persons who apparently expressed their views audibly), and the assembly was addressed by certain elders who (as occurs today among the Egyptian Bedouin[2] and elsewhere) gave evidence, on his behalf, as to what was done in previous cases of a similar kind; and in the result Jeremiah was not handed over to the people to be stoned, but was held not liable to the death penalty.[3]

The prophetic writings are also unanimous to the effect that up to the Exile the princes and elders tried lawsuits, while the priests were concerned with the religious teaching, or Torah. "Hear, I pray you, ye heads of Jacob," cries Micah,[4] "and rulers of the house of Israel; is it not for you to know law (or justice)?"[5] "Hear this, I pray you, ye heads of the house of Jacob, and rulers of the house of Israel, that abhor law[5] and pervert all right. They build up Zion with blood, and Jerusalem with iniquity. The heads thereof judge[6] for reward, and the priests thereof teach[7] for hire, and the prophets thereof divine for money."[8] And again: "The prince asketh, and the judge, for a reward, and the great man uttereth the wickedness of his soul; thus they weave it together."[9] "Where now is thy King," says God, by the mouth of Hosea,[10] "that he may save thee

[1] See also Jer. xxxvii, 14. Apparently the infliction of the death penalty in criminal cases rested with the King; see Jer. xxxviii, 4.

[2] *Bedouin Justice*, p. 13.

[3] The historical writings up to the First Exile are unanimously to the effect that the jurisdiction to try disputes was in the secular rulers. There are two later traditions which add certain curious incidents; they are untrustworthy, but do not materially affect the position even if accepted. According to 1 Samuel, Eli and Samuel and his sons, priests of the sanctuary at Shiloh, were also local rulers and judges (1 Sam. iv, 18; vii, 6; vii, 15 f.); and Samuel (like any other great feudal chieftain) went on circuit from year to year to Bethel, Gilgal and Mizpah (vii, 16). According to the post-exilic tradition in 2 Chron. xix, King Jehoshaphat ("Jehovah is shophet") some 450 years earlier set judges throughout the fenced cities of Judah; and in Jerusalem he appointed priests under the Chief Priest to deal with religious disputes, and elders to decide "disputes in all the King's matters." See *post*, p. 96.

[4] Micah iii, 1.

[5] Mishpat.

[6] Verb from which "mishpat" is derived.

[7] Verb of "torah."

[8] Micah iii, 9 f.

[9] Micah vii, 3.

[10] Hosea xiii, 10.

in all thy cities, and thy judges, of whom thou hast said, 'Give me a king and princes'?" "Thy princes are rebellious and companions of thieves," prophesies Isaiah[1]; "everyone loveth gifts and followeth after rewards; they judge not the fatherless, neither doth the cause of the widow come before them." "Come," say the enemies of Jeremiah,[2] "let us devise devices against Jeremiah; for Torah shall not perish from the priest, nor counsel from the wise, nor the word from the prophet.[3] Come, and let us smite him with the tongue." When Jeremiah purchases land according to the conveyancing methods of the time, it is expressed to be done "according to the law[4] and the statutes.[5]" These and many another passage show that the law and the Torah were two distinct conceptions until the First Exile, at any rate, and that the trial of cases belonged to lay rulers, and the Torah, or religious teaching, to the priests.[6]

The fall of Jerusalem, when the Babylonians carried away into exile the King, the leaders who had not been slain, and the population of the city of Jerusalem, put an end to the Kingdom and deprived the country of its chief "nobles" and "princes." But the overwhelming majority of the population of Judea remained, and, no doubt, under a governor nominated by the King of Babylon, elders continued to exercise their civil and judicial functions, nor is there any reason to suppose a discontinuity in the development of the native civil law. In the exilic book of Ezekiel, princes are mentioned as judges[7] and priests as custodians of religious teaching[8]; but a startling change appears in one of the last chapters. In the midst of a long passage inculcating the priestly

[1] Isa. i, 23.
[2] Jer. xviii, 18.
[3] A phrase recurring in several places in the prophetic books.
[4] Mishpat.
[5] Jer. xxxii, 11.
[6] See also Hos. vii, 7; Isa. i, 26; iii, 1 f.; xxxiii, 22; xl, 23; Jer. xxxi, 33, 34; Ezek. xxii, 26.
[7] e.g. Ezek. xlv, 8, 9. See Ezek. vii, 26; viii, 1; xiv, 1.
[8] Ezek. xxii, 26; cf. vii, 26.

duty of purity, has been interpolated a verse which runs as follows: "And in a dispute, they shall stand to judge; by my judgments[1] they shall judge it; and they shall keep my torahs[2] and my statutes in all my festivals and they shall sanctify my sabbaths."[3] It is not plain, in this passage, whether the priests are to try disputes according to the secular law, or (as seems more likely from the use of the phrase "my judgments") according to an ecclesiastical system of law. However this may be, the priests are given judicial powers. In the very next chapter[4] is an injunction to the *princes* to execute law ("judgment") and right. In the book of Deuteronomy—much of which is undoubtedly contemtemporary with much of Ezekiel—occur similar phenomena. In Chapter xvi, verse 18, is an injunction to do justice without respect of persons. "Judges and officers shalt thou make thee in all thy gates, which the Lord thy God giveth thee, according to thy tribes, and they shall judge thy people with righteous judgment." Clearly the ruling tribal heads, the princes and elders,[5] are to try disputes. But the very next chapter[6] provides that disputes shall be tried in the Temple (or some other sacred place) before the priests and the judge; "and they shall explain to thee the provision of the law (or judgment)"; and obedience shall be shown to their decisions, "according to the tenor of the Torah which they[7] shall teach thee, and according to the law (judgment) which they[8] shall tell thee." This passage appears to provide for two classes of disputes, one as to religious

[1] "Mishpatim."

[2] Note the plural. This use appears to be late, when the Torah is regarded as containing provisions of a legislative or quasi-legislative character.

[3] Ezek. xliv, 24.

[4] Ezek. xlv, 8.

[5] See also Deut. xxix, 10; Joshua viii, 33.

[6] Deut. xvii, 8.

[7] The priests.

[8] Either the judges, or the priests and the judge. Note the "priests" come before the "judge," and the "Torah" before the "law."

matters, and the other as to secular matters. The first is to be tried by the priests according to rules contained in the Torah, the second is to be tried either by priests and judge, or judge alone (it is not clear which) according to the law. And the jurisdiction of the priests is desperately insisted upon: "And the man that doeth presumptuously in not hearkening unto the priest that standeth to minister there before the Lord thy God, or unto the judge, even that man shall die."[1] This sentence may seem a little severe.[2] In another chapter a little further on is an interesting passage. It is provided that where a charge of any lapse is made against a man by any witness, the accuser and the accused "shall stand before the Lord, before the priests and the judges which shall be in those days. And the judges shall make a thorough investigation," and if the witness is a false witness, he shall suffer "as he thought to do unto his brother."[3] The passage suggests a trial by ordeal in a sacred place, before priests and judges, the enquiry being held by the judges and the ordeal administered by the priests.[4] A little later comes a passage relating to a purely religious offence,[5] and providing that all disputes shall be decided according to the word of the priests.[6] In the rest of Deuteronomy, including some of the oldest parts of that book, which are also among the oldest parts of the Pentateuch, except for the Code, the elders are spoken of as the judges.[7] In the post-exilic book of Chronicles[8] is a tradition that King Jehoshaphat,[9] long before, had

[1] Deut. xvii, 12.

[2] What it shows is that the sanction of the jurisdiction of the priest is purely religious.

[3] Deut. xix, 15 f.

[4] These verses also provide that a charge is not made out unless supported by "two or three witnesses." Apparently where there is only one witness to the charge there is a resort to the ordeal. In early law ordeals, by oath or otherwise, are at first only employed in the absence of evidence.

[5] The pollution of land where a man has been slain by an unknown hand (see *post*, p. 160).

[6] Deut. xxi, 5.

[7] See Deut. xix, 12; xxi, 2; xxi, 19; xxii, 15; xxv, 2; xxv,8.

[8] 2 Chron. xix, 5 f.

[9] See *ante*, p. 93 (note 3).

" set judges in the land throughout all the fenced cities of Judah, city by city," and had set in Jerusalem Levites and priests, on the one hand, and elders on the other, " for the judgment of the Lord, and for disputes," urging them to warn the parties that they be not guilty towards the Lord; and that Amariah, the chief priest, was over them " for every matter (or case) of the Lord," and Zebadiah, the ruler of the house of Judah, " for every matter (or case) of the King." Here clearly is a separation between ecclesiastical courts trying ecclesiastical disputes under an ecclesiastical system of law, and secular courts trying secular cases under the civil law. And in the Book of Ezra, the famous passage in Chaldee purporting to be the words of Artaxerxes' letter of authority to the scribe contains a similar distinction.[1] " Thou, Ezra, after the wisdom of thy God that is in thine hand, appoint judges which may judge all the people that is beyond the river, and that know the law of thy God, and teach him that knoweth it not. And whoever will not do the law of thy God and the law of the King, let judgment be executed upon him." Finally, the post-exilic prophet Zechariah prophesies that if the High Priest will walk in the ways of God and keep his charge, he shall also " judge my house."[2]

The historical and prophetic books, therefore, show, and the Pentateuch[3] confirms the view, that a considerable time after the exile began, and after the appearance of a theoretical interest in law (represented by the Book of Deuteronomy) the priests commenced to try disputes,

[1] Ezra vii, 25 f. [2] Zech. iii, 7.

[3] As to the Pentateuch, the only addition to be made to the passages quoted is the account that at Sinai, at Jethro's suggestion, Moses devolved judicial functions on rulers of thousands, rulers of hundreds, of fifties and of tens, who judged the people, and the hard cases they brought to Moses (Exod. xviii, 13 f.). Compare with this late passage, Deut. i, 16; Num. xxxi, 14,54. The system is an ideal one, reminiscent of parts of the A.-S. laws. In the second account of Moses' visit to Sinai, when Joshua accompanied him (Exod. xxiv, 13), it is related that he entrusted to Aaron and Hur the task of hearing all cases in his absence.

and their judicial functions were two-fold. First, they developed an ecclesiastical system of law, by which they tried ecclesiastical disputes.[1] Secondly, somewhat later, they were also trying secular cases along with lay judges,[2] applying the ordeal themselves.[3] Still later a clear separation is mentioned between ecclesiastical courts trying disputes of an ecclesiastical nature and secular courts trying secular issues, the head of the ecclesiastical courts being the chief priest, and the head of the secular courts a lay officer.[4] But after the Return, and at the period to which Zechariah iii, 7 refers, which probably began about the time when the Pentateuch was published in its present form, the High Priest became the Chief Judge in all cases[5]; and although we must not assume a fusion of the rules of the secular and the ecclesiastical law, the two systems appear in the same publication.[6]

The evidence is equally conclusive that throughout recorded Hebrew history there was a progressive increase in the wealth and power of the priesthood. In the course of that history there took place a gradual transfer to the priests of power in the State, and this power had two aspects: it consisted of the power to try disputes, and the power to make laws. These powers and the material prosperity of the priests ad-

[1] Ezek. xliv, 24 (an interpolation), Deut. xvii, 8 f.; xxi, 5; 2 Chron. xix, 5 f.; Ezra vii, 25 f.

[2] Deut. xvii, 8; xix, 15 f.

[3] This represents the stage of the English law in the Conqueror's time; see *P. & M.*, Vol. I, pp. 449–50.

[4] 2 Chron. xix, 5 f.; see Ezra vii, 25. This stage was reached in England in the middle of the twelfth century (Constitutions of Clarendon, 1164). Much the same subjects were assigned to the ecclesiastical Courts among the Hebrews as in England; see *post* pp. 121, 122. The jurisdiction of these Courts had expanded, and some of these subjects would be considered by us exclusively appropriate to secular tribunals.

[5] See Zech. iii, 7; Num. xxxv, 25, 28. The date is the first half of the fourth century B.C.

[6] The Heb. Code, with all its priestly additions, remains the secular system. The rules of the ecclesiastical Courts are contained in the rest of the Pentateuch. See the next chapter.

vanced hand in hand. As has already been seen, those who exercised civil power throughout Hebrew history until the commencement of the First Exile were the "nobles" or "princes" and their informal council of "elders." This is clear throughout the historical and prophetic books.[1] The priests and prophets are mentioned after the King and the princes, even though these writings are the work of men of religion. In Palestine before the exile, when a considerable proportion of the population, as we are so often told, went astray after false gods, the lot of the priest of Jehovah, dependent on offerings from the worshippers, must indeed have been small. It would seem that at the time of the reform of Josiah in 621 B.C. the worship of Jehovah scarcely held its own even in His Temple.[2] As the worship of other gods disappeared, the status and material lot of His priests improved. Whereas, in earlier times, most of them must have been household priests in the service of local nobles or men of wealth, when the worship of Jehovah was centralised in Jerusalem their prosperity and independence must have been much advanced. But they relied for their support on voluntary temple offerings, and had no territorial possessions. Because Levi was chosen to minister before the Lord, we are often told in the Pentateuch, "Levi hath no share nor allotment[3] with his brethren; the Lord is his allotment."[4] Therefore, in the priestly writings the duty of charity towards the Levites is insisted on. "And the Levite that is within thy gates, thou shalt not forsake

[1] The legendary figures of Eli, Samuel and his sons, priests of Shiloh, form a possible exception in the earliest times, but the tradition is not reliable. See *ante*, p. 93.

[2] 2 Kings xxii, 3; xxiii, 4.

[3] For this translation of נַחֲלָה, see Kennett, Schweich Lectures (1931). The system of landholding was probably feudal. The local chiefs or nobles "allotted" land to the heads of families within their territory, who held under the chiefs, and their children inherited. See *post*, pp. 334–5.

[4] Deut. x, 9. See also xii, 12; xviii, 1.

him; for he hath no share nor allotment with thee."[1]

A sudden change in the status of the priest in this respect shows itself first in the very same passages of the books of Ezekiel and Deuteronomy, which were quoted in connection with the priests' acquisition of judicial powers. Again appear interpolations conferring rights upon the priestly order. In the very chapter of Ezekiel already referred to as containing an interpolation giving judicial functions to the priests, occurs, a few verses later, what appears to be another interpolation: "And they shall have an [*sic*] allotment, I am their allotment; and ye shall give them no property in Israel, I am their property."[2] And Deuteronomy, Chapter xviii, begins as follows: "The priests, the Levites, the whole tribe of Levi, shall have no share nor allotment with Israel; they shall eat the fire-offerings of the Lord and his allotment.[3] And he shall have no allotment among his brethren; the Lord is his allotment, as he spoke to him. And this shall be the customary due of the priests from the people, from them that offer sacrifice."[4] The passage goes on to describe the customary offerings, and then provides that if a Levite comes from any part of Israel, desiring to serve in the Temple, he shall minister with his Levite brethren. "They shall eat like portions, besides the produce of the sale of his inherited property."[5] So that the tribe of Levi now receive allotments of land, though perhaps they do not occupy them. In the later chapters of the Pentateuch and Joshua, first a tithe is ordered to be paid to them,[6] and finally forty-eight cities and their suburbs are to be

[1] Deut. xiv, 27. See also xii, 19: "Take heed to thyself that thou forsake not the Levite as long as thou livest upon thy land."

[2] Ezek. xliv, 28. See also Ezek. xlv, 5.

[3] The words "and his allotment" are probably an interpolation. The next sentence appears to be a quotation from one of the passages already quoted, perhaps by someone troubled by the contradiction.

[4] This sentence continues the subject of fire offerings.

[5] Deut. xviii, 8.

[6] Deut. xxvi, 12; Num. xviii, 21.

taken from their owners and allotted to the Levites to dwell in.[1] It is even provided that land in the cities of the Levites, sold by a Levite, is perpetually redeemable[2]; and that their fields in the suburbs of their cities are unassignable.[3]

With the material prosperity of the priests increased their civil authority, and Zechariah, to whom reference has already been made, in another chapter sets a crown upon the head of Joshua the High Priest, and prophesies that "he shall bear glory, and shall sit and rule upon his throne, and he shall be an enthroned priest."[4] Ultimately, as is well known, the wealth of the country became centred in the chief priestly families, and the civil power was vested in the High Priest and a Senate chosen from the leading priestly families.[5] The State became a religious oligarchy, or, in the language of Josephus, a theocracy. It is plain from Numbers xxxv, one of the latest chapters of the Pentateuch, that the High Priest had become the civil ruler by the time the Pentateuch was published.[6] In this twofold capacity he issued in one great compilation the secular Code with its priestly additions, and also the moral writings and the ecclesiastical— all attributed to an ancient legislator who was not a priest, but was held in special reverence by the priesthood because, like Aethelberht, he was also credited with the introduction of the religion of the State.

[1] Num. xxxv, 1–8; cf. Joshua xxi, 8. These cities include the cities of sanctuary, which in Deut. iv, 41 and xix, 2 were three in number and have now become six, Num. xxxv, 6, 13. See also 1 Chron. vi, 64; 2 Chron. xi, 14.

[2] Lev. xxv, 29.

[3] Lev. xxv, 34.

[4] Zech. vi, 11–13.

[5] See *Jerusalem under the High Priests*, E. Bevan (1904).

[6] See Num. xxxv, 25, 28, 32. This chapter represents the most advanced law in the Pentateuch.

CHAPTER XII

THE HEBREW CODE

THE Hebrew Code of law,[1] apart from the special interest that it has for us as being contained in the Bible, is of such great importance as a Code of ancient law preserving clear marks of the stages of its development, that it is worth a detailed examination.[2] It is the Code not of a nomadic but of a settled agricultural community, for houses and corn are mentioned and individual ownership of fields, and the provisions of the Code have reference largely to incidents in the life of agriculturalists. The community is, however, also much engaged in commerce; the kinds of property referred to include (besides land, oxen, sheep and asses) slaves, silver money, and cloth; and contracts of sale, deposit (including the deposit of money), loan and hire are provided for. But the community is a small one, for the Code is short and makes no reference to the paraphernalia of a great commercial centre such as may be seen in the provisions of the Code of Hammurabi, with its warehouses, commercial agents and the like.

The translation of the Code contained in the Revised Version is not precise enough for legal purposes and contains errors. A translation is appended which, it is suggested, is better adapted to bring out the legal significance of each clause. It is arranged in two vertical columns, so as the more easily to separate the main body of the Code from later additions and alterations of

[1] Exod. xxi, 2 to xxii, 17.

[2] All the provisions of the Code are separately dealt with in the later chapters of this book, under the various branches of law.

ecclesiastical origin. The Code has, however, grown up over a number of centuries, and the provisions of the main Code are by no means all of the same date. The first word of most of the head clauses upon each topic is here translated by "when,"[1] and the first word of sub-clauses by "if."[2] The two Hebrew words are different, but bear substantially the same meaning, and they are differently translated in order to show the uniformity and precision of style throughout most of the Code.

THE HEBREW CODE

Exod. xxi, 1–xxii, 17

Exod. xxi.

1. Now these are the laws which thou shalt set before them.

[*Main Code*]

[*Priestly Additions*]

Exod. xxi.

2. When thou[3] buyest a Hebrew slave, six years he shall serve, and in the seventh year he shall go out free for nothing.

3. If he comes in by himself he shall go out by himself; if he is married, his wife shall go out with him.

4. If his master gives him a wife and she bears him sons or daughters, the wife and her children shall be his master's and he shall go out by himself.

[1] כִּי

[3] Note the second person, changing to the third in verse 4 (see Exod. xxi, 1).

[*Main Code*]

[*Priestly Additions*]

5. But if the slave surely says, "I love my master, my wife and my children, I will not go out free,"

6. then his master shall bring him to God[1] and shall bring him to the door or to the doorpost, and his master shall bore his ear with an awl and he shall serve him for ever.

7. But when a man sells his daughter as a slave,[2] she shall not go out like the male slaves.

8. If she pleases not her master, and he has not espoused her, then he shall cause her to be redeemed; to a foreign people he shall have no power to sell her, because he has deceived her.[3]

9. And if he espouses her to his son, he shall deal with her according to the law (or custom) relating to daughters.[4]

10. If he takes another woman to himself, her[5]

[1] See *post*, p. 118 (note 5).

[2] i.e. concubine.

[3] For the language, cf. Deut. xxi, 14. Note that the law gives a reason for its existence.

[4] i.e. he shall give her the portion customary on marrying a daughter.

[5] i.e. the former woman's.

[*Main Code*]

[*Priestly Additions*]

food, clothing and lodging he shall not withhold.

11. If he does not do these three things to her,[1] then she shall go out for nothing without money.

12. [A man] Smiting a man, if[2] he dies, shall surely die.

13. But if[3] he lay not in wait, but God brought it(or him) to his hand,[4] then I shall appoint thee a place whither he shall flee.

14. But when a man uses violence to another to slay him with malice,[5] thou shalt take him from my altar to die.

15. And [a man] smiting his father or[6] his mother shall surely die.

16. And [a man] stealing a man, and selling him, or if[7] he is found in his hand, shall surely die.

[1] This means, either (*a*) in case of breach of clauses 8, 9 or 10; or (*b*) in case of failure to supply food, clothing or lodging. I prefer meaning (*a*). Note the redundance of "for nothing without money."

[2] Lit. "and."

[3] אֲשֶׁר. For the language cf. 1 Kings viii, 31 (*post* exilic), and Exod. xxi, 8. In the sense of "if," the word would appear to be late.

[4] The Lord is speaking, yet He uses the word "God" in the third person, in the sense of our "act of God." Note the first and second person in verses 13 and 14.

[5] Or "guilty knowledge." A late word; see Prov. i, 4; viii, 5. Compare C.H., § 206.

[6] Lit. "and."

[7] "Or if"—lit. "and."

[*Main Code*]

17. And [a man] cursing his father or his mother shall surely die.

---

18. And when men fight and one smites the other with a stone or his fist and he does not die but falls to his bed;

19. if he rises and walks abroad on his staff, the smiter shall be quit; only he shall provide for his time of inactivity and shall surely cause him to be healed.

[*Priestly Additions*]

20. But if a man smites his slave, male or female, with a rod, and he dies under his hand, he shall surely avenge himself.[1]

21. However, if he survives for a day or two, he shall not be avenged because he is his money.[2]

22. And when men struggle together and push against a pregnant woman, and a miscarriage occurs,

and there is no mischief,

he shall surely be fined according as the husband lays upon him,

[1] Note the language here and in the next verse. The deceased "shall avenge himself," "shall not be avenged." Note the return to the lot of the slave.

[2] Note, the law gives a reason for itself. Note also the vagueness of "a day or two." Compare the phrase "two or three witnesses." Deut. xix, 15 and xvii, 6.

[*Main Code*]

[*Priestly Additions*[

and he shall pay according to [the decision of] the judges.[1]

23. But if there is mischief, then thou[2] shalt give life for life,

24. eye for eye, tooth for tooth, hand for hand,

25. foot for foot, burn for burn, wound for wound, bruise for bruise.[3]

26. And when a man smites the eye[4] of his male slave, or the eye of his female slave, and destroys it, he shall set him free for his eye.[4]

27. And if a man knocks out the tooth[4] of his male slave or the tooth of his female slave, he shall set him free for his tooth.[4]

28. And when an ox gores a man or woman, and he [or she] dies, the ox shall surely be stoned

and its flesh shall not be eaten

but the owner of the ox shall be quit.

[1] A late word, occurring in the plural, and having apparently religious affinities.

[2] Note the second person.

[3] See post, pp. 116, 122.

[4] Note the repetition (cf. v. 24) of the idea and phraseology of "eye for eye, tooth for tooth"; the redundance of the language; and the continued interest in the lot of the slave.

[*Main Code*] [*Priestly Additions*]

29. But if the ox has gored in the past and notice has been given to its owner, and he has not put a guard on it, but it has killed a man or woman, the ox shall be stoned and its owner also shall die.[1]

30. If a ransom is laid upon him, he shall give for the redemption of his life whatever is laid upon him.

31. If, on the other hand,[2] it gores a son or gores a daughter, according to this law[3] shall he be dealt with.

32. If the ox gores a male or female slave,[4] he shall give to their master 30 shekels of silver and the ox shall be stoned.

[1] The group (vv. 28 to 32) is late; see e.g. the use of אֶת with the indefinite object אִישׁ in v.28 (a late use apparently with verbs denoting violence to a man; cf. Num. xxi, 9; 2 Sam. iv, 11; xxiii, 21). It is also used with the nominative בְּשָׂרוֹ in the insertion in v. 28. The insertion spoils the antithesis between vv. 28 and 29. Other marks of lateness in the main group are the deodand ox, and the idea of "notice." See also the following notes (2) and (4). There are close similarities in style between this group and that in vv. 35–36 (see the use of אוֹ introducing vv. 31 and 36; and שׁוֹר נַגָּח הוּא in vv. 29, 36.)

[2] אוֹ means "if" in the sense of an alternative supposition, not "whether," which spoils the sense. See v. 36.

[3] This law = v. 30, not v. 29.

[4] Note, slaves now appear for the first time in the Code, another sign that the group is late, for the number of slaves in the community calls for special legislation in regard to them (especially debt-slaves).

[*Main Code*] [*Priestly Additions*]

33. And when a man uncovers a pit, or when a man digs a pit and does not cover it, and an ox or ass falls
34. therein, the owner of the pit shall restore its value in money[1] to its owner, and the dead shall be his.
35. And when a man's ox pushes another's ox, and it dies, then they shall sell the living ox and divide its price and they shall divide the dead also.[2]
36. If, on the other hand, it was known that the ox had pushed in the past, and its owner did not put a guard on it, he shall surely pay[3] ox for ox, and the dead shall be his.

Exod. xxii

1. When a man steals an ox or a sheep and kills it or sells it, he shall pay 5 oxen for each ox and 4 sheep for each sheep.
2. If the thief is found breaking in[4] and is smitten and dies, there shall be no blood for him.[5]

[1] Silver. [2] A familiar rule; see e.g. Doughty, *Arabia Deserta*, I, 351.
[3] The word translated "pay" is the same as that translated elsewhere as "make good," and means lit. "make whole."
[4] Lit. "digging through"—a term applicable to houses of clay; cf. C.H., § 21.
[5] Compare the Roman XII Tables: "Si nox furtum faxit, si im occisit jure caesus esto."

[*Main Code*] [*Priestly Additions*]

3. If the sun has shone upon him there shall be blood for[1] him; he shall surely pay; if he has not [the means to pay] then he shall be sold for his theft.
4. If the theft is surely found in his hand alive, whether ox, ass or sheep, he shall pay double.
5. When a man depastures a field or vineyard, or[2] lets loose his cattle and it depastures another man's field, he shall make it good from the best of his field and from the best of his vineyard.[3]
6. When a fire breaks out and gets a hold on thorns, and sheaves of corn or the standing corn or the field is consumed, he who kindled the fire shall surely make it good.[4]
7. When a man gives another money[5] or goods[6] to keep [for him] and it be stolen from the man's house, if the thief is found he shall pay double.

[1] Lit. "to."
[2] Lit. "and."
[3] Cf. C.H., §§ 42, 61, 65.
[4] Cf. H.C., II, § 6.
[5] Silver.
[6] Lit. "utensils" or "implements"?

[*Main Code*]

8. If the thief is not found then the owner of the house shall come before God, [to see] if he has not laid his hand on the other's property.

[*Priestly Additions*]

9. In every case of sin,[1] in the case of ox, ass, sheep, garment or any [other] loss, where it is said, "This is it,"[2] the case of both parties shall come before God; he whom God shall declare unrighteous[3] shall pay double to the other.

10. When a man give another an ass, or ox, or sheep, or any beast to keep [for him], and it dies, or is torn[4], or driven away, no man seeing,

11. the oath of Jehovah shall be between them both, whether he has not laid his hand on the property of the other, and its owner shall accept it, and he shall not make it good.

12. But if it is surely stolen from him, he shall make it good to its owner.

13. If it is surely torn he shall bring it as witness; he shall not make good what is torn.

[1] The significance of the word is purely religious. [2] i.e. "This is mine."
[3] For the language, see the *post*-exilic passage in 1 Kings viii, 31, 32.
[4] i.e. by a wild beast; cf. H.C., I, § 76.

[*Main Code*]

14. And when a man borrows[1] anything from another, and it is torn or dies, its owner not being with it, he shall surely make it good.
15. If its owner is with it, he shall not make it good; if it is hired, it came for the price of its hire.

[*Priestly Additions*]

16. And when a man seduces a maiden who is not betrothed, and lies with her, he shall surely buy her as his wife.
17. If her father shall surely refuse to give her to him, he shall surely weigh out money[2] according to the price[3] of maidens.

---

18. A sorceress thou shalt not suffer to live.
19. Whosoever lieth with a beast shall surely die.
20. He that sacrificeth unto any god, save unto Jehovah only, shall be utterly destroyed.

The separation of the ecclesiastical additions from the main Code shows the provisions of the Code to be arranged in a very clear, simple and methodical fashion.

[1] Lit. "asks."
[2] Silver.
[3] i.e. bride-price.

First[1] is a group of capital offences (Exod. xxi, 12–17)—homicide, assault on a parent, theft of a man, cursing of a parent. Next comes a series of provisions (Exod. xxi, 18–32) relating to personal injuries which are not capital—fighting, jostling a woman so as to cause miscarriage, death by goring oxen. The subject of oxen introduces a group of clauses (verses 33–36) providing for the offences of the killing of animals by goring oxen and uncovered pits. The killing of animals leads to other wrongs in relation to animals. Exod. xxii, 1–4 deals with the *theft* of animals; next a verse provides for the depasturing of another's field by one's animals, and another verse for injury to another's field caused by kindling a fire. There follows a group of clauses (xxii, 7–15) concerned with commercial transactions (bailments), in which ordeal and oath are first mentioned. Verses 7 and 8 deal with deposit of money or goods; §§ 10 to 13 with deposit of cattle; §§ 14 and 15 with loan or hire of cattle.

But although the arrangement is so methodical, it is not based on notions of underlying principle, but on the external similarity of the subject-matter. It will further be seen on close examination that the order of the clauses is roughly the historical order in which they were enacted. First comes the group of capital clauses.[2] Next is a group of laws supplying the needs of an agricultural community,[3] and relating to wounding[4] and theft[5]; and there are a few late insertions of clauses dealing with injuries and damage.[6] Last comes a group of laws of a commercial character,[7] in which even the deposit of

[1] After the group of clauses (which will be seen to be a priestly interpolation) providing for the release of Hebrew (i.e. debt-) slaves, in the seventh year, Exod. xxi, 2–11; see later in this chapter.

[2] Exod. xxi, 12, 15, 16, 17.

[3] Exod. xxi, 18 to xxii, 6.

[4] xxi, 18 f. The Leges inter Brettos et Scottos contains only provisions for homicide and wounding.

[5] xxii, 1 f.

[6] Exod. xxi, 28–32 and 35–36.

[7] Exod. xxii, 7–15.

money is known and provided for,[1] and procedure is first mentioned.[2] Let us examine these three great groups in further detail.

The group of clauses dealing with capital offences are all couched in the same style, which is quite distinct from that of the rest, and is primitive in its extreme terseness. The constructions are all paratactic; there is no conjunction but "and." It is noteworthy that so many as two of the four clauses are concerned with the honouring of father and mother,[3] and that both parents are put on the same plane. The first clause of the group lays down the general rule of death as the sanction for homicide, but does not enter into the refinements of extenuating circumstances. Then come two clauses, clearly shown by their language and matter to be priestly, but of different dates. The former (v. 13), which is Deuteronomic in its language,[4] lays down the distinction between killing by ambush[5] and other killing, for which a right of asylum is given; the second (v. 14), very late in language, contains the more modern distinction between killing with malice and without malice,[6] and limits the right of asylum to homicides of the latter category. But these two interpolated clauses do not abrogate the main clause or alter the general law. What they are concerned with is the sanctuary. The only right conferred by them is the right to take sanctuary in the circumstances defined, and a slayer who does not take sanctuary may be put to death with impunity by the next of kin. In the latest

[1] § 7.

[2] First ordeals (xxii, 8), then the specific ordeal by oath (xxii, 11). Procedure occurs throughout the priestly interpolations, which are later (see e.g. Exod. xxi, 6).

[3] Verses 15, 17. With verse 15 contrast C.H., § 195. With verse 16 cf. C.H., § 14.

[4] See the phrase "I shall appoint thee a place."

[5] The Anglo-Saxon "forsteal"; a distinction which appears early in the eleventh century A.D. in this country. This clause is probably of the early sixth century B.C.

[6] A distinction of the later twelfth century in England. See *post*, Chapter XXVII, p. 319. It represents the law of B.C. 400 among the Hebrews.

priestly writings (early fourth century) the provisions here laid down, their object and their practice, are set forth in great detail.[1] The slayer flees to the altar in one of the cities of refuge (part of the possessions of the priests). There a trial takes place, before "the congregation," of the issue between the refugee and the next of kin of the slain. If acquitted of intentional killing, the refugee is entitled to dwell in the city of refuge till the death of the High Priest, after which he may sally forth. But if, before the High Priest dies, he leaves his city of sanctuary, he may be killed with impunity. Substantially, therefore, these two clauses are rules for the conduct of certain places to which the privilege of sanctuary is attached, and are enunciated at a time when slayers commonly took refuge in a place of sanctuary.[2] The clauses are examples of ecclesiastical-legal writings,[3] which, as in the Anglo-Saxon laws and the Leges Barbarorum,[4] specially concerned themselves with the privileges of these sacred places.

In the second and main group of the Code, the language changes. A uniform style of drafting is employed, in which the head clauses upon each topic are introduced by one conjunction (translated as "when") and the other clauses by another conjunction (translated as "if") —a refinement which is not found elsewhere. The language is much less curt; the word "and" no longer has to serve the purpose of "or," and conjunctions and subordinate sentences are plentiful. The first clause of the group[5] starts as an exception from the rule of homicide[6] by providing that if the man who has been struck

[1] Num. xxxv. See also the earlier Deut. xix.

[2] The Hebrew law of homicide is more fully examined in Chapter XV, *post*.

[3] Cf. Deut. xix; Num. xxxv.

[4] Provisions as to the use of sanctuaries are also to be found in the later A.-S. laws and in the spurious Leges Barbarorum (see e.g. Lex Baiuvariorum, I, 6)—ecclesiastical writings of the period of the Middle Codes.

[5] Exod. xxi, 18.

[6] Verse 12.

in open fight once rises from his bed and walks abroad (though he should afterwards die) the striker is clear of the offence of homicide. There is added, probably at a later date, the last sentence: "only he shall provide for his inactivity and shall surely cause him to be healed."[1] It will be observed that this rule is quite inconsistent with any talionic law for personal injuries. The next rule—also an exception from the rule of homicide, and also providing for an injury brought about by fighting—applies to the case commonly dealt with in ancient Codes, of a miscarriage being caused to a woman who is jostled by men struggling together.[2] As the loss caused in this case is not that of a living person, but the loss of a fœtus, that is to say a smaller loss, the injured husband is to accept a composition. The present rule is the work of more than one hand. Originally it is plain that the rule left it to the husband to fix whatever sum he pleased[3]; but later the clause was varied by the addition which entrusts the assessment of the penalty to the judges. This addition has reference to a system under which disputes are tried not by elders but by a number of professional "judges," and it is of a late date. By the time the Pentateuch was compiled, the law had altered still further, and the sanctions for serious personal injuries were no longer monetary but talionic. Hence, in order to reconcile the Code with existing law (or their view of it) the compilers have also made clumsy interpolations by which they affect to treat the law already mentioned as confined only to the case where "there is no mischief"—a preposterous view,

[1] Compare the similar rule in the Hittite Code, I, § 10, and the Hittite fragment, IX; and C.H., § 209. Compare also such a law as that of the Nandi in E. Africa, under which there is no penalty for personal injuries short of death, even the loss of eye or limb; but while the victim is suffering from the injury, the assaulter must slaughter cattle from time to time to provide him with food.

[2] e.g. the Sumerian fragment (Clay No. 28, § 1); A.C., 21, 51, 52, 53; C.H., 209–214. See Armenian Law Book, § 84.

[3] Compare verse 30.

where the penalty is so severe—and provide for the talionic penalty where there is mischief.[1] But the talionic system as here elaborated and expressed, with its reference to burns and so forth, bears no relation to a miscarriage.

The Code next deals with yet another case of killing, namely, by goring oxen.[2] The liability of the owner, in a rule reminiscent of English law, is made to depend on the owner's knowledge of the vicious propensity of the beast. In the only ritual rule found in this collection it is provided[3] that the flesh of the goring ox shall not be eaten. In the present case, apart from the lateness and strangeness of the language, one has only to read these clauses to see that the words are an interpolation. In these rules of the Code—as in the case of a miscarriage—the relatives are permitted to compromise and are left to fix the amount; but they may also exact the death penalty. If, on the other hand, the slaying is not of the head of the family or his wife, but of his son or daughter —i.e. the plaintiff's son or daughter—the loss sued for is a lesser one, and the plaintiff may fix the amount of his claim in money, but may not exact the death penalty.[4]

What we have called the third, or commercial group of clauses in the Code,[5] is concerned entirely with bailments, and, as usual in ancient Codes, it is in connection with bailments that the ordeal by oath is first mentioned. These laws of bailment have obviously grown up piecemeal. The first of the clauses[6] deals with the deposit of money or goods, and merely provides that if the goods are stolen from the bailee's house, the thief, if found, shall pay double. If no thief is found, the question whether the bailee himself "has laid his hand on the other's property" shall be decided by ordeal undergone

[1] Verses 22, 23. [2] Exod. xxi, 28 f. [3] Verse 28.
[4] In the C.H. in all cases of death by goring oxen the sanction is pecuniary (see § 251).
[5] Exod. xxii, 7–15. [6] Verse 7.

by the bailee. In the nature of the case supposed there is no evidence except the defendant's, hence the ordeal. The clause that follows[1] is plainly an interpolation of priestly origin and has no necessary connection with bailments. It extends this method of use of the ordeal (namely, its application to the defendant alone, in a case where no evidence of witnesses is available) to a general system of trial by ordeal—that is to say, evidence on oath[2]—under which the ordeal may be applied to both parties, and the unsuccessful party (presumably whether plaintiff or defendant) is declared liable to pay double damages to the other. The language shows clearly that the interpolation comes from ecclesiastical practice; the charge is not one of a wrong but of a "sin," and the party unsuccessful in the ordeal is declared by God to be "unrighteous." The terms of the clause, however, seem especially to contemplate a case where the plaintiff finds his property in the defendant's possession and alleges that he is the owner, and that it has been stolen; while the defendant alleges that it is his property by purchase from a third party.[3]

To return to the main Code, so far only the deposit of money or goods has been provided for. In the next clause,[4] which treats of the deposit of cattle (for agistment), it is provided that an ordeal (expressly specified here as an ordeal by oath) is to be taken by the bailee in the name of Jehovah,[5] to see whether he has not "laid

[1] Verse 9.

[2] In the priestly interpolation at the head of the Code (Exod. xxi, 2–11, at v. 6) the phrase "to God" apparently implies *evidence* on oath (as in the present interpolation); not a place where an oath of *purgation* is taken, as in the main Code (Exod. xxii, 8, 11).

[3] Note the phrase "This is it" (i.e. "mine"). The rule would then cover much the same ground as the rules as to vouching to warranty, so familiar in the ecclesiastical parts of the Anglo-Saxon Laws. See also C.H., §§ 9 to 13.

[4] Verse 10.

[5] Elsewhere in the Code and interpolations the word "Elohim" (the generic word for "God") is used technically, as in ancient Codes generally, as the sacred place where an ordeal is to be taken. Here "Jehovah" is mentioned, probably as the divine name by which the oath is to be taken. An oath (as opposed to

his hand on the property of the other," i.e. stolen it. If found in the ordeal not guilty of theft, the bailee is acquitted. A later rule[1] now alters the law by providing that the bailee, although himself not guilty of the theft, is liable if the goods are stolen by another. The liability of the bailee has become contractual, not one for mere theft, as it has hitherto been. The herdsman or shepherd should have been able to prevent the theft. In Babylonian law the notion of negligence first makes it appearance in precisely the same set of facts,[2] presumably the most common case of bailment.

In the next two clauses,[3] which deal not with deposit but with loan and hire of cattle, the idea of contractual liability is further developed. The distinction implied between these two contracts, as regards the liability of the bailee for damage, is based on the fact that the loan is gratuitous,[4] and for the borrower's sole benefit; whilst the contract of hire is for reward, and for the benefit of both. Accordingly it is provided that in a case of the loan of a beast (not a beast accompanied by its owner, in which case the owner would be in control) the bailee is liable whether the beast is torn by a wild animal or dies; if, however, the beast is hired, there is no liability whether it is torn or dies. "If it is hired, it came for the hiring-price."[5]

The Code and its interpolations confirm in many places what was said in the last chapter as to the history of the Code and the steps by which the priesthood obtained control over the law. The earliest activity of the priesthood in legal matters is later than the earliest part of the Code and dates from the time when speculations upon ideal laws had arisen.[6] The ordeal by oath

an ordeal) is not mentioned elsewhere in the Code. This is one of the late rules of the main Code.

[1] Verse 12. [2] C.H., §§ 263, 267. [3] Verses 14, 15.
[4] The word translated as "borrows" lit. means "asks." [5] Verse 15.
[6] i.e. Exod. xxi, 13, is Deuteronomic (early sixth century) and is later than Exod. xxi, 12.

does not appear in the secular Code until the commercial group is reached, comparatively late in the history of the Code proper, but some time before the latest commercial clauses of the Code proper are enacted. The priests employed the ordeal in ecclesiastical disputes,[1] and also in secular disputes,[2] which were at first tried by secular judges. By the time the Code of law appeared in its present place, issued together with the priestly additions by a priestly government, the ordeal had been extended in the ecclesiastical Courts (and perhaps elsewhere) to a more general method of trial,[3] and this practice is, by the interpolation of verse 9, adopted into the Code. There is no space in this book to say much of the system of rules by which the priests had tried ecclesiastical disputes in the ecclesiastical Courts. Not all those rules are contained in the interpolations to the Code; indeed very few of them are here. They are to be gathered from the whole of the rules of the Pentateuch that follow on the Code. In the religious writings of the Pentateuch is set forth a system under which wrongs[4] are compensated for by the amount of the loss or damage sustained plus an additional fifth and a guilt-offering. If the wrong is solely one against God, the fifth goes to the priest; if the injury is to an individual, but neither he nor the next of kin claims, again it goes to the priest.[5] The theoretical ground of the jurisdiction of the priests, as of the jurisdiction of the later ecclesiastical Courts of Europe, was that the wrong was a sin against God.[6]

[1] See for a detailed description of the ordeal "of jealousy," Num. v, 11. As in the C.H. (§ 131) this was used where a charge of adultery was made by a man against his wife without evidence. The ordeal included an oath (or curse), Num. v, 21. This is a description of the practice in an ecclesiastical case. Adultery was a matter specially assigned to the ecclesiastical Courts.

[2] This practice, as has been seen, is not mentioned till a comparatively late passage in Deut. (xix, 15). [3] As in the English ecclesiastical Courts.

[4] Of all the kinds tried by the priests, see Lev. vi, 1 f.

[5] Lev. vi, 1 f.; Num. v, 5 f. See also Lev. iv; v, 14 f.; xxii, 14.

[6] See Exod. xxii, 9; Deut. xix, 15; Lev. vi, 2; 2 Chron. xix, 10, and the other passages referred to in the preceding note.

In this examination of the rules of the Code of law, we have not fully dealt with all the rules described as priestly interpolations, although reasons have been given for regarding most of them as such. Upon a general survey, they bear certain obvious common characteristics of form. They are verbose, without the terse precision of the provisions of the main Code; they are frequently set in the first or second person, and sometimes contain reasons for their own existence. They often use language utterly inappropriate to secular, legal matters, but derived from the religious writings and the doctrines of the ecclesiastical Courts—the defendant commits a "sin,"[1] instead of a wrong; he is found to be "unrighteous"[1]; a wronged person "avenges" himself,[2] instead of the wrongdoer being "fined" or "paying." These priestly additions do not embrace all the topics contained in the Code but, like the ecclesiastical legislation in the Anglo-Saxon laws, only matters of especial interest to the priesthood; and (unlike the other clauses of the Code[3]) they have their counterparts in the writings contained in the rest of the Pentateuch, the substance of which they embody, sometimes in the same words.[4] These additions are of two kinds. Some formed part of the law which had been exclusively practised in the ecclesiastical Courts. This was chiefly criminal and (as in the ecclesiastical Courts of twelfth-century England[5]) comprised mainly the offences of

[1] Exod. xxii, 9.

[2] Exod. xxi, 20, 21. In verse 20 the person avenging himself is dead. This is the late Hebrew (and Athenian) religious notion of the curse of the blood of the innocent and unexpiated slain upon the land. See *post*, Chapter XV. The date is probably about 400 B.C.

[3] There is nothing in the religious writings corresponding in any way with Exod. xxi, 29 to xxii, 8.

[4] Compare Exod. xxii, 16, 17 with Deut. xxii, 28, 29.

[5] See *post*, Chapter XXV. In addition (as in England) the Hebrew ecclesiastical Courts tried homicide at the sanctuaries, and ordeals formed an important part of their procedure. Both these matters are dealt with in the priestly additions to the Code. Again, as in England, the ecclesiastical law contained a great body of rules relating to the internal ecclesiastical economy, but these rules would be out of place in the Code.

Levitical[1] schools. Next comes a ritual version of the Ten Commandments which occurs twice, in Exodus xxiii, 12–19 and Exodus xxxiv, 14–27. The view that, though old,[2] it is later than the rules already mentioned, is corroborated by the tradition in Exodus, Chapter xxxiv, that it was issued to Moses on his second visit to Sinai.[3] Its rules have nothing in common with the Ten Commandments in Exodus, Chapter xx, except the institution of the Sabbath, which is not mentioned in the Code.[4] These rules may be described as a ritual or priestly tradition of the legislation of Moses, and are perhaps the earliest of the ritual rules found throughout the later parts of the Pentateuch.

It appears, then, that almost until the close of biblical history, rules of law, on the one hand, and rules of morality and religion, on the other, were separate conceptions among the Hebrews and were to be found in separate documents. Furthermore, so far from the Hebrew law being derived from rules of religion or morality, it can hardly be doubted that the relative order in which they appear is, firstly rules of law, spoken first by the mouth of an old legislator; secondly, rules of morality with some religious sanctions, spoken first by the mouths of early prophets and represented by the moral writings of the earliest parts of the Pentateuch; and lastly rules of religious ritual, written under the hands of priests.[5] Nor is there any reason to suppose

[1] Lev. xix.

[2] Compare Deut. xiv, 21 and xv, 19 to xvi, 17.

[3] Also by its later position in Exodus.

[4] Nor in the Elephantine papyrus; see Cowley, *Jewish Documents in the Time of Ezra* (1919), Introduction, p. xv.

[5] In the other literature of the Bible the same order of events is shadowed. True history begins with the reigns of Jeroboam and Rehoboam, for from this point onwards 1 Kings is based upon secular literature, the Chronicles of the Kings of Israel (1 Kings xiv, 19) and of Judah (v. 29). Next comes a prophetic or moral class of literature, represented in Isaiah, Jeremiah, Micah, Amos, Hosea. Thirdly, priestly literature begins with Ezekiel, a book of the Exile. Contrast the later historical books of 1 and 2 Chronicles with the books of Kings.

that rules of morality or religion largely affected the course of development of the Hebrew law. Indeed, the contrast is overwhelming between the supreme heights of the passionate morality of the Hebrew prophets, and the quite normal levels of the Hebrew law even of 400 B.C. The rules of the latter differ in no important respect from those of other peoples—such as the Romans of the Twelve Tables—who stood at the same stage of economic development; yet in such teaching as "Thou shalt love thy neighbour as thyself,"[1] the ethics of the Hebrews have not been surpassed.

[1] Lev. xix, 18.

CHAPTER XIII

THE CODE OF MANU

THE Code of Manu[1] is a further instance of the same succession of events in the history of ethical thought, and indeed lawyers who are acquainted with that compilation have for a long time been agreed that it originated in rules of true law. Yet it is necessary briefly to describe the Code, for those who have not read it sometimes appeal to it in support of the theory of the religious origin of law. Sir Henry Maine was himself an exponent of the view that the origin of the Code was secular, though the language in which he from time to time refers to Manu is not wholly consistent. Yet a passage in *Ancient Law* is striking enough. Writing of "the religious oligarchies of Asia" he observes that "their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed. The Hindoo Code, called the Laws of Manu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary Orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindostan."[2] He further observes that this compilation "is in point of the relative progress of Hindoo jurisprudence, a recent production."[3]

[1] See J. D. Mayne, *Hindu Law and Usage*, 8th Edition, 1914. There is an English translation by G. Bühler in *The Sacred Books of the East*, Vol. XXV.

[2] *Ancient Law*, p. 15.

[3] *Ibid.*, p. 16.

The Code of Manu, which may have originated in some form at about the commencement of the Christian era, but has probably been altered since, is thought to be the earliest and most authoritative of the three complete Dharma Sastras (or strings of metrical rules of conduct), of which the other two, the Yajnavalkya and the Narada Smriti,[1] have probably both been derived from some form of the Code of Manu. The prototype of the Code originated among Aryan invaders of India, before the rise of Brahmanism. It was a brief Code of secular laws of some Indian kingdom, and the King, it plainly appears, was both ruler and supreme judge.[2] When a speculative interest in rules of conduct arose, and Brahmanism began to appear, the Code, in the hands of Brahman sages and teachers, was developed and extended by the addition of further rules of conduct, until it became a Brahmanical school-book—a book containing the rules whereby a Brahman should govern his life in all its activities. It included rules of morality and religion, of hygiene and of social intercourse, and especially—since, by virtue of his monopoly of learning the Brahman assisted the King as Councillor in the trial of disputes—the rules of law that should be applied in the Courts. As Brahmanism spread beyond the confines of a kingdom it would carry the book with it; but then the application of the legal rules in the book would be subject to differences of local laws and custom. It was not by any means the only Brahman school-book. The various Karanas, or schools of the Brahmans, used their own Dharma Sutras (or prose collections of rules of conduct for everyday life), and each collection was called by the name of the teacher from whom it was thought to originate. One such school was the school of the Manavas. The Dharma Sutras of this school

[1] Translated by Jolly.
[2] See Chapters VIII and IX of the Code.

are lost, but the Code of Manu (the Manava Dharma Sastras) is thought to be a metrical version of such pre-existing Dharma Sutras.

The first, the introductory chapter of the Code, like that of other collections which have been described, is of a late date and is shaped by the final form of the whole compilation, whose origin it purports to explain. The mythical Manu—the impersonal man, the founder of the moral and social order among men—is besought by the Sages to tell them of the sacred laws. He informs them how he was born from Brahma, and how the world was created. He declares that he received the Code from Brahma, and communicated its contents to the Ten Sages, and he asks Bhrigu, one of the Ten, to repeat it to the other nine. Then follows the Code, recited by Bhrigu.

In the second chapter are contained rules prescribing the manner in which a Brahman should study the sacred law. Then follow a number of chapters (III to VI) containing rules in minute detail for the conduct of the Brahman—as to his marriage, the daily rites of the Brahman householder, his food and dress, the duties of women, the life of hermits and ascetics. Chapter VII concerns the duties of kings. "Let the King, rising early in the morning, worship Brâhmanas who are well-versed in the threefold sacred science and learned in polity, and follow their advice."[1] He is told how to govern his realm, how to conduct his army and wage war; and the duty of the administration of justice. "Having fully considered the time and the place of the offence, the strength and the knowledge of the offender, let him justly inflict that punishment on men who act unjustly."[2] Then comes Chapter VIII, far and away the longest of all. This contains the rules according to

[1] Chapter vii, 37. The quotations are from Bühler's translation.
[2] *Ibid.*, § 16.

which the King should administer justice in the Courts, "preserving a dignified demeanour, together with Brâhmanas and with experienced councillors."[1] If he "does not personally investigate the suits, then let him appoint a learned Brâhmana to try them."[2]

The previous chapters were rules of morality. The present chapter[3] includes much purely secular law. It is perhaps not without significance that it contains many characteristics of Codes of late primitive law. Sale is scarcely mentioned. Bailments are treated off with fullness.[4] Where the one party alleges that he has bailed property to the other, and the other denies; or the dispute is whether property, which has been bailed and has disappeared, has been appropriated by the bailee—these issues are to be tried by oaths or other ordeals, and the unsuccessful party in each case is mulcted in a sum equal to the value of the thing in dispute.[5] A herdsman is liable for a beast lost through his negligence, but not for a beast stolen or torn by wolves.[6] "If cattle die, let him carry to his master their ears, skins, tails, etc., and let him point out their particular marks."[7] Assaults by a man of a low caste on a member of one of the three highest castes are punishable by "characteristic" punishments—for a kick, the foot is cut off, and so on.[8] In the next chapter (Chapter IX) are contained rules of a moral and didactic nature, relating to the duties of husband and wife, and the giving of a daughter in marriage, rules of the Levirate, rules of inheritance, and punishments for miscellaneous offences. The duties of the King are then

[1] Chapter viii, 1.
[2] *Ibid.*, § 9.
[3] Chapter viii.
[4] *Ibid.*, §§ 179 to 196.
[5] *Ibid.*, §§ 189 to 192; cf. C.H., § 124 and other Codes, and see *post* Chapters XXX, XXXI, for the history of the ordeal in relation to bailments.
[6] *Ibid.*, § 229 f.; as in C.H., §§ 266, 267.
[7] Compare Hebrew Code, Exod. xxii, 13.
[8] *Ibid.*, § 279 f.; cf. C.H., §§ 195, 202, 205.

continued.[1] Lastly, the final chapters (Chapters X to XII) contain caste law, and moral and religious rules relating to penances, gifts[2] and sacrifices, various moral offences, and the doctrines of retribution and transmigration.

In all probability the "Code" of Manu originated in a short Code of secular law now embedded in Chapter VIII. After Brahmanism arose this Code was expanded and it was set within a body of rules prescribing the various duties of the King, who was also law-giver and judge. This was introduced and followed by chapters governing the life of the Brahman, and the present introduction was added at a late date. Even in its present form the Code throughout contemplates that the King is sole judge, but seeks to influence him by rules claiming a high intrinsic moral authority.[3] But the Code does not claim that its rules are either universal or overriding. Firstly, the Code, as a whole, is addressed solely to Brahmans; and secondly, it is expressly subject to all custom, and all local and special law, to the contrary. The King is to decide the causes of suitors "according to principles drawn from local usages and from the Institutes of the sacred law"[4] (i.e. of Manu). "The King who knows the sacred law must enquire into the laws of castes, of districts, of guilds and of families, and thus settle the peculiar law of each."[5] "What may have been practised by the virtuous, by such twice-born men as are devoted to the law, that shall he establish as law if it be not opposed to the

[1] Chapter ix, 251 f. It is the King who punishes, § 262.

[2] Chapter xi, 6: "One should give, according to one's ability, wealth to Brâhmanas learned in the Veda and living alone; thus one obtains after death heavenly bliss."

[3] Hence perhaps (cf. the Pentateuch) a certain hostility to the kingship in parts of the Code of Manu. Cf. Chapter iv, 86, 87: "A King is declared to be equal in wickedness to a butcher who keeps 100,000 slaughter-houses; to accept presents from him is a terrible crime"; and so on.

[4] Chapter viii, 3.

[5] Chapter viii, 41.

law of countries, families and castes."[1] "Immemorial usage is transcendant law"; and "holy sages, well knowing that law is grounded on immemorial custom, embraced, as the root of piety, good usages long established."[2] In the territories where local native customary laws have been examined and collected by English writers, it has been found that over a large proportion of these areas allegiance is not given to the rules of Manu.[3] The general legal institutions of the Code of Manu are found in many parts of the world at a certain stage of development[4] and are not special to Brahmanism; but in many cases familiar rules are construed with a view to the fulfilment of a supposed religious or moral purpose, or are distorted or altered with such a purpose. Yet there are large tracts of India where those familiar rules of primitive law survive and are observed without such religious significance and without the changes dictated by religious motive.

The Code of Manu slowly extended its sway in India, but it is only during the last 150 years and at British hands that it reached its present pre-eminence. The English judges were advised on the law by the pundits attached to their Courts, and that advice could not fail to be based upon the Code in which they were learned; but whereas the pundits would rightly regard the Code (like other primitive Codes) as not calling for literal construction and blind unvarying obedience, the judges capable of reading it for themselves long tended to construe its provisions (in spite of their manifold contradictions) with a faithfulness more appropriate to the process of construing an English statute. In this way, in India as sometimes in Africa, the British occupation has tended not only to perpetuate but even to extend the

[1] *Ibid.*, § 46.
[2] Chapter I, 108, 110.
[3] For the Punjab, see Tupper, *Punjab Customary Law*, Vol. II, 82 f.
[4] Namely, that of the end of the Middle Codes.

authority and field of influence of a native system of rules.

The Code of Manu, and even the Hebrew Code, are not to be regarded as isolated productions of their own countries. At various points over a great cultural field of which Babylon was roughly the centre—in Greece, Palestine, Persia, India and China—the period of the seventh to the fifth centuries B.C. was a period of intense religious activity.[1] Civilisation, in its economic and other aspects, had then advanced in each of these countries to approximately the same stage, namely the close of the Middle Codes, a stage which is characterised by the beginning of a decline of feudalism, by a powerful religious movement, and (in the law of wrongs) by talionic and other severe corporal sanctions. Apart from the Hebrew and Hindu Codes, collections of laws dating from before this period do not survive. In the other sacred books of this and later dates there is little or no law ; but in practice the law lived its own existence as it had done before the rise of these religions or philosophies. In China, for example, feudalism extended throughout the reign of the Chow dynasty (1122 to 256 B.C.), and Confucius lived towards the end of that period (550 to 478 B.C.). Two thousand and more years ago the law of China contained the severe corporal sanctions and other institutions characteristic of the Late Codes. As for the philosophical literature of China, there is good, ancient authority for the proposition that the philosophical school which is closest to the law—namely, that which is called the School of Law —was a development out of the normal, secular law.[2] The civilisation of Japan is far more recent, and here the place of the Chinese moral literature is taken by the

[1] See Dr. Stanley Cook, *Journal of Theological Studies*, Vol. XXVI (1925), pp. 172–173.

[2] See *The Book of Lord Shang*, Duyvendak (Probsthain's Oriental Series, Vol. XVII), 1928, p. 67 f.

religious teaching of the sacred books of Shinto. These prohibit, chiefly by the sanctions of ceremonial purification and absolution, the commission of certain public religious offences, including sorcery and incest.[1] But it can hardly be doubted that previously and contemporaneously there existed some rudimentary civil and criminal law, enforced by secular sanctions.[2]

[1] And e.g. the sowing of seed twice over in one field (cf. Lev. xix, 19; Deut. xxii, 9, which should probably be similarly translated) and the removal of the boundaries of rice fields.

[2] See *Shinto, The Way of the Gods*, W. G. Aston (1905), p. 243 f.

CHAPTER XIV

THE FRAGMENTS OF THE TWELVE TABLES

AMONG the early Roman fragments containing rules of conduct are a number of clauses known as the Leges Regiae,[1] or "laws of the Rex." They are, however, of a purely religious character and their sanctions are religious.[2] Whether their title signifies that the later Romans attributed them to a legendary King, or whether, as is more likely, they were issued by the "rex sacrorum" (a religious official of the Republic), or by the pontiffs, they are of no great age and have no connection with the Roman law.[3]

Of the primitive Roman law nothing is known except what we hear of the contents of a Code which is called the "Twelve Tables" and is supposed to have been compiled in the year 450 B.C. One Sextus Aelius, who was Consul in 198 B.C. and Censor in 194, published a collection of rules called the Tripertita, containing all that was known of the contents of the Twelve Tables (which had been destroyed long before), the interpretatio (or development of the law up to date) and something of procedure. All later writers derived their knowledge of the Twelve Tables directly or indirectly from copies of the Tripertita, and our own information consists of passages attributed to the Tables and scattered about

[1] For a summary of historical references, see Jolowicz, *Historical Introduction to Roman Law* (1932), p. 83. For the Leges Regiae, see Girard, *Textes de Droit Romain* (1913), p. 3 f.

[2] The sanction is commonly of the form "sacer esto."

[3] See Mommsen, *History of Rome* (trans. by Dickson, 1913 Edition), Vol, II, p. 112. Probably the "leges regiae" are of the second century B.C.

their works.[1] Some purport to give verbatim extracts from the Code, others merely to give the drift. Our earliest evidence comes from the works of Cicero[2] (four centuries after the traditional date of the Code); and Festus, Gellius and Gaius (all two centuries later than Cicero) are our other main authorities. The quotations that purport to give the words of the Code are couched in language of the early second century B.C. (that is, of the time of Sextus Aelius) and even later. We have, therefore, far less satisfactory evidence of the contents of this than of any other of the Codes that have been discussed.

Was there, then, ever a Code of 450 B.C., and what were Sextus Aelius' sources of information as to its contents?

Our earliest authority for the story of the compilation of the Twelve Tables comes from the middle of the first century B.C., some 400 years later.[3] The outlines of Livy's account are familiar. The law was unwritten, and there was great discontent amongst the plebeians at the high-handed manner in which the consuls were wont to exercise their functions. The plebeians felt that they were being subjected to adverse discrimination. In the year 462 B.C. one of the Tribunes, C. Terentilius Arsa, demanded "the appointment of a commission of five to draw up laws defining the powers of the consuls."[4] For some years the patricians successfully resisted the proposal, but in the end it was expanded (why, does not appear) to an agreed plan for the preparation of an all-embracing Code of Law. A Commission of Three was "dispatched to Athens to copy the famous laws of Solon and learn the institutions, customs and laws of

[1] These passages have been for the last century or so arranged in a more or less arbitrary order, following Dirksen. For the collected passages, see Girard, *Textes de Droit Romain* (1913), p. 9 f.; Muirhead, *Historical Introduction to the Private Law of Rome* (1916), p. 420 f.

[2] Chiefly his *De Leg.*, which contains some spurious versions of old laws.

[3] Livy, 3, 9–57; Cicero, *De Repub.*, II, 36, 37.

[4] Livy, 3, 9.

other Greek states "[1] ; and on their return a Commission of Ten was elected, including the Three just mentioned. The latter were appointed as a reward for their services, and because it was thought that their knowledge of foreign laws would be of use in the enacting of new laws.[2] A Code of Ten Tables was drawn up by the Commission of Ten ; but as there was "a general feeling that there lacked two tables, by the addition of which, as it were, a corpus of all Roman law could be rounded off,"[3] a further two tables were later added. The Assembly carried the Code, and it was inscribed upon bronze (or wooden) tablets which were set up in the market-place. In 390 B.C. Rome was sacked by the Gauls and the Tables were destroyed. Later a collection was made of treaties and laws, including the Twelve Tables and some Leges Regiae, and part of it was published to the people.[4]

The story of the events of 450 B.C. can hardly be considered satisfactory, especially when the legendary matter that surrounds the enactment of the last two tables is considered. At the commencement of his sixth book Livy (not an over-accurate historian) apologises at some length for the character of his narrative of the early days of Rome up to the year 390 B.C., and pleads the remoteness of the period and the lack of authority. In fact, history does not dawn at Rome before the war with Pyrrhus (280 B.C.).[5] Only a very select few could write or read before about 240 B.C.,[6] and writing was not in use by the general population before 200. The year 450 B.C. at Rome belongs to a period of blankness and vague traditions, coloured and filled in by a reflection of events of later centuries.

[1] Livy, 3, 31. According to Pomponius ((Dig. 1, 2, 2, 4) Hermodorus of Ephesus was the author of some of the laws. See also Pliny, H.N., 34, 11, 5.
[2] "Condenda nova jura."
[3] Livy, 3, 34.
[4] Livy, 6, 1.
[5] See J. L. Myres, *History of Rome* (2nd Edition, p. 39).
[6] See *post* p. 426.

About the beginning of the present century serious doubt was thrown on this story of the enactment of the Twelve Tables by the vigorous criticism of Pais[1] and Lambert.[2] Pais in a detailed examination of the story arrives at the view that the so-called Twelve Tables grew up piecemeal and were not completed till the time of Appius Claudius the Censor of 312, not Appius Claudius the Decemvir of 450. Lambert goes further and regards the Tables as a collection of rules, some very old, made in the early part of the second century B.C., probably by Sextus Aelius. On the whole, however, the views of Lambert and Pais have not been accepted, for, though it is agreed that the quotations from the Twelve Tables contain interpolations, the story of the events of 450 B.C. is accepted in outline, apparently on the ground that it is a probable one. This is strange, for if its probability is to be measured by our knowledge of the history of other Codes, it would be astonishing indeed if the Twelve Tables did not upon examination appear to have commenced as brief legislation upon a few isolated topics, and to have ended (instead of beginning) as something like a compendium of existing law. There are certainly one or two other Codes[3] which pretend to originate as a compilation of law, but such traditions are of the familiar kind which assign to a Code an origin befitting its final form, while they attribute every rule of it to the old national legislator. The important questions, therefore, are: firstly, what proportion of the Code consists of interpolations, or, in other words, what is the date of the surviving passages? and secondly, what was the character of the Code as shown by these passages?

[1] *Storia di Roma*, I, 1 (1898), 550 ff.; 2 (1899), 546 ff., 631 ff.; II, 217 ff. Ricerche 1, paras. I–VII.

[2] *N.R.H.*, XXVI (1902), 149–200, *Revue Générale de Droit*, XXVI (1902), 385 ff., 480; XXVII, 15 f.; Mélanges, Appleton, I (1903), 398.

[3] See, for the Irish and Welsh Laws, pp. 81–84, *ante*.

First, however, we must add to the story in order to put the early Roman legal tradition in its proper perspective. During the history of the Republic the pontiffs, who were priestly officials of some kind, gradually increased in power. The pontifex maximus, or chief pontiff, became a magistrate with a department of his own, and as such achieved the power of issuing regulations within the field of his public duties. In the earlier days of the Republic the pontiffs alone could read or write, they had custody of the State archives, and the chronicles of the important events of the year were kept by them.[1] In the course of time they declared and built up a body of written rules of religious observance which they had the power to enforce. So, for example, they punished offences such as incest and witchcraft; and burials, wills and adoptions fell within the province of their office: in short, they came to exercise the whole jurisdiction of the ecclesiastical Courts of the Hebrews and of twelfth-century England. In time they also acquired wide functions in the field of the secular law. They were given, for example, absolute control over the calendar, and it was for them to say whether for religious reasons it was lawful (fas) for Courts to be held on a particular day; so that an unscrupulous pontiff was able to veto the holding of a trial. By reason of their reputation for general learning they were appealed to for their opinions on questions of secular law, and they were, in fact, the first Roman jurists. Even in Cicero's time it was usual that the pontiff should be a lawyer. When laws were first reduced to writing, they remained in the custody of the pontiffs; and we are told that the plebeians (who as foreigners, and not devotees of the Roman religion, could not hold the office) suspected the priests of producing laws which suited them—a suspicion natural to

[1] From about the late fourth century B.C.

those who could neither write nor read. There was a tradition at Rome that one Appius Claudius and his associate Cn. Flavius published to the people the calendar and a list of legal rules hitherto kept secret by the pontiffs, and that this was the beginning of the end of their power.

This is but the universal history of law in the period of the Middle Codes, of which the Twelve Tables appear at the close. The surviving quotations from that Code also illustrate the same history. The great bulk of the clauses belong to the date of approximately 190 B.C. (perhaps the year 194, when Sextus Aelius was Censor, fits as well as any). A few of the clauses may be later, and a few are spurious; and there is evidence that one or two of the rules were earlier than 194 B.C. and had ceased to be in force. These (as might be expected) appear to belong to the topic of personal injuries, and may be statutory. But the great mass of the legal rules of the Code, though sometimes couched (like similar matter elsewhere) in the language of statutory legislation, are the maxims or principles of a school. The Code is not, however, confined to secular law, for there is also included a body of rules of a religious subject-matter, rules applied by the pontiffs in the exercise of their functions. Most of the clauses of the Code will be found in their appropriate place in the ensuing chapters of this book, but a few examples are here given of the various types of rules just referred to.

The language of the bulk of the clauses is that of other primitive Codes, namely, terse clauses in the third person introduced by "if," the facts supposed being in the protasis and the legal result or sanction in the third person of the imperative. This is especially the language of a group of short clauses providing for personal injuries.[1] All of these, except one, contain a sanction

[1] Tab. viii. Several of them may well have been statutory, for they provide for isolated cases of injury.

expressed in money[1] : it is provided, for example, that "if (a man) has broken by hand or stick a bone of a freeman, he shall pay 300 (asses)[2] ; if of a slave, 150 (asses)." The other clause is quite inconsistent with the latter, for it provides that "if (a man) has broken a member, unless he makes his peace with him, there shall be like for like (talio)."[3] There can be no antithesis between broken bones and broken members ; and the provision for the talio must embrace (as in Babylon) limbs, eyes and teeth.[4] It is plain that, as in the Hebrew Code,[5] not long before the time of this compilation a change took place in the law, and the talio came into force in cases of breakage of eyes, teeth and limbs ; and hence the new rule was also included in the Code. This is practically the whole evidence that the Twelve Tables include earlier law that was no longer in force.[6]

The clauses which show the Code to be a school-book are very numerous. Several of them may be described as maxims or principles of conveyancing. One, for example, provides that in the transaction known as a nexum or mancipium, whatever one speaks by word of mouth is binding at law. Another provides that the instructions which a man leaves as to his property are binding in law. But like similar rules in other Codes, these maxims follow the language of earlier

[1] For this reason it is, at the least, extremely doubtful whether they can be assigned to as early a date as 450 B.C., for even according to Roman tradition it was only by the Lex Julia et Papiria of 429 B.C. that money was substituted for cows and sheep as the medium of payment of compensation ; see Cicero, *De Rep.*, II, 35 ; Gellius, XI, 1, 2 ; Festus, *Peculatus*, 237 ; Livy, 4, 30.

[2] The "as" was a Roman monetary unit.

[3] "Si membrum rupsit, ni cum eo pacit talio esto." "Talio" is the language of a school. No other Code has a general term for retaliatory sanctions.

[4] See *post* p. 321.

[5] *Ante*, p. 122f.

[6] Other clauses relating to civil injuries which may well have been statutory are e.g. "Si nox furtum faxit, si im occisit, jure caesus esto" (cf. Heb. Code, Exod. xxii,1) ; and especially "Si pater filium ter venum duuit, filius a patre liber esto."

statutory legislation, and the apodosis is put into the third person imperative instead of the indicative.[1] Another fragment (almost identical with a clause of the Hebrew priestly writings)[2] runs: "If a man dies intestate, leaving no heir, the nearest agnate shall have the household." Statutory legislation does not set out principles of succession, but defines the person who is to succeed in a given event. Who were the heirs, and who the nearest agnate?[3] Still clearer evidence of a school-book is found in a group of clauses with which the collection probably began in Cicero's time,[4] and which showed the pupil how to initiate and conduct an action. Such matter is never found in a statutory Code.[5] The rules do not constitute offences or contain sanctions of any kind; they are merely intended to teach the pupil the procedure of the Courts. Some of them, unlike primitive laws, are couched in the second person singular of the imperative.[6]

The rules of religious law consist chiefly of clauses prescribing the method of conducting funerals.[7] They contain no sanctions and the language generally consists of commands, expressed chiefly in the second person.[8] Several of these clauses survive, but none are conditional sentences in the third person.[9]

Finally an example of spurious law may be given. There is a group of clauses defining details of the process whereby personal execution is levied on a judgment

[1] e.g. "Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto."

[2] Num. xxvii, 8, f.

[3] See *post* p. 253.

[4] Tab. i.

[5] The Salic Law (Chapter I) has taken from a capitulary two *offences* relating to procedure and added a short commentary.

[6] e.g. "Ni it, antestamino."

[7] Tab. x.

[8] e.g. "Hominem mortuum in urbe ne sepelito neve urito."

[9] There is also a fragment of a rule against witchcraft, "Si malum carmen incantassit." Witchcraft, like interment, was a topic within the province of the pontiffs.

debtor,[1] culminating at the point where he is cut up and divided equally among the creditors. It is even provided that no creditor who cuts more or less than his share shall be guilty of fraud. This is nonsense.

Here, then, is a normal story of how some early written legislation (traditionally associated at Rome with a layman called Appius Claudius) was expanded in the hands of the pontiffs into a collection of rules of ecclesiastical and secular law, a school-book used by the priestly order. This was the collection which was issued by Sextus Aelius to a public which could now read and write, about the year 190 B.C. when the pontifical power was at its height[2] and was about to follow the Roman religion in an impending decline.[3] The Twelve Tables long remained a school-book, though it was not till Cicero's time that, in a period of intense interest in the theory of law and the origins of Rome, it achieved its final fame and was regarded as "the fountain-head of all law public and private."[4] Its rules contained principles which survived for centuries, and other rules of conduct important to a general education. In the early second century B.C. law formed a substantial part of the curriculum of the patrician boy, whether at home or at school. Plautus says of parental education

Expoliunt, docent litteras, jura, leges[5]

and law in Cato's view formed one of the essential means of the training of a Roman. The Tripertita must have been in use for this purpose until the early part of the first century B.C., for Cicero tells us that when he was a boy at school they learned the "Si in jus vocat" (presumably the initial words) "as a compulsory chant," but

[1] Tab. iii.

[2] e.g. it was only by a law of 191 B.C. that the pontiffs were given complete control over the calendar; see Censorinus 20, 6; Solinus, 1, 43; Macrobius, 1, 13, 31.

[3] Have the events of 194 B.C. been reflected into the past in the story of Appius Claudius and Cn. Flavius?

[4] Livy, 3, 34.

[5] Plaut. Most. 126.

that no one now studied them.[1] We can even understand the presence in the " Twelve Tables " of the one surviving rule which has an express religious or moral sanction, a rule which is addressed to patricians alone.[2] In time to come, like other patricians, the pupil knew that he would be called upon to advise his clientes (dependants) however undistinguished his knowledge of the law might be, and he must be told that a man who deceived his clientes was " taboo."

[1] De Leg., II, 4, 9 ; 23, 59. He says they learned the XII Tables and other laws of that kind (l)

[2] " Patronus si clienti fraudem faxit, sacer esto."

CHAPTER XV

RELIGION AND THE PRIMITIVE LAW OF HOMICIDE[1]

In previous chapters a review has been completed of all extant fragments of early written law of any size or of any importance in relation to the religious theory.[2] Before, however, passing from the consideration of the beginnings of law in the past, some mention should be made of certain other systems of law (and especially the law of Greece) which have been thought to yield support for the theory now under discussion. These systems do not survive in written form, but something can with care be learned of their character from other written evidence which is available.

Sir Henry Maine begins *Ancient Law* with an analysis, accurate as far as it goes, of one or two expressions of legal interest which are to be found in the Homeric poems. The chief of these is "themis" (θέμις), a word which—like several others that have been mentioned—cannot be represented in all its senses by any one of our modern specialised terms. Themis signifies what is "set"[3] or established, what is "done" or customary,[4] what is orderly and so right and proper. It

[1] This chapter may conveniently be read after the reader has perused Chapters XXV to XXVII.

[2] A few extant documents of the 13th century A.D. and later have been omitted. The chief of these are the 13th century *Armenian Law Book* (*Armenisches Rechtsbuch*, Ediert and Kommentiert von Josef Karst, Strassburg, 1905); and the 18th century *Georgian Code of King Vakhtang VI* (*Corpus Juris Ibero-Caucasici*, Tome I, translated into French by Karst, Strassbourg, Heitz & Cie, 1934). These documents do not in any way affect the conclusions come to.

[3] The root is found in τίθημι.

[4] From its meaning of that which is customary there is an occasional use of the word as a "customary payment" or tribute (*Il.*, 9, 156, 298). Cf. the Latin "consuetudo" and our "customs."

represents, therefore, a vague, rudimentary and comprehensive notion of "law." It does not represent that which is morally or religiously right, but at the most something that is just because it is established and therefore ought to be done.[1] The word "themistes" (θέμιστες) is the plural of "themis,"[2] and signifies things that are set or established, usages that should be observed because they are established. It also means "decisions," in the sense in which that word has been often used in this book—decisions as to what is right and customary, decisions which embody what is right and customary. The judgments given by the Kings in the agorai (or general assemblies in which disputes were heard) were themistes. But the word has also the wider, derivative significance of decisions on general questions, decisions arrived at as the result of deliberation and consultation and not necessarily concerned with private disputes.[3] Then there is the derivative verb θεμιστεύειν which denotes to declare what is right and customary, and especially to rule,[4] since the giving of decisions is an essential incident of the ruling function, and the ruling function is essential to the giving of decisions.[5] There is also a goddess Themis in Homer. She is an officer of Zeus who performs among the gods functions connected on earth with the notion of themis. She is mentioned three times in the Homeric poems, as summoning the gods to their assembly,[6] as summoning and dismissing assemblies of men,[7]

[1] The furthest point in this respect is reached in one or two passages containing the notion that Zeus is angry if that which is right and customary is not impartially meted out and upheld in the decisions of disputes; see Il. 1, 238; 16, 385; Od. 19, 109.

[2] θέμις (both as the common and proper noun) is so declined by Homer; accus. θέμιστα, etc.

[3] See e.g. Il., 9, 99.

[4] In the Odyssey, 9, 114; 11, 569. The same two meanings occur e.g. in the English expression "to rule."

[5] Compare the Hebrew "mishpat."

[6] Il., 21, 4. [7] Od., 2, 68.

and as being in charge of the wine, and perhaps presiding at the banquet of the gods.[1] She is, then, the goddess of law and order, who mirrors and embodies among the Gods the earthly conception of themis. She does not in any sense inspire the decisions of men: if any Homeric God performed such a function it was not Themis but Zeus. Even he, however, does not inspire decisions, except that in the poet's conception of him the King of the Gods entrusts to human kings the power of ruling and deciding, and is wroth if their decisions are not straight and right, but are crooked.[2] "In thy hands," says Nestor to Agamemnon, "Zeus has put the sceptre and themistes,"[3] by which concrete nouns are meant the prerogative of holding the sceptre, and the function of giving decisions. Let us, however, assume —what the language of Homer does not warrant—that in the poet's view the King in giving "decisions" was inspired by Zeus, and in giving "crooked decisions" was committing a religious offence. Yet such a view is infinitely remote from the notion that the law is itself derived from rules of religion, or mixed religion, morality and law. On the contrary, the language of the Homeric poems, like that of other ancient peoples, tells us plainly that according to contemporary notions law was made up of custom, judgments and legislation,[4] and that the Homeric Greeks created their gods in the image of men and the things of men.

[1] Il., 15, 87.

[2] σκολιός see Il., 1, 238; 16, 387; Od., 19, 109; contrasted with ἰθύς (Il., 23, 580 and *passim*).

[3] Il., 9, 99. As among primitive peoples generally, the prestige of the chief is supported by mythological tradition. Agamemnon is the paramount chief. The lesser chiefs form a council of elders (γέροντες) who are also judges (δικασπόλοι); see Il., 18, 497; 1, 238; Od., 11, 186.

[4] Compare the Homeric δίκη, which conveys the same ideas. It is derived from a root meaning to "stretch out the hand," "point the way" (cf. δείκνυμι, and δέχομαι, Il., 15, 88), and signifies a way or usage, the straight or right way, a decision embodying what is right. There is no goddess Δίκη in Homer, though there is in Hesiod, Th. 902. δικάζω, "to judge," is common in Homer.

A picture not unlike in these respects is presented by the earliest and best of the Icelandic literature. Writing came into use in Iceland in the twelfth century,[1] and not till then was law reduced to writing. The saga literature flourished from the latter part of the century, but the texts themselves date chiefly from several centuries later. Pre-eminent in style and matter among the sagas is Burnt Njal[2] (the story of the burning of Njal) which, like other literature of the kind, consists largely of fiction and contains tales of different date knitted together by an editor. It purports to tell a story of events of the end of the tenth century, and is a product of the period—often discussed in the preceding chapters—when an intense theoretical interest in law had arisen. To us it is one of the strangest of books—the prose epic of a people loving violence and law. Its climaxes are murders, and breathless lawsuits which are always compromised; its hero, Njal, is an eminent lay lawyer. "He was wealthy and handsome of face. . . . He was so great a lawyer that his match was not to be found. Wise, too, he was and fore-knowing and fore-sighted; of good counsel and ready to give it; and all that he advised men was sure to be the best for them to do. Gentle and generous, he unravelled every man's knotty points who came to see him."[3] But though the law depicted in the Saga, and especially the procedure, cannot be wholly accepted as representative of Iceland about the year A.D. 1000, yet the book casts a good deal of light on the life of the country in the period covered by it. It shows us that until the introduction of Christianity—when a later saga of a wholly different

[1] The traditional legislator was Ulfyot, who was believed to have given a Code of law to the colonists about A.D. 930, but it was not written, and nothing is known of its contents.

[2] See, for an English translation, *The Story of Burnt Njal*, G. W. Dasent (1861). See also Craigie, *The Icelandic Sagas* (Camb. Univ. Press).

[3] Dasent, Vol. I, p. 61.

spirit continues the story—there was no religious element in contemporary notions of law and no trace of a religious origin. Even those who are called priests are merely the chieftains who own land which happens to contain a local shrine. At the period of which the Saga speaks, the republic had elected a " Speaker of the Law." He was a species of Lord Chief Justice, and we are told that it was his duty to recite publicly the whole of the law within the space of his tenure of office. His functions were purely legal and secular. Not only did the law contain no religious element of any kind; it contained no moral element. Nowhere is it suggested that there is anything morally, as distinct from legally, wrongful even in slaying a man, at any rate, if the slayer declares his deed afterwards (as he does).[1] Referring to one heroic figure, the narrator says in admiration: " He was a strong man well skilled in arms, and had slain many men, and made no atonement in money for one of them."[2] And Ragi is admired as " a great manslayer."[3] The general sanction of homicide in Iceland was the giving of blood-money varying in amount according to the social status of the deceased, and the payment was thought so completely to wipe out the deed that in one case the father of the slayer adopts the son of the slain.[4] If the slayer were to engage himself too frequently in homicide, he might in the end be considered a nuisance, and the community or part of it might be stirred to action against him.[5] But subject to this, homicide is a purely civil wrong, a matter for the individuals or families affected to avenge or compromise as they think fit. In fact, they always or almost always compromised by the giving and acceptance of an agreed sum of money.

[1] Not an act of courage, but merely natural. See, for this distinction between " murder " and other homicide, *post* p. 319.

[2] Dasent, Vol. I, p. 30.

[3] *Ibid.*, p. 44.

[4] *Ibid.*, Vol. II, p. 59 f.

[5] See *post* pp. 295–6.

In the Homeric poems, too, which betoken a stage of civilisation hardly more advanced than this, homicide is not a moral or religious wrong,[1] but is a mere tort, a concern of individuals or families. It is hardly reasonable to look in the Homeric poems for a statement of law, especially not for a statement of a single law of homicide in force among the widely separated ages and places in which the authors and editors of these epics may have lived. But certainly the Iliad evinces a general practice to pay and accept blood-money,[2] although there are in the (later) Odyssey a number of references to the next of kin avenging the death, and the slayer taking to flight.[3]

Of the law of Greece, however, outside the classical period of Athens, our information is scanty. The first Athenian legislator of whom we hear was Draco; but beyond his reputed legislation upon the subject of homicide, and the tradition that his sanctions were generally of extreme severity and included death for trivial thefts, nothing is known of his Code.[4] All these indications, however, are consistent with one another, and show that his work belonged to the period of the Late Codes.[5]

But classical scholars, beginning the history of Greek law with Draco's legislation as to homicide, and seeing the origin of that legislation in a certain Athenian religious doctrine, have constructed a history of the

[1] See Od., 16, 402.

[2] See Il., 5, 266; 9, 631; 13, 659; 14, 483. Compare Il., 18, 498.

[3] See Od., 13, 259; Od., 23, 118 (homicides in flight); Od., 24, 433 (the disgrace of not avenging—τίνεσθαι—a slain child or brother; but τίνεσθαι, like poena and many similar words, originally referred to money-compensation). Il., 18, 498 is apparently a case of trial at a sanctuary; see translation, *post* p. 200f.

[4] He legislated in 621 B.C., but his laws were repealed by Solon, except for those relating to homicide. These also do not survive, except as altered and republished in 409–8 B.C. See Dareste, Haussoullier, Reinach, *Recueil des inscriptions juridiques grecques*, II (No. 21), 1.

[5] See, in addition to the present chapter, Chapters XXV to XXVII.

Athenian law of homicide—and even of Greek law generally—in which religion furnishes the origin of the law and brings about its development. This theory, which is still accepted by many, is to the following effect.[1] It was the belief of the Athenians that the spirit of a slain man cries to his kindred for vengeance, and may not be appeased except by the shedding of blood. If not thus set at rest the spirit remains hostile, and calls in as its allies the powers of nature, which refuse fertility to the tainted land. The son inherits the blood feud and has no choice but to seek revenge. If there be no next of kin, yet the slain must be appeased; so that the State must pursue the feud. If the vengeance of the next of kin falls upon the wrong person, and the guilty goes free, the dead is still hostile; and therefore the Areopagus was made a sanctuary whither a man might flee before the feud and declare his innocence. If he was acquitted by the Council of State, the avenger must turn elsewhere. At first the ghost is equally wroth whatever the circumstances of the slaying; but later it is realised that if a man kills in defence of life or property, the slain man is the cause of his own death. Therefore Draco introduced the conception of justifiable homicide, and provided that in such a case the slayer might flee to the sanctuary of Apollo Delphinios, and, if found by the Court of Ephetae to have killed in defence, was to be admitted to purification and protected. Draco also legislated for cases of unintentional homicide, and enacted that the slayer might take refuge at the sanctuary of Pallas outside the city, and, if found innocent of the intention to kill, should be permitted to go into exile; but if he returned to Attica unpardoned by the next of kin, he might be killed with impunity.

That this notion of the pollution of the land by unexpiated blood was present in the religious thought of

[1] See e.g. *Cambridge Ancient History*, Vol. IV, 29 f.

Aeschylus and his successors in the fifth century, there can be no doubt; but how long before that date it appeared, it is not easy to say. Certainly there is no trace of it in Homer; on the contrary, in Homer, as has been seen, homicide is not even a moral or religious offence, but is a purely legal and private wrong. In Hesiod and the extant fragments of Solon's Eunomia, though the notion appears that acts of lawlessness may be morally wrong, there is still no mention of the doctrine of pollution, nor is it supported by a genuine quotation from any writer older than Aeschylus, although it may well have existed in some form at the time of Draco.[1]

Furthermore it is impossible to suppose that the Athenian practice of taking sanctuary in a case of homicide originated with Draco; indeed it is to be found in the Iliad.[2] The traditional account, already given, of the legislation of Draco forcibly suggests that his contribution to the law was to define further the method of taking sanctuary, and the procedure of trial as between cases of justifiable, unintentional and intentional homicide. In other words, he was defining the conditions and extent of the interference of the State between the parties, and the private wrong of homicide had now become in part a criminal offence.

In truth the early law of homicide, at Athens and everywhere else, owed neither its origin nor its development to any religious doctrine. When a recognised sanction for homicide first appears among primitive peoples, that offence is always a private, purely civil, wrong, and the sanction is always pecuniary.[3] Capital

[1] See Mr. G. M. Calhoun's scholarly and suggestive volume, *The Growth of Criminal Law in Ancient Greece* (Univ. of California Press, 1927).

[2] Il., 18, 504, ἱερῷ ἐνὶ κύκλῳ ("in the sacred circle").

[3] i.e. a payment of cattle or other valuable object. The early history of homicide is considered in detail in Chapters XXV to XXVII *post*, especially Chapter XXVII.

sanctions are limited to criminal offences, and when sanctuaries first come within the ken of the law among advanced tribes they are not necessarily religious places,[1] and the refugees are fleeing from their enemies or from criminal punishment.[2] A man seeks to escape from the anger of the King by leaving the country or by taking refuge in some place which is out of the reach of his arm. In the period of the Early Middle Codes the sanction for homicide is still a payment varying according to the status of the slain and the circumstances of the slaying. Now, when the circumstances are of an aggravated character, the relatives of the slain begin to be dissatisfied with cattle or money, and the community generally begins to regard homicide of a certain aggravated character[3] as an offence against it, which ought not to be compounded by a payment. The slayers, whose lives are in jeopardy, are increasingly taking refuge either abroad[4] or at some sacred place (for now religion has greatly grown in strength and is a powerful deterrent to the pursuer) and here they are at first safe from violence, for homicide is not yet a religious offence.[5] But the change in public opinion, that is rendering aggravated homicide an offence against the community as well as a civil wrong, now begins also to have the effect of rendering it a religious offence. Hence, at the sanctuary to which the slayer has taken refuge, trials take place as to the circumstances of the slaying; and if they were of a certain character the refugee is driven forth and delivered to the vengeance of the pursuing next of kin, and if not, he is allowed shelter. At the end of the

[1] e.g. the kraal of the chief councillor, among the Kaffirs.

[2] In the Anglo-Saxon laws, for example, the sanction for homicide is still pecuniary, and sanctuaries are first mentioned in regard to persons liable to capital punishment for crimes, or fleeing from their enemies (see Ine, § 5; Alfred, §§ 2, 5, 42). This is the period of the Early Middle Codes.

[3] At first, among the English and the Hebrews, homicide by ambush.

[4] In the Odyssey the slayer usually flees abroad; see note *ante* p. 149.

[5] Compare, in the A.-S. laws, I Canute, § 2 (3)—homicide committed in a church.

period of the Middle Codes this distinction between civil and criminal, or secular and religious offence, is defined everywhere as follows: intentional homicide is capital,[1] unintentional homicide gives a right of shelter, while homicide in self-defence is justifiable. Meanwhile the religious doctrine develops, and finally, among the Hebrews and Athenians, takes shape in an elaborate conception of the pollution of the land by unexpiated blood.[2]

The notion, therefore, that homicide is wrongful made its appearance in the religion after it had appeared in the law, and it was derived from the legal notion and was a religious abstraction from it. Having once developed, the religious doctrine did not produce an enlightened amendment of the law, pardoning a slayer innocent of malice; religion performed its normal function in relation to law, namely, that of resisting change. In the classical Athenian procedure of the fourth century the law of homicide remained, with little change, as Draco had left it; and except that in all probability the religious doctrine had operated to hinder development,[3] it had no influence on the substantive law. Homicide remained in many or most respects a civil wrong. Whereas any Athenian citizen might initiate a prosecution for a criminal offence, none but the next of kin could take proceedings for homicide. Indeed those proceedings were called δίκαι,[4] or civil actions, and not γραφαί, or prosecutions. Nor was the accused arrested pending the trial, but only forbidden

[1] See e.g., for an instance among the most advanced tribes, Rattray, *Ashanti*, p. 130. The refugee's life is spared (and he becomes a servant of the grove) except in cases of adultery with the wife of a king, murder, cursing the king or his ancestors, etc. These are all typically both criminal and religious offences.

[2] At a somewhat earlier period in England (the early twelfth century) there is a slight trace of the doctrine in Edward and Guthrum, § 11.

[3] For the procedure is obviously old in many respects; and, furthermore, if the next of kin had not been a ready prosecutor, it would have been necessary to give any citizen the right to prosecute.

[4] δίκαι φονικαί, "actions for homicide."

by proclamation to enter the agora or sacred places; and even after the trial began he could escape the death sentence by voluntary exile. On the Areopagus, charges of intentional homicide were heard and punished by death and confiscation of goods. The Court at the Palladion heard pleas of involuntary homicide, which were punished by banishment for a limited period; but in certain cases, at least, if the next of kin forgave him, the defendant could return before the expiration of the period. The Court at the Delphinion heard the cases of those who pleaded that the homicide was committed in self-defence; and if the defendant proved his case there was no punishment, but he was admitted to purification. He was held, therefore, to have committed no legal wrong, but was nevertheless guilty of a religious offence. Here is an example of two situations not uncommon in early law—firstly, a conflict between the rule of law and the rule of religion; and secondly, a religious rule (abstracted from a general legal rule of the wrongfulness of homicide) surviving legislation which defined exceptions from the general law.

But this Athenian evidence is late indeed,[1] and the relations between the law of homicide and the doctrine of pollution can be far better studied among the Hebrews. An old law of the Hebrew Code (Exod. xxi, 12) introduced the capital sanction for homicide: "He that smiteth a man, and he dies, shall surely die." In practice, however, in extenuating circumstances blood-money was paid and taken[2]; and from early times slayers and persons guilty of sundry criminal offences were wont to take refuge at an altar or other sacred place.[3] The Sixth Commandment[4] shows that in the

[1] Draco belonged to the period of the Late Codes, and the evidence as to his legislation comes from more than two centuries later. [2] Cf. Num. xxxv, 32.

[3] See two cases of men fleeing to the altar from the wrath of Solomon, 1 Kings i, 50 (Adonijah, a case of treason), and 1 Kings ii, 28 (Joab, murder). The sanctity of the altar did not avail Joab. These passages are not early.

[4] Exod. xx, 13.

Deuteronomic period (perhaps 600 B.C.) "murder" (whatever the word may signify) had become a moral or religious as well as a legal wrong. In the priestly additions to the Code of law are two rules relating to the sanctuary. The older one,[1] also of the Deuteronomic period, gives a right of sanctuary to the slayer except in cases of killing by ambush. The later rule[2] (perhaps of the late fifth century) takes away the right of sanctuary from any case of killing with malice; but the general rule of law rendering homicide capital remains unaffected by these rules of the sanctuary. Under the procedure as described in the latest priestly writings,[3] the slayer, if he could reach a city of refuge, was there tried by a tribunal consisting of the local congregation, and if acquitted of the intention to kill was entitled to remain. But if he did not take refuge, or if he were not acquitted of the intention to kill or if he left his city of refuge after acquittal,[4] he might be put to death.[5]

The doctrine of the pollution of the land by unexpiated blood appears only in late religious writings, and the best extant statement of this doctrine is to be found in one of the very latest passages of the Pentateuch.[6] "Ye shall take no ransom for the life of a manslayer liable to death, for he shall surely die. And ye shall take no ransom for him that is fled to his city of refuge that he should return to dwell in the land until the death of

[1] Exod. xxi, 13. [2] Exod. xxi, 14.

[3] Num. xxxv; see Deut. xix, 8 f.

[4] At any rate, if he left before the death of the High Priest (Num. xxxv); but the latter is not mentioned in Exod. xxi, 12 f., which is probably slightly earlier.

[5] Unlike the traditional legislation of Draco, the less advanced Pentateuchal legislation makes no express distinction between homicide in self-defence and other homicide, where there is no malice. In England in the middle of the twelfth century the law is much the same. A man who slays unintentionally is still liable to the kin of the deceased (and see the so-called Leges Henrici I, Chapter LXX, Sec. 12). In the middle of the thirteenth century (when homicide is partly a criminal, partly a civil offence) he receives a pardon from the Crown, but all his chattels are forfeited. This forfeiture was abolished in 1828. See *P. & M.*, Vol. II, p. 479 f.

[6] Num. xxxv, 31 f. (probably early fourth century).

the Priest. So ye shall not pollute the land wherein ye are; for blood, it polluteth the land and no expiation can be made for the land for the blood which is shed therein, but by the blood of him that shed it. And thou shalt not defile the land which ye inhabit, in the midst of which I dwell: for I the Lord dwell in the midst of the children of Israel." But the doctrine of pollution did not appear till long after the practice of taking sanctuary had become established. This is plainly to be seen in the Pentateuch. The oldest mention of the sanctuary is probably Exodus xxi, 13, which contemplates a single city of refuge.[1] At a later date it is plain that there were three cities of refuge[2]; and towards the very end of the Pentateuchal legislation, and not long before its compilation, it was provided in further religious writings that the number of the cities of refuge should be increased from three to six.[3] The doctrine of pollution does not appear in the passages providing for one or three cities of refuge, but only in passages referring to six.[4] Nor does that doctrine appear before the rise of the distinction between intentional and unintentional homicide, for that distinction is already seen in the passages providing for three cities of refuge.[5] The doctrine of pollution cannot, therefore, have influenced any of the developments that had taken place in the law of homicide for it was subsequent to them all. Those developments had been produced by

[1] "I will appoint thee a place whither he shall flee."

[2] Say about 500 B.C. See Deut. iv, 41 f.; xix, 1–7.

[3] Deut. xix, 8–13 (an addition to verses 1–7 which precede); Num. xxxv. In the latter chapter, one of the latest of the Pentateuch, the High Priest is now the civil ruler; the local populace is the "congregation." The same chapter provides that forty-eight cities are to be assigned to the Levites, including the six cities of refuge. The rules for ascertaining the intention of the slayer are full and interesting, and contain something of the modern English rule that a man is presumed to intend the natural and probable consequences of his act.

[4] In one of the (late) references elsewhere to refugees at the altar (1 Kings ii, 31) occurs the notion of a family curse arising from bloodshed. Cf. the same notion in Athenian tragedy.

[5] e.g. Deut. iv, 41 f., xix, 4 f.

changes in public opinion. When the doctrine arose it was a religious abstraction derived from the existing state of the law, every aspect of which it justified. It is mentioned in the religious teachings as a reason for the establishment of sanctuary for an unintentional slayer,[1] but especially as the ground of an injunction to the next of kin not to accept compensation from the slayer, even from him who has killed without intention and has been permitted to reside in a a city of refuge.[2] This injunction receives greater force when it is realised that even at the date when the Pentateuch was compiled, homicide remained in many respects a private, civil wrong and not a criminal offence. The slayer—unlike the man who had committed a criminal offence—was not stoned by the community : the wrong was left to the next of kin, the " avenger of blood " to punish. Even a refugee who had been tried at the sanctuary and found guilty of killing with malice, was handed over to the next of kin to put to death.[3] Hence the force of the religious injunction not to accept a " ransom."[4]

The doctrine of the pollution of the land by unexpiated blood, derived and abstracted, as it is, from the notion of the general legal liability for homicide, may be compared with two kindred conceptions derived from the same legal source. They are not of a solely religious character, but appear both in the law and the religion of the peoples of the Middle Codes. The first underlies the institution of the so-called deodand. As has been said, when the sanctions for homicide first become well established, the wrong is still a civil injury for which there is a pecuniary sanction whatever be the circumstances of the slaying. Even at this stage,

[1] So that his " innocent blood " should not be shed, Deut. xix, 10.

[2] Deut. xix, 13 ; Num. xxxv, 31 f.

[3] See e.g. Deut. xix, 6, 12 ; Num. xxxv, 19, 21, 25, 27. Deut. xvii, 7 refers to crimes.

[4] Num. xxxv, 31, 32 and Deut. xix, 13 (" Thine eye shall not pity him ").

however, there is sometimes to be found the very natural idea (and one very familiar in modern Courts) that when a person has been killed justice demands that someone or other ought to be made to pay, if at all possible. A few rules are to be found, applying to cases of difficulty, and based on compromise.[1] Among the Akikuyu, for example, if the actual slayer is not to be found, his brother is liable to pay half the recognised blood-money. In the laws of Aethelberht it is provided that if a slayer departs from the country, his relatives must pay half the blood-money[2]. When corporal sanctions first appear in the law, it is in regard to offences by slaves (who have usually no means of their own)[3]; and the Salic Law provides that a slave who kills a free-man is handed over to the parents of the latter in place of half the sum, and his master pays the other half.[4] Similarly if a man is killed by a domestic animal, the owner of the animal hands it over and pays half the usual blood-money.[5] This delivery over of the slave, animal or thing that has caused the death slowly becomes common. Among the later Anglo-Saxon laws, the laws of Alfred (which first mention the practice) declare that if two men are felling a tree together and one of them unintentionally allows it to fall on the other, the tree may be taken by the kindred of the dead man within thirty days, otherwise it is the property of the owner of the wood.[6] In the Late Middle Codes, as has been seen in this chapter, homicide is capital and is also a religious and partly a criminal offence, though the unintentional slayer may obtain protection at the sanctuary. The deodand correspondingly changes in character, and now, as it were, suffers capital punishment at the hands of the State, and its proceeds are devoted to pious uses for the

[1] See *post* p. 309.
[2] Aeth., § 23.
[3] See *post* Chapter XXVI.
[4] Lex Salica, 35 (5).
[5] Lex Salica, 36. Compare Lex Burg., 18 (1).
[6] Alfred, § 13.

benefit of the next of kin or the community. In a somewhat late provision of the Hebrew Code it is laid down that where a free man or woman has been gored to death by an ox, the ox is to be stoned[1]; and a ritual rule has been added providing that the flesh of the ox shall not be eaten.[2] In the period of the Late Codes the deodand becomes increasingly common. In England in the thirteenth century the thing is usually delivered to the men of the township in which the deceased died, and they must answer to the royal officers for the proceeds of sale. Sometimes the judges declare the charitable purpose to which the money is to be applied—it is for example devoted "for God's sake" to the repair of the bridge, or is given to a relative in distress.[3] The forfeiture of deodands survived in England till 1846.[4] Similarly among the Athenians of the fourth century B.C. the King Archon and the Tribal Kings, sitting at the Prytaneum and exercising a kind of criminal jurisdiction, still tried for homicide both animals and inanimate objects, and cast them beyond the boundaries of Attica.[5]

From the same idea that the kindred of the slain should receive compensation from someone or other, is derived a rule of the legal liability of the occupiers of a territory to compensate the relatives of a person found upon it slain by an unknown hand. It is not a universal rule, but is another product of compromise, supported by the probability that some of the occupiers either committed the act or knew the culprit. The Hittite Code contains a law rendering the nearest inhabitants pecuniarily liable to the relatives of the slain,[6] and the later Anglo-Saxon laws contain instances of similar

[1] The sanction for criminal offences.
[2] Exod. xxi, 28.
[3] *P. & M.*, Vol. II, p. 473.
[4] See Kenny, *Outlines of Criminal Law* (9th Edition), p. 106 f.
[5] They also tried and sentenced undiscovered homicides.
[6] H.C., I, § 6; and fragment IV, another version of the same law.

notions of justice.[1] Not till we reach some of the latest writings of the Pentateuch is there found a rule of the religious liability of the territory. There is a provision here that in such a case a heifer shall be sacrificed by the elders of the city nearest to the spot where the slain man was found.[2] So we reach, from another angle, the doctrine of the pollution of the land by unexpiated blood.[3]

[1] Compare, among the tribes, the spoor-law of the Kaffirs, who stand at the same stage of legal development. This rule renders liable for theft of cattle the inhabitants of the place where the spoor ends.

[2] Deut. xxi, 1–9.

[3] Deut. xxi, 8, 9.

CHAPTER XVI

PRIMITIVE LAW AND RELIGION IN MODERN TIMES

THE review, in the previous chapters, of the material available for the study of the primitive law of the past, discloses that there is no evidence whatsoever upon which to found a theory of the religious origin of law. How far from the truth is Maine's dictum that "there is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance"![1] On the contrary, the early history of mankind in every age and country, so far as it is known to us, forbids the acceptance of the religious theory. In Maine's day there were already available for study many ancient legal traditions in writing, all commencing with true secular law, and only invaded by religious matter—if indeed they are so invaded— in the later stages of their history: the vast mass of the Leges Barbarorum, the Anglo-Saxon Laws, and the Ancient Laws of Wales and of Ireland. (Homeric legal conceptions were obviously of a secular character.) Even in its present form, the Mosaic legislation substantially commences with true civil law. The surviving fragments of the Twelve Tables of Rome contain little of religious purport; and Maine and the best contemporary Oriental scholars were agreed that the Code of Manu does not represent a system of law that was ever in force. Since then other ancient Codes have come to light, the written

[1] *Early Law and Custom*, p. 5. In his mention of Peru, Maine had, no doubt, in mind that fantastic work the *Royal Commentaries of the Incas* (Garcilasso de la Vega), translation by Markham, 2 vols, London, 1869–71. No theory of any kind can be based upon it.

legislation of Gortyn and of Hammurabi, the Sumerian fragments, and the Assyrian and Hittite Codes, which disclose similar phenomena in Eastern Europe and in Asia. Indeed the foundation of the religious theory was not an analysis of evidence, but the power of the emotional appeal of religion in the second half of the last century. Maine failed to notice the nature of the documents before him, and substituted for conclusions founded on evidence a theory which, leaving aside the past, is wanting in any analysis even of modern religion, morality and law. Law, morality and religion in the modern world have a very limited common territory. Most rules of modern law are empirical rules which contain nothing of interest to religion or even morality. The civil law, especially, which is the overwhelming mass of the law of this country, is substantially based upon a doctrine that the injurious acts with which it deals must be paid for irrespective of the intention to do wrong, and are not excused in the eye of the law by any religious or moral motive. Nor does the civil law give a remedy against anyone for a mere intention, as distinct from an act, however immoral or religious that intention may be.[1] Even that law which corresponds to the simplest and primary rule of morality (if any agreement is possible as to the rules of morality) namely, the law of homicide, has been, down to almost modern times, a law calling for compensation irrespective of intention, and not a law calling for the punishment of an immoral or irreligious mind. On the other hand, modern religion is by no means restricted to a body of rules governing the conduct between man and man.

Nor does the religious theory attempt to examine historically the rules of law, religion and morality, and to take account of the nature of the religious or moral

[1] The English criminal law contains no real exception. Even a charge of conspiracy must be based on an agreement evidenced by overt acts.

phenomena which existed in the days of the primitive law, whose origin it thus purports to explain and describe. It assumes that the rules of conduct found in law, and those found in religion or morality, are derived historically from a notion that the compliance with such canons of behaviour is necessary in order to gain the pleasure of a moral God, who has so willed; and that therefore the concept of a religious or moral duty to do or abstain from a particular act is the parent of a legal duty to do or abstain from the like act. The theory, therefore, traces back religious notions of an ethical character into the time before law appeared; but a survey of the legal and religious conceptions to be found in the savage life of the modern world shows this assumption to be unhistorical and fallacious.

In the relics of primitive law of the past, we found no confusion at the boundary between law and religion; and the same is true of modern primitive life. Anthropological writers, often deriving their conceptions of ancient law from the works of Maine,[1] and making an evident effort to square the observed facts with his theories,[2] yet find no difficulty in separating the fields of primitive law and religion[3]; nor does, I think, any writer of repute, familiar at first hand with savage life, regard religion as the ancestor of law. The respective provinces of religion and law among primitive man are

[1] Perhaps the worst instance of this is to be found in the following passage: "Every ancient code of law, not excepting the Mosaic legislation, comprises social and ritual prohibitions of the kinds just referred to; and they are apparently placed on equal footing with the moral commands of the code." Hartland, *Primitive Law* (Methuen, 1924) at p. 84.

[2] *Primitive Society*, by R. H. Lowie (a distinguished American anthropologist with knowledge of primitive life at first hand), contains examples of the inconsistencies that may result.

[3] Mr. Hartland, however, (op. cit., p. 138) says that the primitive mind recognises resemblances, not differences. "This synthetic attitude renders every part of the civilisation of a relatively primitive people indivisible without great difficulty from the rest. It draws no line between law and morality, religion, medicine or art." With the criticism of this work by Dr. Malinowski, in his brilliant study, *Crime and Custom in Savage Society*, I venture respectfully to associate myself.

as distinct as they are elsewhere. Where judicial tribunals have been evolved, plainly there can be no confusion between rules of conduct enforced by a court, and rules not so enforced. Yet among the modern tribes (none of which arrived at the stage of the promulgation of written law) there are comparatively few who do not possess some such tribunal; and amongst the most primitive of all the peoples of the world, where no specialised organs exist for the administration of justice, and where law can only with doubt be thought to have evolved, rudimentary law can clearly be observed, distinct from all other rules of conduct.[1] Even at this stage, law possesses fundamental characteristics of its modern offspring.[2]

On the other hand, primitive religion—from the point of view that at present concerns us, namely, its ethical content—is vastly different from the religion of civilised man. There are not, in primitive religion at this stage, any rules for the conduct of man towards man, sanctioned by a regard for the will of supernatural beings. Primitive thought and practice in relation to the supernatural can be very roughly separated into two categories, magic and religion. Religion may be defined as "a belief in and a regardful attitude towards a supernatural being on whom man feels himself dependent, and to whose will he makes an appeal in his worship. Supernatural mechanical power, on the other hand, is applied in magic. He who performs a purely magical act utilises such power without making an appeal at all to the will of a supernatural being."[3] On the contrary, his object is often to overcome and counteract a supernatural power. It is plain that magic, a practice of applying supernatural power, has no room for ethical

[1] See especially *Crime and Custom*.
[2] See *post* Chapter XVIII.
[3] Westermarck, *Moral Ideas*, Vol. II, p. 584.

notions of conduct;[1] but magic has a far wider and more important field than religion in savage life. The religion of savages is concerned chiefly with ceremonies calculated to gain the goodwill of supernatural powers, ancestors and fellow-men; it is not concerned to afford sanctions for rules of conduct between man and man. Any sanctions that may be afforded by religion or magic are chiefly concerned to support religious and magical rites and practices. But if primitive man has a notion that supernatural powers are placated by right conduct between man and man, that standard of right conduct (in matters of importance, at any rate) can be none other than the legal standard, for none other exists. In other words, man's notion of divine standards of good conduct between men can only be created by man's notion of good conduct.

And on the other hand, it is important to observe that the ceremonies and practices which make up primitive religion, such as it is, are themselves firmly supported by secular sanctions. There can be few such acts which are not supported by the consideration of a corresponding benefit which will be received by the performer from his fellow-man. A widow, for example, who performs a ceremony of mourning for her deceased husband may be entitled to a ceremonial gift from her husband's family.[2] And conversely, in almost modern times (as for example in the Gortyn Code)[3] an adopted child who fails to perform such acts towards a deceased adoptive parent may be barred from the succession. The rudimentary law of savage life covers the whole field of compulsory rules of conduct. If such an expression may be used, his life is as secular as that of modern man.

[1] Often magic is used to effect a wrong, for example, to induce a woman to commit adultery.

[2] Malinowski, *Crime and Custom*, p. 33 f.

[3] First Gortyn Code, § 14 (a code of mature law).

It is impossible, therefore, to consider the rules of primitive law as either originating in or developing under the impulse of primitive religion; though when such rules of law have evolved, they may and do later receive in some cases additional support and stability from taboos and other sanctions of religion and magic.

It may be that there are certain non-compulsory rules of conduct among primitive men—chiefly in the matter of social relations and behaviour between relatives—which we can properly term rules of morality, understanding by that term such rules of conduct as are not rules either of law or religion or magic. Yet, even if they can be found, such rules of morality cannot be regarded as derived from rules of religion, or even as developing under their impulse. In his monumental work, *The Origin and Development of the Moral Ideas*, Professor Westermarck sums up as follows[1]: "I have been led to the conclusion that among uncivilised races the moral ideas relating to man's conduct towards one another have been much more influenced by the belief in magic forces which may be utilised by man, than by the belief in the free activity of gods." I venture to think it true that even the belief in magic has not been a parent of the moral ideas, but that its influence has been of a conservative and stabilising nature, resisting change and strengthening the moral ideas, once they have evolved.

Nor is it possible for a moment to regard primitive law as derived from or developed by primitive morality, such as it is. Indeed, so far as the evidence goes, it points to the conclusion that all the moral ideas that lie within the field of law are derived from corresponding legal conceptions, and that rules of primitive law are

[1] Vol. 2, p. 695 f., where he says: "I can find no solid foundation for the statement made by recent writers that the 'historical beginning of all morality is to be found in religion'."

the true parents of corresponding rules of morality. The moral rule prohibiting homicide, for example, is derived from the legal rule of compensation for homicide. The same observation applies to the ethical element in religion; it, too, is derived from the law. Certainly, in the age of writing, written rules of morality appear later than written rules of law; and thus it happens that in so many cases Codes of true law are found to have been extended, in their later days, by added rules of morality and religion, the product of a school.[1]

But even in the modern civilised world, when religion has adopted a considerable body of ethical rules, the relations between law and religion remain fundamentally what they were in primitive society. The materials are at hand for a study of the influences which brought about, during the last century, the enactment of new legislation of a mass previously unequalled in so short a time throughout the history of the world. These influences have been closely analysed by Dicey in his volume of lectures entitled, *The Relations between Law and Public Opinion in England during the Nineteenth Century*.[2] Objection may perhaps be taken to the use of the phrase and notion of "public opinion" for the purposes of a study of the influences bearing on the development of law; but the author does not intend by the phrase "public opinion" a body of rules of morality. The abstraction is a convenient one for the purpose of denoting an imagined general public attitude on matters of legislation,[3] and that such an attitude partook of a continuity of sorts. Dicey does not suggest that rules

[1] Illustrations were given in Chapters IX to XV.

[2] 2nd Edition, reprinted 1917.

[3] Dicey quotes at p. 20 a passage from a letter of Sir R. Peel to Croker, in which public opinion is referred to as "the tone of England—of that great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy, and newspaper paragraphs, which is called public opinion."

of morality brought about the enactment of new laws, and he does, on the other hand, express the view that "laws foster or create law-making opinion."[1] But the part of the book which is of interest in the present connection consists of those passages in which he analyses the relations between religious and legislative public opinion, and the influence of the former on the latter.

Among the dominant currents of opinion which he traces as having brought about the growth of law, religious opinion nowhere appears. The agitation preceding the enactment of the Reform Bill of 1832 was in no sense inspired by religious feeling, and the clergy were suspected by Reformers as Tories. It would be as untrue to say that the abolition of slavery in 1833 was influenced by religious opinion, as it would be to say that at the time of the American Civil War the inhabitants of the Southern States differed from those of the North in their religious beliefs. If Wilberforce received some Evangelical support in his agitation, it was because the principle of individualism had gained a hold upon Evangelical teachers. During the long series of Acts of the legislature which raised the condition of the working-classes during the last century, it is not to be said that the promoters alone were moved by religious principle. On social legislation generally religion as such had and could have no voice; but many statutes were enacted during the last century upon matters in which the Church had an interest, and in the controversies preceding these enactments the Church was strenuously active. "Since 1832," says Dicey,[2] "not an Act of Parliament directly or indirectly affecting the Church has been passed which does not bear traces

[1] P. 41. He adds at p. 44, in dealing with the Married Women's Property Acts, that "it is difficult to say whether opinion has done most to produce legislation, or laws to create a state of legislative opinion."

[2] P. 334.

of the influence exerted by ecclesiastical opinion." The story was consistently the same; it was a story of "concessions made to the demand of dominant liberalism for the extension of religious and civil equality, and even more of the way in which these concessions were curtailed or delayed, often for years, by deference, partly indeed to the general conservatism, but mainly to the ecclesiastical convictions or sentiment of the time."[1]

The story continues the same. On legislative questions generally religion as such can express no voice, nor has it expressed a voice except where it has opposed changes in the law. The Divorce Act of 1857 was carried in the face of strenuous religious opposition, and ever since the influence of religion has been directed against further change. Examples may also be cited in the realm of judicial legislation. Religion is a great conservative force, and as such fulfils one of its indispensable functions in the State. The legislative victories of a past age are in later days often justified and approved upon religious grounds, and the ideas underlying such legislation are often adopted into the religious outlook and religious doctrine, but it was not religion that changed the law. In the same way, if the comparison may be permitted, the sorcerer and the whole magical system of primitive life perform an important conservative and stabilising function in the most backward of savage communities.

[1] P. 345. See also, pp. 353, 358.

PART III

A HISTORY OF PRIMITIVE LAW

CHAPTER XVII

THE EVIDENCE FROM PRIMITIVE PEOPLES

If the laws of the different primitive peoples of the modern world be collected from reliable sources and systematically arranged, one conclusion very plainly appears. It is seen that the development of the law is part and parcel of the advance of these peoples as judged by material standards. Among those who are the least advanced materially, the nature and contents of the law are strikingly alike from people to people. If one then turns to those who have attained a certain advance, and who, judged by material standards, have reached the same stage of progress, the law is seen to have developed, generally speaking, along parallel lines and to be again strikingly alike as between the various peoples. When, continuing, we reach the most forward stage of material development which is to be found among the primitive groups of the modern world, the same conclusion manifests itself as to their law—namely, that progress has again been made to results essentially alike. Throughout these stages, the advancement in material culture—especially in the organisation of methods of livelihood, in the size, shape and constitution of the chief social groups, and in the building up of governmental institutions—is clearly reflected in the developing law. When, on the other hand, we look at the laws of the primitive peoples of the past, of whom we read from time to time in the writings of contemporary observers, we find the same relation between their material culture and their law. And, still more important, on turning to the law that manifests itself in the Codes and in other written

legal legacies of peoples of the past, we see those peoples emerging from precisely the grade of legal evolution—the same kind of law and the same specific rules—represented by the law of the most advanced of the primitive groups around us. If, then, the progress of law runs parallel with the material advancement of peoples, it follows that the primitive law of the ancient Babylonians, Hebrews, Romans and Saxons had passed through the same history of progress that we see from the simplest to the most developed of the multitudinous tribes of the modern world. If, therefore, the law of each of these peoples, of whom we know by reliable information obtained from observers or from the Codes, be collected together and arranged in order of the material progress of the people to which that law belongs—and this has been attempted in the rest of this book—we have before us a history of the development of what we have called primitive law from its earliest commencement. In that task it is increasingly borne in upon us that in this collation of primitive laws we are tracing the course of the high road of social development from the very beginnings of law. At the side of this high road and intersecting it run lesser winding paths, the course of development of other human activities—some only the abnormal functions of the mind and the emotions, others the precocious inspiration of individual genius—but the high road is the path of legal development, shaped by the fundamental necessities and habits of whole peoples.

We must not claim for this method qualifications which it does not possess. Firstly, it cannot be said that the law of different tribes at the same cultural stage is identical; but a comparison of their laws shows that the main features are common in all cases, that some features are variable, and that some which might have been expected never occur. The common features cover a very great field, and by them we plot the position that

the advancing law has reached. Something will also be said of the variable features, but it is right and necessary to regard those which are common as of outstanding importance. (An account of the common features of the law at each successive grade constitutes a history of primitive law;) we are endeavouring, as it were, to set forth the jurisprudence of each of these different stages of progress. The so-called science of jurisprudence, or, more accurately, the analytical school of jurisprudence, really describes only the institutions of the classical law of Rome and of the modern English law; but law is a different thing at different stages of its advance.

Furthermore, such a history knows nothing of a time-table. It is only a record of the order of important stages of progress. Some parts of the story are being enacted to-day in West Africa just as they were enacted 2,300 years ago in Rome and some 5,000 years ago in parts of Mesopotamia. The whole history has perhaps never been enacted in one place, for progress achieved in one country is transmitted to the inhabitants of another. In one people a part of the story is passed through in a few years, while elsewhere progress may be held up for centuries, and such movement as is found may be in a backward direction. Yet this history remains a universal record of the development of law; and it is the only means whereby a history of law from its beginning could be written. Its value is immense; and above all it is the touchstone for many a baseless assumption or false theory founded upon some isolated or questionable piece of evidence.

Again, these various stages of material advance among primitive peoples are not easy to define; there is more than one criterion of material progress, and each test may not necessarily bring precisely the same result. We must apply all the tests we can, and be satisfied often with an approximate conclusion, relying on the universal charac-

ter of our evidence to correct individual errors. For the present purpose we must eliminate the legal test in defining each stage, for it is the history of the legal development which is to be described in relation to these stages in material advance.

Following the methods used by a number of writers,[1] we fix these stages according to the method of obtaining food employed by the various groups. This is substantially an economic test, and is fundamental to the whole way of life of each people. At the bottom we place the Hunters, those who gain a livelihood by gathering their food, whether it be vegetable or animal. The Hunters may be divided into two classes, the First (or lower) and Second (or advanced) Hunters, of which the latter category embraces those peoples who live rather by hunting than by gathering their food; who live in well-made dwellings, and know something of the domestic arts of pottery, canoe building, weaving, and the training of horses as well as dogs. As typical of the First Hunters, and forming a substantial part of this class, may be cited the aboriginal tribes of Australia; while the Hunters of the Second Class consist chiefly of North American tribes.

Above the Hunters come those who live by Agriculture, and who form the great majority of tribes. The First (or lowest) Agricultural Grade consists of those peoples who, though they live by agriculture, derive their chief sustenance by the hunting and gathering of food. In the Second Agricultural Grade are those tribes whose main livelihood is upon the produce of the soil, but who have no herds of cattle. At the Third Agricultural Grade stand the most advanced of all the tribes, who know the use of irrigation and the plough, and,

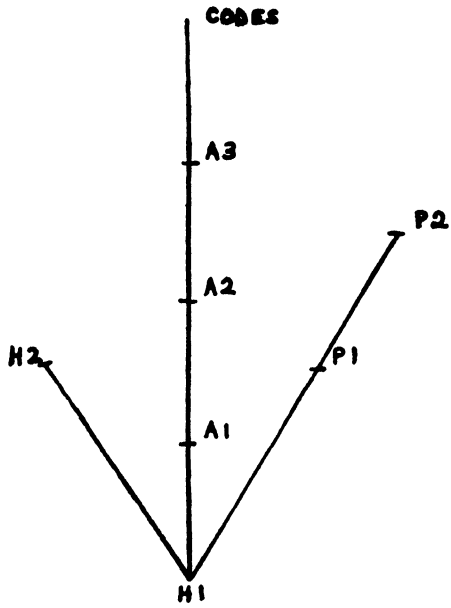
[1] For a fuller discussion of these methods, see *The Material Culture and Social Institutions of the Simpler Peoples, An Essay in Correlation*, by E. C. Hobhouse, G. C. Wheeler and M. Ginsberg (Chapman & Hall, reprinted 1930).

above all, keep herds of cattle and draught animals; among whom handicrafts are well developed and trade is regular and widespread. The tribes of the First Agricultural Grade are chiefly scattered through Asia and America; those of the Second Grade are more widespread, for many of them are also found in Africa and Oceania; while those of the Third are found chiefly in Africa, but also to some extent in Asia.

Those tribes, comparatively few in number, whose way of life is pastoral, should be put above the First Hunters, but at the side of the Agriculturalists, for they represent a development independent of and collateral to that of the majority of the tribes. The First (or lower) Pastoral Grade, as distinct from the Second, consists of those pastoral peoples who have little or no agriculture, trade or handicraft; and the tribes of both these grades are found chiefly in Asia and Africa. Not only is the culture of the Pastoral peoples collateral to that of Agricultural tribes, but even the Second Hunters consist of peoples who have developed along an independent line, that of a specialised hunting way of life.[1] We may represent these various grades by the following diagram, plotting the order of development of the majority of peoples as a straight vertical line :[2]

[1] I have omitted another small independent development, namely, that of the Dependent Hunters of Hobhouse, Wheeler and Ginsberg (op. cit., p. 19 f.).

[2] H1 and H2 signify the First and Second Hunters; A1, A2 and A3 the Agricultural Grades; and P1 and P2 the Pastoral. This distances between the Grades on the above diagram are of no significance, except that in many respects H2 and P1 (though representing independent developments) may be taken as standing roughly midway between A1 and A2, and P2 as midway between A2 and A3.



As has been said, there are occasional difficulties in defining these grades of progress and in assigning a particular people to a particular grade, but these difficulties do not greatly affect the present enquiry. In its early stages law grows slowly, and it is to the Third Agricultural Grade that we shall look for the bulk of our evidence as to the rules of primitive law among the tribes. This grade is also of especial interest and importance, because a comparison between the law at this stage with the law of the Codes shows vividly the direct continuity between them. The Codes are the written legal legacy of the peoples of the next grade, namely, those who knew the use of writing; and a detailed examination of the Codes shows the same relation that we witnessed among the tribes, between advance in material culture and legal development. According to the economic development reflected in their provisions, the Codes range themselves in the following order.

First come the Early Codes, represented chiefly by the Salic Law and the Laws of Aethelberht.[1] Next follow the Middle Codes, which divide themselves easily into three classes. The Early Middle Codes consist of Leges Barbarorum of the reign of Charlemagne (the Lex Alamannorum, Baiuvariorum, Frisionum, Saxonum, Ripuariorum) and the ecclesiastical Anglo-Saxon Laws (those from Wihtred onwards). In the centre of the Middle Codes come the Hittite Code, and the Lex Burgundionum ;[2] and the Late Middle Codes are represented by the Pentateuch[3] and the Twelve Tables.[4] Finally come the Late Codes, namely, the Assyrian Laws,[5] the Sumerian fragments and the Code of Hammurabi.[6] The Gortyn legislation represents the beginning of mature law. In their legal development, even in each separate branch of the law, the Codes retain the same order ; and as most of them cover a period of a couple of centuries and contain older and more recent materials side by side, they overlap, and emphasize this continuity even more. Again, the same history of development may be seen in the Germanic laws themselves, for if we commence with the Germans in the pages of Tacitus,[7] living in the Third Agricultural Grade, we may follow the same changes through the Leges Barbarorum and the Anglo-Saxon laws, till finally we reach in England, in the middle of the thirteenth century, a stage closely similar to that of the Code of Hammurabi nearly 3,200 years earlier. And since law advances with material culture, it follows that these stages of legal progress, which are found among the tribes and in the Codes, are the stages through which law passed in the long millenia of human history which preceded the age of Hammurabi.

[1] A number of small fragments are omitted from the following list. See also tables at pp. 217–8, 381–2.
[2] A stage of law represented in England about A.D. 1075.
[3] England, *c.* 1160. [4] England, *c.* 1185. [5] England, *c.* 1220.
[6] England, *c.* 1250. [7] *Germania*, published A.D. 98.

It is not by any means suggested that this progress of law among the different peoples of the past or present has been an independent progress uninfluenced by the culture of other peoples. Innumerable communities at different epochs in the known history of the world have been pioneers in a greater or less degree, and have profoundly affected their neighbours, directly and indirectly, within a wide circle of influence. Among modern tribes also the culture of many peoples is influenced by that of others; so that even the institutions of the First Hunters of Australia contain a number of points of resemblance which distinguish them from the First Hunters of Asia; while, for example, in East Africa the Masai have considerably affected the law of some of their neighbours. But in the present survey the results of such influences are not of the first importance, for, broadly speaking, at the most they only raise the culture and law of the people in question to one of the higher grades found among the tribes, and the relation between law and material culture remains true. It is only in the Third Agricultural Grade, where are found large numbers of tribes whose law has been affected by contact with modern civilised peoples, that this influence is important, for it has raised the law of some of these tribes above the level of progress of the other primitive communities of the modern world and above that of the Early Codes. Here, so far as possible, our evidence of the native institutions must go back to a time before European civilisation was absorbed. Apart from cases of the direct imposition of European systems of law, there are a few regions of the world where, over a long period, tribes have been exposed, as the result of commercial intercourse, to European or Arab influence; and where, over a considerable area, the impulse derived from contact with a higher culture has resulted in an advance independently reproducing to an impressive extent laws of the peoples of the ancient Codes. The

most important of these areas consists of the coastal region of the great bay of West Africa, for example, the Gold Coast, Ashanti and Southern Nigeria. Ever since the end of the fifteenth century this coast has been in commercial relations with Europe, and civilisation has come to its inhabitants in a rough proportion to their nearness to the coast. Here for centuries have flourished native forms of art which since the beginning of the present century have had great effect in Europe, and in particular have wielded upon the world's music an influence of rare magnitude. In the laws of many parts of this area are to be found not only the capital sanction for homicide and for theft (which might conceivably have been adopted from Europe), but also the handing over of persons as a sanction for homicide, the talio for adultery, the institution of concubinage, the legal procedure of early Rome known as the Legis Actio Sacramenti, the systematic practice of conducting sales and loans before a number of witnesses, and other legal institutions so characteristic of the Late Middle Codes. There was no source in existence from which these institutions could have been adopted, and they must have evolved naturally and independently, under the stimulus of contact with higher cultures, and in the course of a consequent normal advance in civilisation. These facts represent further impressive evidence of the essential uniformity of the progress of law in all ages and places, and enable us to explain the precocity of legal development in certain areas. A less important but equally interesting region of a similar kind is found in East Africa, where the influence of Arab and European commercial intercourse has spread in from the coast. A journey south through Nilotic Sudan[1] and Uganda[2] to

[1] See Dr. and Mrs. Seligman's valuable *Pagan Tribes of the Nilotic Sudan* (1932), for the laws of these peoples.

[2] See, for example, Driberg, *The Lango*. I omit Abyssinia, an outpost of the Semitic world, standing at the stage of the Late Codes.

the interior of East Africa would only show the familiar and characteristic legal rules of average tribes of the Third Agricultural Grade. If then we were to turn East and travel towards the coast of Kenya, our journey (at the close of the last century) would have afforded almost a living display of the history of the law of homicide. Starting from Lake Victoria, we would pass, first, the populous Kavirondo, among whom the sanction for homicide consists of a number of head of cattle fixed by the elders in consultation in each case, mainly in accordance with the defendant's means, and apparently taking no particular account of the presence or absence of intention to kill.[1] Next we would pass the numerous Akikuyu, among whom, for intentional or unintentional homicide alike, a certain number of cattle are paid by way of bloodmoney.[2] Next come the Akamba of the neighbourhood of Machakos, where again the law fixes a number of cattle which are paid irrespective of intention.[3] But among other Akamba further on there is a distinction between intentional and unintentional killing; the latter has the special name of Mbanga, and the customary sanction is half the number of oxen paid for murder.[4] Away to our right are the Masai, and among them, too, while a fixed number of cattle form the sanction for homicide, there is a distinction between intentional and unintentional killing.[5] Still nearer the coast we find, to left and right of us, the Waboni, Wateita, Wataveta and Wanyika, and among all of them a difference is made between intentional and unintentional homicide, and the sanctions now consist of the handing over of persons, and even death, though in some

[1] *E.A.*, Vol. III, p. 141.
[2] *E.A.*, Vol. I, pp. 109–110; Vol. III, p. 147.
[3] *E.A.*, Vol. I, pp. 107–109.
[4] Akamba of Kitui, *E.A.*, Vol. II, pp. 117–119; of Mumoni, *ibid.*, pp. 120–121.
[5] *E.A.*, Vol. I, pp. 104–105.

cases, in some of these tribes, cattle may be accepted.[1] Lastly, among the Galla, death is the punishment for murder, while manslaughter may be forgiven.[2]

The Kaffirs of South Africa, who have migrated from the north in modern times, are as a whole less advanced than the Galla and West African peoples who have been mentioned, and form a less important instance of the same process; but here is a good example of a living feudalism such as was probably to be found in England in late Anglo-Saxon times,[3] and there is a beginning of sanctuaries, a spread of the criminal law, and a spoor law for theft, all strongly reminiscent of the same period in English and continental legal history. In other parts of the world, too, even among the lower grades, there is sometimes evidence of contact with ancient or modern civilisations. All this evidence only emphasises the value and precision of the method of defining the course of the history of law by collating the laws of the different peoples according to their stage of material culture. It helps us also to recognise that the Early Codes represent the law of tribes of the Third Agricultural Grade about the general level of the Kaffirs; and that the Ashanti and some other peoples of West Africa had reached (while their own law was still in force) the stage of the Late Middle Codes.

If it were possible, each sentence in the history that follows should contain a reference to the law of every relevant tribe and to the pages of every observer. It would then be necessary to discuss the rightful place of cer-

[1] Waboni, Wateita and Wataveta, *E.A.*, Vol. I, pp. 102–104; Wanyika, *ibid.*, p. 98 ff.

[2] *E.A.*, Vol. I, p. 101. Among the Galla and Wataveta the talio is prominent, and the Galla even have a fixed sanction for trespassing in a man's house, *E.A.*, Vol. II, p. 122. The Galla are so advanced that in some cases public cursing or excommunication is resorted to in order to influence a wrongdoer. Nothing like this is probably found elsewhere among the tribes except in parts of West Africa.

[3] The Cape Commission of 1883, in fact, reported that the native law was not unlike that of our Saxon ancestors in the early days of civilisation.

tain tribes in the order of the grades, to consider conflicts between the accounts of different observers, to question the reliability of some doubtful evidence, and to speak of rules that occur more rarely. But these matters arise chiefly in regard to the lowest tribes, and with them we are less concerned. Further, the volume of authority in regard to the Third Agricultural Grade would be enormous; much, for example, of what is said of the bride-price marriage is represented in the law of several hundreds of primitive communities. The account that follows must be short, and must only deal with the more universal rules; and for the purpose of clarity references will only be made, by way of example, to a few works of outstanding accuracy and authority, to a limited number of representative tribes,[1] and to the provisions of the Codes.

[1] The reader will thereby more easily note that a tribe which has advanced to a certain stage in one department of the law, has also advanced to the same stage in the other departments. References to the laws of a tribe without mention of date refer to the period of which the particular authority speaks—e.g. Kaffirs of about 1880, East African tribes of about 1895, etc.

CHAPTER XVIII

BEFORE THE EVOLUTION OF COURTS

THE communities standing at the lowest grades of progress, those of the Hunters and the 1st Agricultural and 1st Pastoral Grades, are usually exceedingly small.[1] Quite often they comprise only a couple of families of parents, children and grandchildren; and the Australian aboriginal communities of the Stone Age[2] seem usually to consist of groups of some fifty persons. In more favourable economic conditions these local groups may extend to a village of some two or three hundred persons bound together not only by local but (in different ways) by kinship, totemic and other ties.

Instances may be found of communities so small and simple that among them each kinship group within the community is separate and independent of the rest,[3] but such cases are extremely few. More commonly the local community (with its constituent groups of various kinds, totemic, kinship, or other) is for some purposes united or rather represented by a central authority consisting of an informal or formal council of elders, one of whom is often the head or chief. As a rule his position is such as can be fairly described as a constitutional headship: before a decision is arrived at he must consult the councillors, nor is a decision made without their approval. The position of the head chief is often hereditary, and is commonly fortified by venerable mythology and tradition, and much influence may be exerted by a chief of great

[1] See Hobhouse, Wheeler and Ginsberg, p. 46.
[2] Hr.
[3] Lowie (*Primitive Society*, p. 383) cites the Ifugao as an example.

personality, born in a family with a reputation for great magical power; but it remains in essence a constitutional headship.

These local groups—when agriculture begins they may properly be called villages—are the basic economic unit. In the lowest stages of culture they are largely self-dependent, for trade is practically non-existent and each community occupies a limited territory within which it finds subsistence. Nevertheless a local group may in some respects be connected with certain neighbouring groups, as by ties of marriages, by common religion, or a common name; and these groups may together form a sufficiently connected whole to be called a tribe. This larger body,[1] consisting of local groups, tends to grow in cohesion; and, in the higher grades of culture, government tends to spread outwards from the local group to the tribe, so that we can speak of a tribal council and often of a tribal head chief. When we reach the more advanced peoples of the 3rd Agricultural Grade it is often more appropriate to speak of a nation[2] rather than a tribe, but the term "the tribes" is a convenient term to apply collectively to all the peoples of the modern world up to and including the 3rd Agricultural Grade. In none of these stages is it right to refer to any of the communities as races, or as purely ethnic groups; the ties that bind each unit together are not always ties of kinship, and foreign individuals are continually assimilated into the group through various means.

In short, therefore, the progress of economic development is accompanied by an increase in the strength of government and an extension of the size and area of the governed group.[3] But in this chapter we are concerned

[1] Sometimes containing a population of more than one million persons in the A3 Grade.

[2] See Chapter XXVIII for a description of the constitution of such a community. Examples may be taken from any of the feudal peoples of Africa, e.g. among the Kaffirs or on the Gold Coast.

[3] Hobhouse, Wheeler and Ginsberg, p. 53.

with communities living at and below the 1st Agricultural Grade; tribal government of any kind is exceptional, and even in the local group it is only among the 2nd Hunters and in the 1st Agricultural Grade that any real government of the local group is found to be the rule.) Among these peoples, it is exceptional to find any that possess Courts; or, more accurately, in these communities there has been no evolution of specialised organs for the settlement of disputes between members of the group. Courts begin, generally speaking, in the 1st and 2nd Agricultural Grades; and, from the point of view of the history of law, the time before Courts have evolved is a clearly defined stage in legal development, and one of importance.

Not only do no special organs exist in these communities for the purpose of the settlement of disputes between members, but no Courts or other communal organs exist even for the purpose of laying down or enforcing any rules of civil law. Two important questions, then, arise for answer: Firstly, how is the peace and orderly activity of the group maintained? Secondly, is there any law already in existence?

Savage man is still conceived of by many as unrestrained and turbulent, though there is no foundation for such a belief. On the contrary there is an impressive volume of testimony to the effect that violence and other wrongs are on the whole rarer in the average primitive community than in a civilised people. More recent and more widespread, especially among anthropological writers, is a view of savage life diametrically opposed to the former. According to this view the two chief influences by which orderly activity is enforced are fear and the compelling influence of custom upon the mind of the savage. The rules of conduct observed in the primitive community are said to be obeyed chiefly because of his fear of public opinion and of supernatural

powers, because savage man is hemmed in at every turn by rules and customs, because he is incapable of departing from their dictates or even of contemplating conduct inconsistent with them. This view is, however, inaccurate and incomplete. Fear of the supernatural operates only as a sanction for religious rules, which are distinct and often different from, and even opposed to, secular rules of conduct. It is probably true that public opinion exercises a more potent influence in a savage tribe than in a populous civilised state.[1] It is also true that the savage, like the child or the ignorant and unlettered man in a civilised community, is strongly influenced by respect for custom. Indeed, just as in the case of the Homeric "themis", so in the thought of other primitive peoples, one important basis of the observance of rules of conduct considered to be binding is that whatever is established, whatever has always been done, ought to be done.[2]

This, however, does not give a complete picture of the secular rules of conduct of a savage community. In the first place, some of these rules are not in any sense compulsory—they belong to the domain of etiquette, of behaviour between groups or classes, or between relatives, and so forth. They need not be invariably followed; they cannot even be called rules except by a somewhat strained analysis of the facts. Apart from them is a class of rules of conduct, distinguishable without difficulty from the others, rules which are invariably observed, and which in the opinion of all must be observed. In this sense they can be called compulsory; but they are not observed because of any thought of definite public sanctions which may follow disobedience.

No voluntary association of men for the purpose of

[1] Just as it exercises more influence in a small English village than, say, in London.

[2] See *ante*, p. 144. See also Westermarck, *Moral Ideas*, Vol. I, p. 159.

common activity can arise or exist unless in the opinion of each member there is benefit to be derived by him from the common undertaking. The same is true of savage life: primitive communities exist because each member does his allotted task, and each does his task because it is made worth his while, because he receives a corresponding benefit—or, to use a phrase of English law, "consideration"—from the activity of the other members. In his penetrating study, *Crime and Custom in Savage Society*, Dr. Malinowski gives, as the chief factor which constitutes the binding character of these rules, the factor of reciprocity. One instance of its working he derives from the fishing industry in the Trobriand Archipelago.[1] One man owns a canoe; he is under a duty to keep it in repair, and in the work of repair the members of the crew must help. When the time comes to build a new canoe, the owner must finance the work of building, and at the feast, which celebrates the completion, must give each member of the crew his due gift in return for the work. When the community goes fishing the owner must allow his canoe to be used, and must take part in the expedition or allow someone else to do so in his place. Each member of the crew, on the other hand, must take part in the work of the expedition, and in consideration of his work receives a fair share of the catch. If the owner or a member of the crew surrenders his place to someone else it is always in consideration of a payment[2] of some kind. Each member of the crew takes a place for which a combination of rank, age and personal ability fit him; each canoe has its place in the village fleet, and the owner represents the members

[1] 2nd Agricultural Grade. Compare Armstrong, *Rossel Island Money* (1924, *Economic Journal* XXXIV, 423 ff.); Radcliffe-Brown, *The Andaman Islanders* (1922); Mauss, *Essai sur le Don, L'Année Sociologique*, N.S. Tom. I, Fasc. i, 30–186 (1923–24); Thurnwald, *Die Gemeinde der Bánaro* (1921, Stuttgart).

[2] This is not to be regarded as of a commercial character. It is something between a modern gift and a modern payment. See *post* Chapter XXXII.

and their interests in the village. The owner and crew of each boat are members of the same sub-clan, and are bound to one another, as the sub-clan is to the rest of the village, by a chain of mutual acts and benefits. The members of the fishing village are supplied by the members of an inland village with vegetables and repay with fish; and each fisherman conducts the exchange with his inland horticultural partner, to whom he is connected by membership of a group owning mutual obligations between themselves. Every gift he receives from his partner he must repay in due amount in its season.

In this way mutual dependence and benefit create a framework which fixes the mutual acts. But the savage is not a machine; and, as it were, the framework of acts and corresponding acts is clothed, and its corners are rounded off, by other factors. One such factor is natural conceit. The savage is not humble; the exchanges of produce are made in a public ceremonial manner; and by this display the party makes it known that he is a skilled fisherman or gardener, and that he has meticulously fulfilled his due obligations, or even exceeded them —for generosity is a great virtue in the eyes of primitive man. At the same time hitches are prevented by general restraint and good manners and a mutual give and take, and not merely by the absolute dependence of each on his neighbour. The system is pliant and adaptable; and its rules, like all other compulsory rules, are sometimes broken.

Some such framework as this embraces the whole life of the savage before the days of Courts—even magical and religious phenomena. The magician must exercise his functions when called upon by anyone so to do, and is entitled to his due reward. Acts of piety are not merely religious duties, but are also social obligations towards relatives or other persons, and entitle the performer to a

due gift in season. This framework even extends to the relations between the chief and his followers, and embraces the tribute and services due to him, and his corresponding duty to consult others or to make them the customary gifts.

These reciprocal relationships within the group are necessary to common activity and at the same time are created by common activity. They have been tentatively and empirically determined in the course of the building up of common activities and organised society, aided by the habit of imitation, and of taking the easy path by following an established course of conduct. They continue because without them the existence of the society is impossible. The word "rule" may, I think, properly be used to describe the fact that on occasions of a given kind acts of a given kind are called for and performed. And such a rule has its private and public sanctions of a sort; for if it were not obeyed, the remedy would, notionally, be the withholding of the reciprocal act to which the offender would have been entitled; and also the unfavourable impression upon public opinion. In an extreme case of persistent disobedience the offender would find himself ultimately outside the whole framework of society and without means of support. But it is not a rule laid down by any authority possessing power to declare law, for no such authority exists; the rule is a mere abstraction in the mind of the observer. It is not therefore a satisfactory use of the term "law" to apply it to the rules of conduct which we have mentioned as being observable among savage peoples who possess no Courts. The term "custom", as used with its technical meaning in modern English law, may perhaps be appropriately applied to such of them as are invariably followed. Furthermore, these rules, generally speaking, never become law, and historically they are of little importance in our enquiry, except as constituting the background

upon which to place the earliest law. It is true that, later, Courts will be established to settle disputes between members of the community, and in the course of deciding whether an applicant has been wronged will sometimes in a sense formulate rules of conduct which should have been observed. But by this time the rules of conduct, which we observed among savage communities, will, in the changes of economic and social conditions, have disappeared, giving place to others.

There are, however, already in the savage societies which do not possess Courts, a few rules that are in the direct line of the history of law. Though property is extremely scanty, there are one or two rules for its inheritance on death. There are rules of marriage, prescribing between what persons it may take place.[1] The future civil law of wrongs is represented merely by an irregular and ill-defined practice—the word rule cannot be applied to anything so fitful and variable—that cases of homicide are avenged by a friend or member of the family or other group to which the deceased belonged. Sometimes the wrongdoer or a member of his group is slain; more often, compensation is given and accepted; often, especially if the deceased is thought to have deserved his fate, no punishment is inflicted or compensation rendered. The kinship or other group of the deceased acts irregularly, and its solidarity can easily be exaggerated. Theft is even rarer than homicide; it is in many communities regarded chiefly as an eccentric and amusing peccadillo, characteristic of children or idiots, and its sanctions, if any, are most irregular. The criminal law is also represented by traces, which are already, even at this stage, entirely distinct and separate from the traces of the civil law of wrongs. As commonly in savage life, the chief offences of this character are incest and

[1] These are also rules of the criminal law, for an offence against them generally constitutes incest.

witchcraft. The punishment is inflicted by the community or part; but the practice is irregular and fitful, and commonly no action will be taken until the crime becomes notorious and a public scandal. Though the action of the community savours partly of the nature of an executive act and partly of the nature of " lynch law ", we can still see the beginning of the criminal law. Similarly, a member of the community may so repeatedly and seriously violate the general canons of approved conduct that among many communities he may become a public nuisance and may be expelled, or one person, having obtained the consent of each member, may put him to death.

Of these traces of the beginnings of civil and criminal law more will be said in a later chapter, when their trend of development can easily be seen in a more advanced epoch.

CHAPTER XIX

THE ESTABLISHMENT OF COURTS

COURTS begin to appear, for the most part, about the 1st Agricultural Grade. The communities of that grade are more settled than the 1st Hunters, and are generally larger; the authority of government has grown, and the holding of Courts is historically and organically merely one of the functions of government. These Courts grow out of the vaguest beginnings; but it is possible to distinguish between their criminal and civil origins.

The criminal and the civil law are, as will be seen, quite separate from the commencement. The sanctions attached to criminal offences are public, communal action. At first that action is irregular, and sometimes it is not taken at all; and while we hear of elders influencing the opinions of the populace in one direction or another,[1] the punishment itself, of whatever character, is carried out by the community or a part of it; indeed, as late as the 3rd Agricultural Grade and the Middle Codes[2] it is sometimes carried out by the general populace. But even among peoples as early as the 1st Hunters, a practice begins to grow under which the elders, the heads of the community, discuss the guilt of the accused, and if necessary the nature of the punishment, in the presence of the people, hearing the accused and anyone else who has anything to tell them. Here are the beginnings of Courts; but criminal procedure, as distinct from the

[1] Among the 1st Hunters, e.g. Queensland; cf. Westermarck, *Moral Ideas*, Vol. I, p. 175.

[2] See e.g. the sacral (criminal) offences of the Pentateuch.

procedure of civil trials, retains an extremely irregular character throughout the primitive law. For this there are two main reasons: firstly, criminal offences continue to be very few, and trials of such offences (except witchcraft) very rare, and so rules of criminal procedure have little opportunity to develop; and secondly, to use modern language, one of the parties is also the judge, and hence crimes continue to be punished in an exceedingly summary way, often with little semblance of a formal trial. Among many tribes, for example,[1] a man is denounced for witchcraft by the Sorcerer, and sentenced to death without a hearing; and among most tribes of the 3rd Agricultural Grade and the Codes, though the defendant is usually charged with this offence before the chief and elders, he is rarely tried by evidence before them, but a special local form of ordeal is, as a rule, resorted to for the purpose of determining his guilt or innocence. Except for the most advanced of the tribes of the 3rd Agricultural Grade and the peoples of the Codes, there are hardly any further rules of criminal procedure. Among advanced tribes, offences against the dignity of the king are often punished without trial by the king who considers himself to have been wronged; so that among the Kaffirs, for example, the kraal of the chief councillor is a sanctuary for such an offender, and a kind of Court of appeal against the arbitrary action of the king.[2] Among the Kaffirs, too, where the criminal law has developed sufficiently to cover a number of civil offences, and the criminal sanction is pecuniary, the king will as a rule send a messenger to collect the fine without prior formality.[3] In the feudal communities which are found among the most advanced tribes and in the Codes and in Norman England, crimes are especially tried not

[1] From A1 peoples up to peoples so advanced as the Kaffirs; see Cape Commission, Evidence, p. 68.

[2] Cape Commission, Evidence, p. 83. [3] *Ibid.*, p. 84.

by the local Courts and local judges, but by the King's Court.[1] Criminal procedure retains its irregular character in modern times, and among some civilised peoples lynch law is still practised in regard to certain criminal offences; and where the framework of civilised society is weakened by economic or other stress, one of the first results is that offences against the State are tried with little or no formality.

Yet though, among the tribes, criminal offences are few and criminal trials irregular, yet, because of the public nature of criminal sanctions, rudimentary Courts can be seen trying crimes before the trial of civil disputes is to be found; and when civil trials do appear, they take place before the same Courts, namely, the elders with or without a presiding chief.

Maine's view that a practice of private arbitration preceded the establishment of Courts,[2] is hardly supported by the evidence. In a few cases, confined chiefly to the 2nd Hunters of North America, a regular practice of voluntary arbitration in civil disputes[3] is to be found, whether the arbitrator is a special public personage or official, or one or other of the elders;[4] and there is in these cases no power of enforcing the award. But arbitration is not so much a precursor of Courts as an independent development. On the other hand, among some widely sundered peoples who possess no Courts (for example, some of the Eskimo[5] and of the Melanesians),[6] the influence of public opinion in private disputes may take an organised form. The two parties to a quarrel

[1] For the Kaffirs, see Cape Commission, p. 85; cf. *A.C.*, § 48; H.C., I § 45 (b); II, 73, 83, 84, 85. See further Chapter XXV. In the Late Middle Codes certain crimes are tried by ecclesiastical Courts.

[2] See e.g., *A. L.*, p. 385.

[3] Civil offences consist at this stage of homicide and wounding.

[4] For instance, among the Ifugao, Lowie, p. 398; and see a few instances cited Hobhouse, Wheeler and Ginsberg, p. 58.

[5] e.g. Rink, *Eskimo Tribes*, p. 24; *idem.*, Greenland, pp. 141, 150; Nansen, *First Crossing of Greenland*, II, p. 328.

[6] *Crime and Custom*, p. 60.

accompanied by their respective friends, relatives and supporters, will assemble in the presence of an interested and amused audience, and hurl at one another taunts, recriminations, abuse, and even satirical songs. These contests may continue for years, and though one of the parties may be driven by contempt or ridicule from the community, generally no useful purpose is served, and the practice often leads to an increase of ill-feeling. Good government demands that such exchanges of abuse should be prevented. It is obvious that such institutions cannot develop into Courts, and that a Court which shall not only decide a dispute but possess sufficient influence or power to secure obedience to its order awarding compensation, can only be established by whatever executive authority exists. We must regard the exercise of civil jurisdiction as a function of government, which begins to be performed by the growing strength of executive authority in the 1st Agricultural Grade, and which in the 3rd Grade is found almost everywhere.

The decisions of the Courts are for the most part readily obeyed ;[1] and this is chiefly because of the force of public opinion that lies behind a judgment of the elders. The public interest in disputes is intense, and to a certain extent the populace takes part in the trial. But the enforcement of the decision against a recalcitrant party, should occasion arise, requires executive power, and even in the 3rd Agricultural Grade many peoples may be found among whom there is no physical force behind the Court's decision.[2] It follows, a fortiori, that a man who sues for justice in a Court outside his own community will obtain it only in accordance with the friendliness of the local populace towards his group, or

[1] To take an extreme case, a Kikuyu Court, having made up its mind against a party, usually advises him to consult his friends ; he then retires with his supporters and returns, having admitted to them his guilt, and asks for lenience ; see Routledge, p. 204 ff.

[2] e.g. Lango of Uganda.

the power of his group, for otherwise, even if he should secure a judgment, public opinion would not press against his opponent for its fulfilment. The force of public opinion slowly decreases as we advance through the grades, and among the large communities of the Middle Codes it has lost much of its strength, while, on the other hand, the power of the executive authority, although it has grown, varies much from people to people; and where we find a number of tribes in process of federating to form one national organism, the central government is often weak. In the law of such peoples is to be seen abundant evidence of the difficulties experienced by the Courts in enforcing their decisions; in particular we find a practice of demanding security as a condition of accepting jurisdiction,[1] and a certain hesitation in giving judgment by default.[2] But in the bulk of the 3rd Agricultural Grade these conditions have not yet arisen.

What was said earlier as to the likeness of legal institutions independently evolved in different ages and places is strikingly illustrated in regard to the primitive Courts, for their constitution and general procedure are almost identical everywhere, both as we read of them in the past and as they take their fully-developed form in the 3rd Agricultural Grade.[3]

The Court consists of the chief[4] presiding over the council of elders, who sit beside him; and the local populace, who are interested and voluble spectators, stand around. In front of the chief and council are the

[1] Leges Barbarorum and Anglo-Saxon Laws from A.D. 750 onwards; early Rome; and Gold Coast Commission, p. 31.

[2] Later Salic Law (Chapters XL–LX, of about A.D. 700–750); Twelve Tables (first table); Gold Coast.

[3] For a description of a number of trials among the Akikuyu (an average A3 people), see Routledge, p. 204 ff. For trials among more advanced A3 peoples, see that invaluable document, Cape Commission. For the procedure among the most advanced tribes, see Gold Coast Commission; and see also Native Courts of the Gold Coast, *J.C.L.*, Vol. VI (1906) N.S., p. 307 (in which the report of the Gold Coast Commission was used).

[4] The community may, however, have no chief, and among advanced peoples (e.g. Kaffirs) he will not sit except in a case of unusual importance.

plaintiff and his witness and supporters on one side, and on the other side the defendant (who has been summoned by the Court) and his followers. The trial is entirely by oral evidence, namely, the unsworn evidence of the parties and their witnesses, and ordeals are only resorted to where evidence is wanting. It is roughly true to say that the defendant is presumed to be guilty till proved to be innocent; but this is to speak the technical language of a later date; and no defendant is condemned unless there is substantial evidence against him. In answer to the claim the defendant tells his story, and he is cross-examined; and if he has witnesses they are heard. The evidence of the plaintiff and his witnesses is then given, and they are also cross-examined. The proceedings are generally orderly, but often very protracted; the Court is painstaking and there is no rule excluding hearsay evidence. In some Courts the public are also permitted to ask questions, in some the parties are not permitted to do so. There is a widespread practice among the most advanced tribes (adopted for obvious reasons of convenience and order) according to which all the questions are put not by the Court but by an official, who is sometimes also a councillor.[1] He alone is permitted to examine the witnesses, and if the Court desires to ask a question it requests him to put it. Everyone, including women and even children, may usually give evidence, but the same weight is not necessarily attached to all evidence. The public, throughout the hearing, makes audible observations which have necessarily an effect on the Court. In several respects such a trial before the chief and his councillors resembles in its atmosphere a modern English trial by judge and jury. Among the most

[1] Called the "Linguist" on the Gold Coast. See also Cape Commission, p. 158. Another reason for the existence of this official is that it is thought that silence best befits the dignity of the Chief. Cf. the ἴστωρ in the Homeric Trial Scene, *post* p. 201.

advanced tribes, if occasion arises, some elder gives evidence of what was done in previous cases of the same kind. Upon judgment being given, a Court fee (in cattle) is payable, and often the successful party must pay it himself and then recover from the other side. The judgment of the Court is usually for payment of so many head of cattle, and in giving judgment it may also impose a fine on a witness for flagrant perjury committed in the course of the hearing; but, apart from such a punishment, no one cares to be known as a liar. Execution on the property of the debtor (or perhaps of his family) is levied by an official of the Court, who is often a councillor; but, among the most advanced tribes, if there is no property the person of the debtor may be seized by the plaintiff and held until he pays or works off the debt; and the plaintiff sometimes even seizes a third party or his property, to induce him to put pressure on the defendant to pay.

In this developed form the primitive Court may be found not only among the tribes but in such contemporary descriptions of trials as are found in ancient literature. An example is given in an earlier chapter from a contemporary account of the prosecution of Jeremiah in Jerusalem for a criminal offence.[1] Another interesting instance is to be found in the Homeric description of the Shield of Achilles, upon which is depicted a trial.[2] The scene is portrayed in vivid terms; it apparently takes place at a sanctuary, and the trial is one for homicide. "And the crowds were massed in the place of assembly; and there the trial had been joined,[3] and two men were contesting[4] concerning the penalty[5] in respect of a man who had perished; the one was begging (to be allowed)

[1] *Ante* p. 92. [2] *Il.* 18, 497 *et seq.*

[3] Lit. the "taunting had been joined."

[4] Lit. "taunting" or "squabbling."

[5] ποινῆς covers any penalty, but especially a money penalty, because the general penalty for all offences was pecuniary.

to[1] pay up the full sum, showing (the money) to the people, and the other was refusing to accept anything; and both were asking the Examiner[2] to try the issue.[3] And the crowds were shouting to each party, encouraging them on both sides, while the heralds were keeping back the crowd; and the Elders sat on smooth stones in the holy circle,[4] and they held in their hands heralds' staves; and with these[5] they afterwards jumped up and gave judgment in turn. And there lay in the middle two talents of gold, to give to him who should speak the fairest judgment between the parties."[6]

[1] εὔχετο ἀποδοῦναι. For the construction (which is not uncommon) see εὐχ. θάνατον φυγεῖν; Il., 2, 401.

[2] ἴστορι "enquirer"; cf. ἱστορέω. The root of the verb signifies to "learn" or "ascertain," not "to know." Cf. the "linguist" of the Gold Coast.

[3] ἕλεσθαι, "to pick out" = κρίνειν.

[4] i.e. the sanctuary.

[5] In some primitive Courts the first speaker, when he has ended, hands his staff to the next, who, by that token, has the sole right to be heard. The usage here is apparently not quite the same, but the herald's staff gives the right to be heard.

[6] The Court fee. It is strange, however, that the fee should be paid to a particular member of the Court, other than the Chief. As the trial is of a civil dispute, and takes place at a local sanctuary, the Chief does not sit. It is a matter only of local importance.

CHAPTER XX

THE GROWTH OF THE EARLIEST LAW

In the previous chapter the rise of the Courts about the 1st Agricultural Grade was considered, and at the close of the chapter the developed Court of the more advanced tribes of the 3rd Agricultural Grade was described. During these three grades the law of civil wrongs has come to the birth and is developing in scope and strength.

The general framework of society, with its binding elements of reciprocity and common interest, remains what it was. Common pursuits, tentatively developing, have created fixed acts and obligations to perform such acts, and so rules of conduct have evolved, some of which (as being held to be compulsory) may be called customs in the English legal sense of that word. Breaches of rules of conduct have been followed in individual cases by the infliction of sanctions, such as the taking of life or property. In one class of cases, namely, criminal offences, the sanction is inflicted by the community, in the civil class of cases by the individual. It is in the nature of things that some rules of conduct will become fixed and determined before sanctions for breaches of rules of conduct also become fixed ;[1] but little by little sanctions are by custom attached to definite wrongs, and difficult cases are determined in the light of previous decisions. Not that either customary rules of conduct or customary rules as to remedies are unalterable ; both kinds of rules,

[1] Therefore some law of marriage and of descent is evolved among the 1st Hunters, before any law of civil wrongs appears.

and especially the latter, remain elastic throughout primitive peoples. In response to changes of environment wrought by the passing of time and natural events, rules of conduct are altered, and old rules become obsolete and are forgotten. Nor is there anything unalterable in the customary sanctions that are evolved: in the case of any particular type of wrong, such as wounding or theft, the sentence or penalty will vary between wide limits, according to the circumstances in which the wrong is committed. But the effective element in the process of the growth of law is a species of stereotyping. An act if repeated with sufficient frequency becomes a custom, and a custom becomes a law; and every vacuum in the social structure tends to be filled by a law. If there is no compulsory or recognised method of doing an act, the tendency of mankind is to adopt one practice empirically and by a growing accord; and if it is a practice within the field of human activity covered by law it tends to become a law, if not it remains a mere rule of social behaviour or the like.

The process by which conduct became stereotyped in this way was much assisted by the establishment of trial by Courts. In the Courts, after exhaustive discussion in the hearing of the community, the behaviour of this or that party is approved or disapproved. With the conservatism characteristic of lawyers and primitive man, and indeed of the upbuilding of civilisation generally, the Courts feel their way from decision to decision and remedy to remedy, and slowly standards of conduct are built up not only for the community without but also for the Court within.

But although, as has been said, first, rules of conduct were fixed and, later, remedies for breaches, yet the Courts were established to deal directly with the latter and not with the former. They were established to deal with disputes, and for the preservation of order, and

from their earliest days the Courts have directly and chiefly been concerned with claims to relief for wrongs. The creation of legal rules of conduct has been incidental. So, in later days, when written laws appear, it is seen that the Early Codes are filled almost entirely with rules as to sanctions, that is rules of civil injuries, and only in the Middle and Late Codes do rules of property and of contract appear to any extent. This characteristic viewpoint of legal procedure has in substance remained to the present day;[1] but in the primitive times with which we are concerned, that tendency is accentuated for certain reasons. Until we reach the 3rd Agricultural Grade there is extremely little property, and any questions that arise as to the title to it relate either to land or inheritance. Disputes as to land (as will be seen) are necessarily few, and disputes as to succession still fewer. The latter arise between members of the same family, and the solidarity within the family is such that proceedings of any kind between its members are rare; and, moreover, the earliest type of succession gives all the family property to one person. It is only among the Kaffirs, and others of the more advanced tribes of the 3rd Agricultural Grade, that disputes as to property do frequently arise between members of different families, and these are chiefly disputes between a husband and his wife's family, upon the important topic of the bride-price. Actions of this kind are very common among these tribes,[2] and provisions as to the bride-price are found in some Early and Middle Codes.[3] Personal injuries however were, from the beginning, commonly committed between members of different groups, and claims to remedies

[1] For example, actions for a declaration of right are a recent introduction in English law. In the Common Law Courts they were unknown until 1883 (see R.S.C., O. 25, r. 5); and the Court of Chancery could only grant a declaration where a right to some other relief was established.

[2] See Cape Commission, p. 149.

[3] See Aeth. 31, 77, 82; H.C., I, 28–38; Heb. Code, Exod. xxii, 16, 17.

arising from such cases formed the staple matter o litigation. Yet meanwhile, without the aid of litigation the law of property develops by the growth of custom For example, a local practice of distributing property i a certain way on the death of a deceased person become a rule and finally a law that it should be distributed i such a way; and so in this country have from time t time been evolved rules for the devolution of land o death, varying from locality to locality, but all possessin the force of law over a defined territory.

Throughout the tribes not only are these rules o conduct and these sanctions elastic, but they are change unconsciously when the needs of the community change and they are changed consciously by what the moder English law calls statutory legislation. The notion tha primitive man regards law as unchangeable is withou foundation. Observers in innumerable instances hav noted great alterations in the customs of a tribe withi living memory, and the histories of primitive people tell us of many more; and sometimes the recollection o a community standing at the lowest grade of cultur speaks to such changes effected by conscious legislatio in the past.[1] The process of legislation is well understoo among the tribes. It is difficult to say that such law a exists among them suffers less alteration, in proportio to its volume, than the common law of this country Throughout the transformation of material civilisatio in England since the fifteenth century the law of tort an contract has rarely been altered by legislation, and it foundations remain untouched. As to the criminal law the English lawyer delights to recollect that a century ag some two hundred offences were removed from the lis of capital crimes; yet this great revolution merel

[1] See e.g. Spencer and Gillen, *Central Tribes*, p. 11 (1st Hunters). As a instance of an A3 tribe, may be taken the Mumoni Akamba, among whom th husband's right to kill a ravisher of his wife was abolished by legislation *E.A.*, Vol. III, p. 121.

restored the list to the condition in which it stood at the end of the thirteenth century. The primitive chief of an advanced people cannot usually alter the law by his own volition.[1] His powers are constitutional; but if occasion arises he consults his council, and any alteration in the law that is agreed by the council is published and bruited abroad and thereupon comes into force. In the smaller communities the change is sometimes made after consultation among the whole populace. On the whole it may be said, that if primitive man is more conservative than his posterity, yet his customs are forever changing; and a leader of determination and personality may often radically affect the ways of his people.

The generally accepted view of the place of legislation in the history of the evolution of law is that set out in the early chapters of *Ancient Law*, and is as follows. The Codes embodied in writing the then existing rules of law; and after these rules have been so embodied, "there is an end to what may be called its spontaneous development."[2] Henceforth any changes in the law must be effected from without, and such changes are effected by three instrumentalities, which are, in their historical order, legal fictions, equity and legislation.[3] This view is opposed to all the evidence and is totally untenable. Legislation long preceded written Codes, and, as will presently appear, the true Codes were themselves but collected legislation. Of fictions and equity something will be said later:[4] legislation is as old as Courts, and on criminal matters may in a sense be regarded as preceding them, for the public infliction of a penalty for a serious offence against public notions of right conduct is, as it were, rudimentary legislation. We do not, however, hear of a distinct and regular process of legis-

[1] Cetewayo, ex-King of Zululand, giving evidence before the Cape Native Laws Commission, said (p. 530) that he had not as king the power to make a change in any law in Zululand without the chiefs being consulted and agreeing.

[2] *A.L.*, p. 26. [3] *A.L.*, p. 29. [4] *Post* pp. 346–9.

lation until we reach the more advanced communities of the 3rd Agricultural Grade, which are large and possess a strong central government; and here legislative and judicial functions take separate forms. For example, among the Kaffirs of South Africa[1] during the last century, civil disputes of a commonplace character were tried by the local headman, or petty chief of the district, sitting with his councillors. There might be an appeal (by way of rehearing) to the Court of the great chief, which also tried in the first instance cases of special importance. But in most of the cases tried in the Court of the great chief he himself did not sit.[2] The trial took place before the hereditary councillors, who reported their view to the chief, and if he agreed[3] they announced that the chief sentenced So-and-so to be fined, for example, so many head of cattle. Among the Kaffirs, as among all other primitive tribes, written law was unknown; but changes in the law were made from time to time by the chief and council (usually hereditary rulers of districts) after deliberating together at one of their meetings.[4] Changes in the law were naturally not frequent, for there was but a small body of law to change. The establishment of Courts must, however, in forming law and in creating a public consciousness of the rules of the law, have encouraged to some extent the process of legislation. The connection between jurisdiction and legislation is a close one among primitive peoples: the civil ruler is both the chief judge and the head of the legislature. The just settlement of their disputes is in the eyes of early communities an important function of the

[1] Cape Commission, p. 475 (=the stage of the Early Codes). Previously there are very few laws to change, and therefore no scope for a recognised procedure of legislation.

[2] Similarly in most other feudal communities, including early Norman England.

[3] The decision must be agreed between the chief and councillors: if the councillors refuse to alter it, the chief yields, Cape Commission, p. 84.

[4] Cape Commission, pp. 4, 475.

chief, and his skill and impartiality in this respect adds enormously to his prestige. Jurisdiction among primitive peoples is power;[1] and the ideal chief must be above all things a good judge and a good administrator.[2]

[1] A magistrate giving evidence before the Cape Commission, p. 190.
[2] *Bedouin Justice*, p. 146.

CHAPTER XXI

THE CODES

In turning to the communities that have produced Codes of law, we must leave the backward peoples of the modern world (for written law is unknown among them) and confine ourselves to the consideration of the peoples of the past at the time of their earliest extant Codes. As has already been said, however, in turning to the Codes we do not by any means find ourselves among new legal conceptions. The Codes, taken as a whole, do show an advance in law and material civilisation as against the generality of modern tribes of the 3rd Agricultural Grade; but the least advanced of the Codes contain, expressed or implied, the same quality of law and often even the same rules, as are found among the more advanced tribes of the 3rd Agricultural Grade. Nor can those Codes be understood unless we suppose a background of primitive law of the kind which can be observed in that grade of the tribes, for the Codes as a whole are, first and foremost, conscious statutory legislation upon a background of primitive common law. That the Codes originated in statutory legislation plainly appeared when they were described and discussed in the earlier chapters of this book. The ancients, too, were well aware of this truth, in fact they stressed it to the exclusion of most or all other aspects of the Codes. To the ancients of the period of the Early and Middle Codes all written law originated as the work of a great, first, national legislator: indeed, so pre-eminent was his position that not only the accretions of later written law but even the later unwritten law was

commonly believed to have been enacted by him.[1] To Clovis, Gundobald, David I of Scotland and Howell Dda of Wales were in later days attributed all the law of their respective peoples. At the time of the compilation of the Pentateuch, Moses was believed to have been the recipient from God of all the law of Israel, secular and religious. Almost every Greek city state in the colonies and the mother country from about 660 B.C. onwards had its own great legislator, and the names of a large number of these survive. To them was generally attributed much of the later constitution of the body politic, as well as other law that they can never have enacted. Even the work of the Roman Decemvirs was regarded as containing statutory legislation, and as being "the fountain of all law, public and private". As for the Hittite Code, the Assyrian and Sumerian fragments, and the Code of Hammurabi, we have seen that these were all collections of written legislation. In view of this unanimity of evidence we are compelled to believe that the Codes originated in statutory legislation. Tradition does not tell us, however, and we cannot believe, that there was no law before the time of those legislators; but tradition is unanimous that some of the laws laid down by them were entirely new, and we are told that they also altered and abrogated some older rules. Many instances of such express alterations of older laws have been given, and the Codes are indeed full of them.

Although undoubtedly the Codes originated in statutory legislation, all of the rules comprised in that legislation were not necessarily entirely new. An important remark of Ephorus is preserved[2] to the effect that the Greek legislators fixed the sanctions, and no longer left the punishments to be assessed by the arbitrary will of

[1] A modern instance may be taken from Northern Albania where, until the other day, all custom and usage was attributed to Lek Dukagin. Whatever was done, was done "Because Lek ordered it"; Durham, p. 64.

[2] Strabo, VI, 1, 8.

the judge. There can be little doubt that this was an important characteristic of the work of the early legislators, namely, that they often made certain what was uncertain. In some cases of wrongs to which no definite sanction was attached, but which were punished by the judges according to their sense of what was fair in the circumstances, the legislators probably laid down a specified sanction.[1] Such legislation was in its form new, in its contents partly new.

These two chief characteristics of the Codes do not differentiate written law from the unwritten law that preceded it. As has already been said, the process of legislation is well understood by the tribes, and the history of their law is very largely a process of the slow substitution of more defined for more variable sanctions. In short, written legislation is not itself a new stage in legal development; it constitutes merely a process of applying the newly acquired practice of writing to legal uses. But the employment of writing for legal purposes has, as will be seen, important effects on the subsequent development of the law.

The Codes, however, are commonly regarded not as statutory legislation, but as the embodiment in writing of pre-existing laws—a view derived from the work of Maine. Now it cannot be doubted that ultimately, as more and more written legislation was collected, large tracts of the law became embodied in writing, and furthermore some of the later documents bore a different character; but the earliest Codes of Law constituted primarily legislation for current purposes. Comparatively small as was the body of the existing law, it would have been a process of difficulty or impossibility to set forth in writing the existing rules of law. Such a thing as legal principle had as yet no existence; and a codification, in

[1] Though these specified sanctions are to be taken rather as guiding rules for the judge than as invariable.

the modern sense, could only have meant an attempt to set out in writing such rules of law as were considered of chief importance and usefulness. Even such a process in the earliest days of writing would have been one of great difficulty, and of little or no use; and the only accounts that tell us of such codifications are of a most unreliable character.[1] In fact the term "Codes" can hardly be applied with justice to such documents as we must suppose the earliest written law to have been, for the Codes that have come down to us are invariably, upon examination, seen to be extensions from time to time, under various hands, of earlier documents of a much briefer character. Of the true secular Code of Moses, only a few sentences could be attributed to that legislator, and the Hittite and Assyrian Codes have plainly been extended by various authors. The Code of Hammurabi is (apart from the new law it contains) a collection in an advanced age of earlier written legislation from various sources, which it enacts as law; and even the Sumerian fragments that survive presuppose a history of written law. So too with the Leges Barbarorum: the Salic Law grew up piecemeal, and the laws of Aethelberht cover a considerable period of time. Gundobald was not the first Burgundian legislator, and the Lex Burgundionum contains much more than his Code.

The continuity, therefore, of the written from the earlier oral law is plainly established. The earliest "Codes" were statutory legislation on a few isolated matters, issued by rulers, and recorded in writing instead of orally. As, however, changes in different branches of the law involved, sooner or later, legislation upon most subjects, the collections of legislation that have survived came to embrace a large number of topics and present

[1] The stories of the enactment of the Twelve Tables and Cain Patrick and the laws of Howell Dda—but in each of these cases we are told of new laws that were made. The stories are arrived at to account for these compilations in the form which they finally attained.

at first sight the aspect of a written version of the whole law. It would not be right, however, to regard even the developed Codes in this light. Important and well-known rules of law will be found to be missing from every Code: even the Code of Hammurabi, as we have seen, omits the topic of murder, but includes manslaughter.

Another mistaken view of the Codes is that they embodied judgments of the Courts—recent judgments, novel judgments, or judgments of importance for some other reason. This view is partly, no doubt, derived from the notion that the process of statutory legislation is unknown in primitive law, for, if so, the Codes could only embody the decisions of the Courts. There is, however, no evidence whatsoever to support such a view, and there is scarcely a sentence in any of the Codes which, it is reasonable to suppose, represented the judgment of a Court. It is impossible to deny that in some cases a provision of a Code may have been prompted by a judgment. The origin of some modern legislation is the same, but now, as probably then also, legislation which takes its origin in a judgment is usually enacted for the purpose of altering the law so declared, or of removing doubts.

The form and language of the Codes is, as we have seen, substantially identical throughout the world. The language was no doubt that of the earliest known legislation of each people, and survived as the proper form for all ensuing work of that kind.[1] The provisions are couched in conditional sentences in the third person, the natural language of statutory legislation. As the process of the enactment of written law goes on, and the volume of such matter increases, for the sake of convenience the provisions of the Codes are usually arranged according to their subject matter.[2]

[1] For example, even the religious rules contained in the Twelve Tables are couched in the same form, derived no doubt from the language of true legislation; see e.g. the phrase "Si patronus clienti fraudem faxit, sacer esto."

[2] In the Leges Barbarorum, the fact that in some Codes the provisions are

Apart from their general resemblance, some Codes (and especially those of the same grade of development) contain provisions of similar matter, sometimes in almost the same words. It is perhaps in part the appreciation of this fact that brought about the tradition that so many legislators took their materials from the work of others. Ephorus says that Zaleucus[1] adopted laws from Cretan, Spartan and Athenian sources.[2] Plutarch[3] tells us that the Spartan legislator, Lycurgus, studied the legislation of Crete, Ionia, Egypt, and perhaps Libya, Iberia and India. Herodotus[4] says that Spartan institutions came from Crete; and Charondas[5] is said to have adopted the best from the laws of many peoples. Livy, following the fashion of Greek historians, tells us that the Commission of Three appointed to enact the Roman Code was "despatched to Athens to copy the famous laws of Solon and to learn the institutions, customs and laws of other Greek states."[6] Although among such close and kindred communities as the Greek city-states some conscious adaptation may well have taken place, and though the peoples of antiquity learned much from one another, yet such traditions as these cannot altogether be accepted. Similarities between different Codes are partly explained by the similarity in the previous unwritten law, and the similarity in the problems set to the legislator in the same stage of civilisation.

So far the Codes of the primitive period have been surveyed as a whole, and their obvious common characteristics have been noticed. But if we regard the Codes in greater detail, striking changes appear as we turn from the Early to the Middle and from the Middle to the

not so arranged, shows piecemeal accretions, and gives us evidence as to the dates of various portions.

[1] Of Achæan Locris.
[2] Strabo, VI, 1, 8.
[3] Lycurgus, IV.
[4] I, 65 ff.
[5] About 660 B.C. of Catana, traditionally the first Greek legislator.
[6] Livy, 3, 31.

Late Codes, and these changes reflect fundamental, progressive alterations in the surrounding conditions. These changes appear uniformly at the same stage of development in different ages and places, and illustrate with vividness the basic uniformity of the progress of law and of civilisation.[1]

Whatever may have been the origin of writing, when we first find it in use among the peoples of the Early and Middle Codes, it appears to be the monopoly of ecclesiastics. The scribes are members of a great priestly order and writing is only taught in the temples and monasteries. Among the ancient civilisations of the Late Codes, too, there is abundant evidence that this had previously been the case. In the time of Hammurabi the scribes have become distinct from the priests, but there is a close relation between them, and for long afterwards writing was still taught chiefly in the temple schools.[2]

The Early Codes, therefore, were written by the hand of "clerks". The oldest rules of these Codes, as has been said, are pure statutory legislation, but these collections owe their origin to a new and speculative interest in the law, which has just arisen. The writers have acquired some experience of law in its working and a growing consciousness of rules of law in force around them, and the Early Codes include, apart from statutory legislation, an added quantity of non-statutory or speculative matter, consisting chiefly of a number of rules wrongly attributed to the old national legislator, and a number of rules of a partly theoretical or ideal nature representing law rather as it ought to be than as it is. Nevertheless the contents of the Early Codes show no (or almost no) ecclesiastical bias. A second change begins

[1] The following account is largely a summary of the results of the analysis of the Codes in the earlier part of this book.

[2] Just as in modern English the words "clerk" and "clerical" still denote both writer and priest, so in Neo-Babylonian times the same ideogram was still used for priest and writer of the tablet. The craft of scribe was largely hereditary. See, for references, San Nicolo, *Beiträge*, p. 142.

at the same time, namely, a substantial increase in the power of religion. This may be called the real birth of religion as we know it, and it shows itself in all places at this stage. Among the tribes it appears at the same stage; for example, among the Galla of East Africa it explains the use of public cursing or excommunication to influence a wrongdoer, and in West Africa it explains the use of the oath in legal procedure on the Gold Coast, and in contracts among the Ashanti.

The Middle Codes show the results of these last two changes. The priestly order—now a distinct and organised profession—by their reputation for power, by their monopoly of letters and learning, by the religious devotion of the people, by the unremitting flow of gifts of land and goods, gradually gain a position of great influence and material strength in the State. They are advisers of the Crown and the custodians of all written law, and as feudal lords the great ecclesiastics sit to try secular disputes within their territories. The priests have built up a great body of religious law, and have established a practice to try disputes of a religious nature, including questions relating to inheritance, marriage, adultery, incest, bestiality, heresy and certain other criminal offences.[1] When we reach the Late Middle Codes, we find that the ecclesiastical order has obtained the exclusive jurisdiction in these matters, and there is a clear separation between the field of operation of ecclesiastical and secular Courts. The law is now a very important branch of the teaching given in the temples and monasteries. The result of the professional outlook and professional interest of the priests in legal matters is that the Middle Codes contain, besides old statutory legislation, a number of what may be called priestly rules. These are rules which the priests desire to see in force, dressed in the guise of old legislation, and they include chiefly rules of

[1] See *post*, chapter XXV.

conduct embodying religious doctrine, and rules tending to the material benefit of the church. These phenomena occur in varying degree in different documents, but they are found in all Middle Codes.

The Late Middle Codes also witnessed a great birth and growth of trade, and this in turn produced two far-reaching results. The first was, that the use of writing for everyday commercial purposes began to spread among laymen ;[1] the second was a great expansion in the law, so that schools for the study of law arose, as distinct from priestly schools where law was a subject of study.[2] These developments, added to the separation of the Courts and the increase in the power of the monarchy, took the secular law out of the hands of the clergy, and the Late Codes are again true statutory legislation.

The following table, in which the Codes are arranged in an order which is true for all purposes, shows these changes as they take place. The first column shows the appearance and disappearance of non-statutory or speculative rules; and the second the appearance and disappearance of priestly rules.[3]

[1] But it is not till the end of the primitive law that writing is common among laymen. It is not till Neo-Babylonian times (sixth century and later) that the contracts are often written by parties or friends.

[2] This development is not complete till the end of the primitive period (e.g., Neo-Assyrian period, eighth century B.C.; and at Rome probably not till the time of Plautus and Cato).

[3] For the purpose of clarity, some omissions are made from the above table. The place of the Welsh Code is at the end of the Early Codes, and the place of the Irish Code is among the Early Middle Codes. The Armenian Law Book occurs between the Central and Late Middle Codes. The Code of Manu belongs to the end of the Middle Codes, and the Code of Draco to the Late Codes. A few unimportant fragments are also omitted, so as to leave the Leges Barbarorum continuous in order of date, except for the A.-S. laws. For the commercial clauses of the Codes see *post* Chapters XXX, XXXI.

Date.	*Code.*	*Whether containing speculative or non-statutory rules.*	*Whether containing priestly rules.*
EARLY CODES.			
A.D. 500–650	Salic (ch. 2–36)	No	No
[A.–S.] A.D. 600 –1100	Aethelberht (ch. 2–29)	No	No
	Aethelberht (ch. 30–90)	Yes	No
A.D. 650 to later 8th century	Pactus Alamannorum	Yes	No
do.	Salic (ch. 37–60)	Yes	No
[A.–S.] A.D. 700 –1100	Hlothhere and Eadric	Yes	No
MIDDLE CODES.			
Early Middle.			
A.D. 725 to late 8th century	Lex Alamannorum	Yes	Yes
A.D. 743 to do.	Lex Baiuvariorum	Yes	Yes
circa A.D. 800	Lex Ripuariorum	Yes	Yes
do.	Lex Saxonum	Yes	Yes
do.	Lex Frisionum	Yes	Yes
[A.–S.] A.D. 900 –1100	Anglo-Saxon Laws (from Wihtred onwards)	Yes	Yes
Central.			
circa 1350 B.C.	Hittite Code	Yes	Yes
A.D. 500–900	Lex Burgundionum	Yes	Yes
Late Middle.			
circa 375 B.C.	Hebrew Code	Yes	Yes
circa 190 B.C.	Roman Twelve Tables	Yes	Yes
LATE CODES.			
circa 1500 B.C.	Assyrian Laws	No	No
circa 2250 B.C.	Sumerian fragments	No	No
circa 1914 B.C.	Code of Hammurabi	No	No

CHAPTER XXII

MARRIAGE

In the preceding four chapters an account has been attempted of the general features of the development of primitive law taken as a whole from its first beginnings until the ages that produced the Codes. In the chapters that follow let us retrace our steps and attempt a separate survey of the history of the rules comprised in each department of the law. It was noticed that among the tribes who have not yet evolved Courts for the trial of disputes, we could not yet speak of laws relating to remedies for civil wrongs, and this for two reasons: firstly, there were no settled rules relating to sanctions for civil injuries; and secondly, there were no Courts in existence to fix or enforce those sanctions. But we did observe certain settled rules of conduct as to marriage and inheritance and perhaps property, and these, except that there were no Courts to enforce them, might well be described as laws. Let us then examine, in this and the following two chapters, the history of the primitive law upon these three fundamental subjects of marriage, inheritance and property, commencing from the lowest tribes. For the purposes of arrangement a separate treatment of each of these subjects must be attempted, but the separation is artificial and incomplete. Not only do the rules upon one topic closely affect the rules upon another, but the different bodies of rules are to some extent accurately described as different aspects of the same rules. A complete separation between the rules of each topic is never reached even in the most advanced

primitive law, and their common origin in the conditions of primitive society remains always apparent.

Mere sexual intercourse, among some primitive peoples, is licensed upon defined occasions or as between certain classes of persons.[1] Marriage is the lasting union of the sexes. Throughout primitive law it is essentially a secular institution requiring no preliminary formality, though among some peoples religious ceremonial may be superadded. It is the fact of cohabitation that constitutes the marriage. In other respects, throughout its history, marriage retains its fundamental characteristics. The generality of men have always married one woman, though among most tribes there is no rule prohibiting polygamy.[2] The standard of chastity before and during marriage varies little from grade to grade, but much from people to people. The position of woman remains unsatisfactory, and her consent to a marriage is no more often required than not. Divorce, as often as not, is obtainable at will. But an exception must be made of the pastoral peoples, who, under the influence of their own particular economic circumstances, have in their 2nd Grade developed a special culture, in which polygamy is universally permitted, patrilocal marriage is predominant, divorce is difficult or at the will of the husband, the position of women is lower than elsewhere, and chastity is higher.[3] But these aspects of marriage are of no great importance in the general history of law.

As has been said, throughout the tribes the fact of

[1] Such as children, or other classes based on age.

[2] In the higher grades, however, as wealth increases, the individual practice of polygamy extends. Among a few peoples in all grades monogamy is exclusively practised, but these cases are rare. It is common or usual for women to suckle their children for anything up to three years, and during that period, for the sake of the health of the child, not to allow their husbands access. These facts afford some reason for polygamy among the tribes. Even among the Hebrews polygamy was permitted, though the Romans and Babylonians were monogamous.

[3] There is much to be said for the view that among all tribes the higher the position of women the lower is the standard of chastity.

cohabitation constitutes the marriage. Economic conditions (in the broadest sense of the expression) varying from locality to locality create differences in the form of cohabitation, and the tendency is for the latter to become stereotyped within a comparatively small territory. As society is made up of small, self-supporting, local groups, marriages in primitive law are of two types, the patrilocal, where the married pair take up their residence among the husband's people, and the matrilocal,[1] where the married home is among the wife's people. There are other classifications of marriage, but none other of any real moment in the history of law. The first-mentioned classification is of the utmost importance, because it marks a difference that produces corresponding fundamental differences throughout the domain of the relations between husband and wife, of property, of inheritance and the family; but it is sometimes an artificial and a difficult distinction, for there are a number of intermediate forms of cohabitation. Among some peoples the pair live at first with the wife's people and then with the husband's group; or first with the wife's people and then set up independent house; among some peoples the wife returns to her father's house for varying periods; or she rears the children among her group, and the husband has his permanent abode among his own kindred. In all such cases the residence of the children furnishes the test.

Even in the lowest grade, one or other of these forms is customary throughout the tribe. Among the 1st Hunters the number of tribes where marriage is patrilocal is much the same as the number where it is matrilocal. It is obvious, however, that tribes practising the patrilocal type are better fitted to survive and progress than

[1] "Matriarchy" is an unfortunate expression, implying a system under which, in contradistinction to a "patriarchal" system, the mother rules or is head of the family. A system of that kind has never had any general existence.

tribes where the menfolk leave the group on marriage, or where the parents live apart. When the 3rd Agricultural Grade is reached, about 85 per cent of the tribes appear to have the patrilocal marriage.[1] Amongst the peoples of the Middle Codes, which contain local communities federated to form a feudal nation, while the population in general has the patrilocal marriage, matrilocal marriage is also mentioned, presumably as the marriage observed among a section of the populace. It is clear that matrilocal marriages were to be found among the Hittites,[2] Hebrews,[3] Romans,[4] Assyrians, and subjects of Hammurabi.[5]

For example, the Code of Hammurabi, which, as we have seen, makes use of laws drawn from different local communities within his dominions, includes a group of laws[6] relating to the wrong of striking a woman so as to cause abortion. This group is drawn from a people among whom matrilocal marriage was the rule, for these laws all deal with injury to a "gentleman's daughter", the "daughter of a plebeian", and so on. It is obviously because he is the head and representative of the family group that the married woman's father and not her husband is claiming for the injury to her.[7] Hence the type of marriage here is the common species of matrilocal marriage, under which the married pair take up residence with the wife's family.[8] But the mass of the provisions

[1] Hobhouse, Wheeler and Ginsberg (p. 151) show figures which make this proportion about 55 per cent, but their list of A3 tribes (p. 153) is scanty. The accounts of anthropological observers, in this and all other respects, mention the bizarre or unusual, and omit the ordinary or common. Furthermore, Hobhouse, Wheeler and Ginsberg include in their list (p. 152) the Wadigo (matrilocal), but omit all the other Wanyika (patrilocal). [2] H.C., I, § 28.

[3] At any rate between Hebrews and others, cf. Samson's marriage with the Philistine Delilah. They remained with their respective peoples.

[4] See *post* p. 225.

[5] The Ashanti marriage was also matrilocal.

[6] C.H., §§ 209 ff. Compare the Sumerian fragment (Clay, No. 28, §§ 1 and 2) for similar rules relating to injury to the "daughter of a freeman".

[7] See *post* pp. 284–5.

[8] As the father is the head of the family, he must have come to live with his wife's family on marriage.

of the Code of Hammurabi certainly do not contemplate a matrilocal marriage.[1] Again, in the Assyrian Women's Code one clause relating to the same injury to women provides for a case where " a man has struck the daughter of a man " ;[2] and in a different part of the Code later provisions on the same topic relate to the case of a man striking " the wife of a man ".[3] In the Assyrian matrilocal marriage, as in the Hittite and Southern Mesopotamian counterparts, the husband has apparently come to live with his wife among her people, and has brought in property with him.[4] We saw reason to suppose that at the date of the earlier provisions of the Code matrilocal marriage[5] was more common than it became in the days of the later additions.

Among the peoples of the late Middle Codes new social problems arise. There has been a great expansion of trade, with a consequent rapid development of town life, and there is much reference to towns in these Codes. In the towns (but not yet in the countryside) the difference between marriages where the couple join the wife's people and where they join the husband's begins to fade, for the married pair set up their own home wherever the husband finds his livelihood. Matrilocal marriage begins to lose its meaning: for example, in clauses of the Assyrian Code the provisions referring to cases " where a woman lives in the house of her father " include cases where the marriage is of the commoner, patrilocal sort, but the wife has either not yet been " delivered " by her

[1] See as to differences in marriage law between Sumerian and Semitic groups, Koschaker, *Rechtsvergleichende Studien zur Gesetzgebung Hammurapis* (1917), p. 178 *et seq.* ; and ante note (6).

[2] A.C., § 21.

[3] A.C., §§ 51, 52.

[4] This property, or part of it, if one of the spouses dies, is left in the wife's family and is inherited by the children of the marriage, A.C. §§ 26, 27, 39 ; H.C., I, § 28.

[5] Referred to in the words " if a woman lives in the house of her father ". The expression shows that the difference between the two marriages is untechnical, and is a difference in the place of habitation.

father to her husband's family, or has returned to her father's house. At the end of the stage of the Middle Codes the tribal organisation begins to fade, and the old local kinship group—namely, the clan or *gens* built up chiefly by marriages patrilocal or matrilocal as the case may be—begins to weaken and give way to the town ;[1] and a narrowed local kinship group, that is to say, the household or home of the married pair, emerges as the basic social unit. So at the date of the Pentateuch and the Twelve Tables the tribe and the *gens* or clan are already losing importance, and the household or *familia* begins to be left high and dry. There is no mention of tribe or clan in the Assyrian or Babylonian Codes. The trend of the law has changed at the end of the Middle Codes ; and, in the Twelve Tables and the Assyrian and Babylonian Codes, is in the direction of discouraging loose marriages and fixing a solid household, in which the husband has control over its members.[2] The Assyrian Code provides that "if a man marries a widow without fixing her obligations, if she lives two years in the house she is a wife, she shall not go out."[3] The Code of Hammurabi enacts that "if a man has married a wife and has not laid down her bonds, that woman is no wife."[4] Commercial credit is now of importance, and the law contains many provisions not merely as to personal execution for debt,[5] but also in the direction of concentrating the property of the household in one person, preferably the husband, for the benefit of creditors and commerce. The Assyrian Code provides

[1] At Rome, however, the *gens* survived at least till the time of Augustus.

[2] With powers of life and death, see *post* pp. 312–3.

[3] A.C., § 35. Marriages of widows among the tribes and in the Early Codes are loose affairs, often without payment of bride-price.

[4] C.H., § 128. Both these clauses refer to the Mesopotamian clay contract tablet.

[5] Heb. Code, Exod. xxi, 2 *et seq.* (late addition) ; Twelve Tables (added to by later hands) ; A.C., §§ 33, 49 ; C.H., §§ 117, 118, 119, 131, 152. There is nothing on this topic in the H.C. or earlier Codes. Personal execution for debt is common in, e.g., Southern Nigeria. See *post*, pp. 311–2.

that " If a widow enters the house of[1] a man all that she brings belongs to her husband. And if a man enters the house of a woman, all that he brings belongs to the woman."[2] Similarly at Rome, at and prior to the time of the Twelve Tables, it was the law that if a wife lived for one continuous year in her husband's house, the latter acquired control over her person and that of her children, and ownership of her property. To avoid such a result there arose a device of practitioners, namely, that the wife absented herself for three nights during the year; and this device was included in that school-book of 190 B.C., the Twelve Tables.[3]

The most important institution in the history of marriage is that of the bride-price, or, as it is more appropriately called, the bride-wealth. It is not by any means limited to patrilocal marriage. It commences historically as a present or compensatory payment to the woman's father by the bridegroom or his father. The giving of a consideration of some kind at the time of marriage—either by goods, service or even exchange of women—begins among tribes of the lowest grade of culture, and spreads as we ascend through the grades, until in the 3rd Agricultural Grade the giving of bride-wealth is the rule among the overwhelming majority of tribes, and is general in the Codes.[4] At the same time the amount of the consideration tends to increase in value until it becomes an enormous sum; the giving of the consideration or part of it comes to represent, as it were,

[1] i.e. " marries "—common phraseology in Mesopotamia.

[2] A.C., § 36. Compare H.C., § 33.

[3] See Gai, I, 108 f. " Manus " or control was also an incident of the marriage (irrespective of the year's cohabitation) if there had been confarreatio (the religious ceremony of the Roman patrician marriage) or coemptio (an oral conveyance corresponding to the Mesopotamian clay contract tablet and dating from the same time). See, as to the history of the mancipatio, *post* Chapter XXXIV.

[4] That is to say, it appears at least in some of the *Leges Barbarorum*, and the H.C., Heb. Code, A.C. and C.H. It does not appear in the surviving fragments of the Twelve Tables.

a betrothal or time of commencement of the marriage; and hence the transaction, particularly among peoples where the position of woman is especially low, comes to resemble, in the eyes of a European, a sale of the woman. But this is not a fair description of the institution. It is true that a native of an advanced African tribe will sometimes admit (for want of a better term) that the marriage is from one point of view a "sale" (though he will not admit that to be a complete description); and it is true that in Early and Middle Codes the same word is used of the father giving away his daughter and of the owner of goods parting with his goods for the customary payment.[1] But it must be remembered, firstly, that generally speaking until the 3rd Agricultural Grade there is no such thing as a sale or any other commercial transaction;[2] and secondly that, even in the age of the Middle Codes, neither our word "sell" nor words corresponding to it in primitive tongues, have yet become limited to a commercial meaning.[3] If there were in our language a term which would cover the giving of any customary gift or payment in return for a service, this might be used to signify the bride-price marriage. But there is none; and we shall be far more accurate in translating the word used, and denoting the things it implies to the native, by our phrase "giving away", which we still use in this same connection. Primitive law does not regard women or children as property,[4] nor is the bride-price marriage characteristic only of tribes where the position of women is low. It is found just as

[1] e.g., Aethelbert, 77; Heb. Code, Exod. xxii, 16–17; cf. Ashanti "'yere" (Rattray, p. 79).

[2] See *post* Chapter XXXII.

[3] See *post* p. 410.

[4] Among tribes where the marriage of the girl takes place when she is very young, her consent is commonly not asked, but her father will not usually marry her to a man of whom he does not approve. Among an equal number of tribes her consent, at least in theory, is required. As to personal execution on wife and children, see *post* p. 311.

often among tribes where their position is highest.[1] Tacitus[2] remarks on the high regard in which women were held among the Germans, and (being himself a member of a nation where, as in most modern countries, marriage portions were customary) praises, by way of contrast, the bride-price marriage. In England that institution was the regular practice till the twelfth century.[3] A native witness before the Cape Commission (p. 81), being asked why he gave cattle for a wife, replied, referring to her father, "He brought her up and I took her away". He also puts the matter thus: "A father expects to get something for his daughter, as she has to perform the duties of a wife and give birth to children. As these things are inflictions on the girl, the father must get something in compensation". Another witness puts a different and more important aspect when he says: "There would be no relationship (or alliance) without the cattle, for there would be no relationship between the two kraals" (p. 93). Another native says (p. 100): "I paid lobola[4] to make a knot of alliance". It is worthy of note that although ancient Codes often purport to fix the price of a surprisingly large number of commodities of importance, and although, for example, the civil sanctions in primitive law become fixed in amount, there appears to be no ancient Code or modern tribe among whom the bride-price is fixed.[5] Because marriage is the greatest event in a man's life, and generosity is a virtue held in high regard among primitive folk, and both the groom and the girl's father desire to show the value of the girl and the importance of the

[1] e.g., in Ashanti, where the women, even after marriage, have an entirely independent proprietary capacity, and descent and inheritance are matrilineal.

[2] *Germania*, 18, 19.

[3] See Aethelberht, 31, 77; II Canute, 74.

[4] "Lobola" or "ikazi" is the bride price among the Kaffirs.

[5] Among A3 tribes it commonly consists of a heterogeneous collection of goods—e.g. Shilluk (Seligman, p. 65 f.), 10 or more cows, 7 or more sheep, 4 hoes, 2 fish spears, 4 other spears, a basket of tobacco and a bundle of firewood; Anuak (op. cit., p. 111); Germans (Tacitus, c. 18).

occasion, it is natural that the bride-price should grow to be of a very substantial amount. It varies much from a poorer to a wealthier tribe, from poorer to wealthier families, and from a good to a bad season. It is common that it should not be of a fixed amount even in the case of an individual marriage, but that payments of a few head of cattle should be made before the marriage, and a further head from time to time afterwards.[1] Indeed, the amount involved is so large, that among most peoples very few individuals would have the means to pay it except by instalments.[2] It is common in the 3rd Agricultural Grade that cohabitation only begins after a certain total has been paid. Such a practice, in the Middle Codes, forms the basis of a sanction for breach of promise of marriage. In several Codes it is provided that if the groom refuses to marry the woman he forfeits the property already paid, but that if the woman's parents refuse to give her in marriage, they must restore the payment, and, in some systems, twofold.[3]

It is often said of marriage among the simpler peoples that it is a contract between families, not individuals. This is too technical a conception; nevertheless, among the more advanced tribes, so closely does each member lean upon his kinship group, that the relation created by marriage between the two families is an important aspect of it. The wife and children (in the ordinary patrilocal marriage) are members of the husband's family geographically and socially. The children look to his family for their rights of inheritance, and the wife rarely retains a right to inherit from her father, but looks for support to

[1] There is even said to be a case of a man who was still making payments for his grandmother. There are numbers of cases of a man making payments in respect of his mother.

[2] In some systems, however (as in the Assyrian Code), where the groom's father (or, after his death, a brother or the brothers) hold the whole family property, it is common that the father (or eldest brother) should pay the bride-price on the groom's behalf. In some poorer tribes the young couple subsequently make up the bride-price to the husband's father by their labour.

[3] See, e.g., C.H., §§ 159–161; H.C., I, § 31. See also H.C., I, § 29a.

her husband's family and her children. On the death of her husband, by a right savouring in some respects of a right of inheritance, her husband's eldest brother usually takes her as his wife ;[1] or she may be given in marriage by him or the family ; and if she is given in marriage to another person in her husband's group, she may even be given without payment of bride-price.

In all these respects the wife, as well as her children, has become a member of the husband's group. But by reason of the receipt of the bride-price her own family are given an interest in the marriage. If the wife dies without leaving children, one of the chief objects of the marriage has been frustrated, and it is often provided for in the law that in such a case the husband shall receive back the bride-price he has paid,[2] or shall receive a sister of the deceased wife in marriage.[3] Again, if the wife without cause runs away from her husband to her family, the law commonly provides that if she does not return to him her family shall repay the bride-price. If she runs away through ill-treatment, the husband will not receive back the bride-price, and he will not perhaps receive her back without a payment ;[4] and this fact must and does exercise a powerful effect in the direction of inducing the husband to treat her with consideration, for without the bride-price he will very often have no means of procuring another wife. If he turns her away, however, for a recognised cause,[5] he will recover the bride-price and be able to get him another bride.[6] Again, in return for the

[1] Sometimes the first child by the first husband's eldest brother is called a child of the first husband (e.g., among the Hebrews). The Assyrian Code (§ 44) provides that if the bridegroom dies after betrothal, his father, who has paid the bride-price, may give her to a mature son of the deceased or to a brother, or if there are none such is entitled to receive back all gifts (excluding presents of food). See also A.C., § 32.

[2] A rule which survives in C.H., §§ 163, 164. But the rule is not universal; for example, the laws differ between Kaffir peoples.

[3] *e.g.*, among the Kavirondo. [4] For the Kaffirs, see Cape Commission, p. 365.

[5] e.g., sterility, or repeated unfaithfulness.

[6] Among the more advanced tribes, in litigation before the native Courts disputes as to the bride-price commonly form a large proportion of the suits,

bride-price his wife's family must give her refuge, and if she or her children are left destitute, she is entitled to expect to find a home with her own people. Among some advanced tribes, where the cattle received as the bride-price are distributed among certain members of the family (sometimes in defined proportions), those members are under an obligation to support the children if need should arise.[1]

These facts explain to some extent why, at some mission stations, where in the past the bride-price marriage has been vigorously put down, the results have often been lamentable. The necessity of finding the bride-price renders the native industrious. The chief objection to its abolition comes from the woman. Her pride in the knowledge that she is highly valued by her husband, that their marriage has brought some material comfort to her family, and that there is some security for the sustenance of her children—this pride has gone. The husband for his part often prizes less what he does not pay for. The desertion of wives married without bride-price is frequent; and laziness and immorality on the part of the men is rampant. In this way is forcibly illustrated the effect on primitive social life of the sudden removal of restraints and of a system of interlocking obligatory acts.

The bride-price, then, as it increases through the tribes, takes its colour from the surrounding primitive social relationships, and, as society becomes more organised among the most advanced peoples, increasingly performs the function of a settlement by the husband for the benefit of the wife and children. Among the tribes of the 3rd Agricultural Grade, it is also not uncommon that a corresponding gift should be made to the husband by

and there is much legislation as to the ownership of the bride-price in the Late Codes. Much of it relates to succession, as to which see Chapter XXIII.

[1] See, e.g., Cape Commission, p. 93.

the wife or her father.[1] In a poor tribe, where the bride-price may be looked forward to as a highly important source of property and sustenance, the gift is very small; but where the woman's family is wealthy it may sometimes be as large as the bride-price. In the Late Middle Codes, where the household emerges from the kinship group, the system undergoes a change. The bride-price ceases to be invariably paid, and the gift by the wife's father—the marriage portion—becomes larger than the bride-price and is invariably paid.[2] In the surviving fragments of the Twelve Tables there is no mention of the latter, though it had probably not disappeared;[3] and a few years afterwards we find the system of the marriage-portion[4] in full force and nothing is heard of the bride-price.[5]

In the Code of Hammurabi—the law of a people among whom any transaction of importance was evidenced by writing—we see that a written marriage contract is by statute made essential to a valid marriage. The deed commonly contained a settlement on the wife.[6] The bride price was usually but not invariably[7] paid, and a marriage portion was given to the young couple by the woman's father. It was larger than the bride-price. If the wife died childless, both bride-price and marriage-portion were returned;[8] if, however, she left children, her father retained the bride-price, and the marriage-

[1] e.g., among the Kaffirs, and Germans (*Tac. Germ.*, Chapter 18).

[2] The change comes in the Heb. C., where the marriage-portion makes its appearance in a late priestly addition, Exod. xxi, 9, where it is described as customary. The bride-price was also still customary (Exod. xxii, 16,17).

[3] The coemptio is obviously derived from the weighing of the copper bride-price at the time of the contract of marriage. For the history of mancipatio and emptio see *post* Chapter XXXIV.

[4] See Plaut. *Aul.* 2, 2, 78; Plaut. *Trin.*, 5, 2, 34; Ter. *Phorm.*, 4, 3, 52. The marriage-portion is the "dos" ("gift"). The word shows that this institution, like the bride-price, originated in a gift.

[5] At the corresponding stage in England, too, namely, the later twelfth century, the bride-price begins to disappear.

[6] See, e.g., C.H., § 172.

[7] C.H., § 139.

[8] C.H., § 164.

[9] C.H., §§ 163, 164.

portion was inherited by her children.[1] If her husband died and she had children, she was left with the property settled on her, and she also received the marriage-portion. If there had been no settlement, she inherited a share in her husband's goods "like one son". She was entitled to live in her husband's house with her sons, or if she desired to leave, she might take away the marriage-portion; the settlement she left to her sons; and she might remarry.[2] A man might divorce his wife who had not borne him children, but he must pay her the amount of a bride-price, and also the marriage portion "which she brought from her father's house".[3] But if she had borne him children, he could only divorce her on the terms of giving her the marriage-portion, and "the usufruct of field, garden and goods" to enable her to support the children. After they were reared, she shared "like one son" among her children.[4] But a woman who had acted the fool, had wasted her house and had belittled her husband, on proof of these matters might be divorced without maintenance; or alternatively her husband might marry again and relegate her to the status of a maidservant in his house.[5] A wife who was guilty of serious breaches of marital duties might be put to death.[6] On the other hand, a woman whose husband had belittled her was entitled to return to her father's house with the marriage-portion.[7]

Marriage in Babylon was monogamous, but a married man might during the lifetime of his wife take a concubine if his wife was childless.[8] If, however, the childless wife gave him a maidservant by whom he had children, and

[1] C.H., § 162. If she was twice married, the children by both husbands shared the marriage portion, C.H., §§ 173, 174.

[2] C.H., § 172.

[3] § 138. In Assyria the marriage portion went to the wife's children if she died or was divorced, A.C., § 30.

[4] § 137. [5] § 141. [6] § 143. [7] § 142.

[8] He must, of course, support the wife, and he must not put the concubine on an equality with her, § 145.

she reared them, he could not take a concubine.[1] The maidservant, who had borne children in these circumstances, if she afterwards " made herself equal with her mistress because she had borne children " could not be sold by her mistress as a slave, but the mistress might put a mark on her and count her among the maidservants.[2] The maidservant who had been given by the wife to her husband, but who had not borne children, might be sold like any other slave.[3] If a wife was disabled by illness her husband might marry a second wife, but was under a liability to maintain the first for her life.[4] If the first wife was not content, she might take her marriage-portion and return to her father's house.[5]

Concubinage, which commences in the stage of the Late Middle Codes,[6] is an important institution of the late Hebrew,[7] late Assyrian, and Babylonian law. It is a type of marriage in which the woman occupies an inferior social position to that of the true wife in the same community. In the East its chief purpose was to enable a man, whose wife was childless, to take another free-woman for the purpose of begetting children, without thereby impairing the status of the true wife and without binding himself towards the second woman by all the duties of a husband, if she should also be childless. The Assyrian concubine went veiled in the streets, like a freewoman[8] and unlike a slave; her master's wife was a kind of mistress to her; but she was espoused to her master, and her children inherited in the absence of children of a true wife.[9] In the Code of Hammurabi she is a daughter of a freeman. Her father need not give her a marriage-portion, but if he does so she has no right

[1] § 144. [2] § 146. [3] § 147. [4] § 148. [5] § 149.

[6] e.g., Edo-speaking peoples of Nigeria. See J.C.L., vol. XI, N.S., p. 94 f.

[7] See, as to these priestly rules of the Hebrew Code (Exod. xxi. 7 f.), *ante*, Chapter XII.

[8] cf. the Latin " nubere alicui " = " to put on a veil for (i.e. marry) someone ", a fashion which still survives.

[9] A.C., §§ 41, 42. The text is obscure.

of inheritance among her brothers.[1] Once she has borne children, if her husband desires to divorce her she is in the same position as a wife; he must restore her marriage portion to her, and must give her the usufruct of field garden and goods to enable her to rear the children; and when they are grown up she takes a share as one son.[2] In the Roman law concubinage apparently belongs to the classical and post-classical law, and was probably introduced from Eastern practice. A man could not have a concubine and a wife at the same time,[3] nor more than one concubine at a time. The children were not legitimate, but could be legitimised.

[1] C.H., §§ 183, 184.
[2] C.H., § 137.
[3] Paul Sent. Rec., 2, 20.

CHAPTER XXIII

INHERITANCE

Let us now return to the lower grades of culture, and let us imagine a family firmly bonded into the clan (or larger kinship group), and into the local community. We may expect to find that the administrative and executive head of the family will usually be the strongest male; and that on his death the headship will devolve again upon the strongest male. Who that will be, must depend upon the type of marriage practised in the local community. Let us now picture two such communities: in one, let us suppose, it is the practice that the husband takes his wife to live with his own people; in the other, the husband goes to live with his wife's. The first is a patrilocal marriage, the second matrilocal. The kinship group practising the patrilocal marriage will consist of a man (the head of his family) and his wife, his sons and their wives, their sons; one or two unmarried daughters of the head or of his sons; one or more brothers of the head, and their respective families; and perhaps remoter relatives connected through males. On the death of the head, the strongest member of the group will succeed him. Who will that strongest be? Not a woman; and not an ascendant, for ascendants will usually have predeceased the late head. Sometimes the strongest will be a brother; but brothers are as likely as not to have predeceased the late head, and, in any case, will usually be too old. Usually the strongest member of the group will be the eldest son of the deceased. So—since that which usually occurs, ought to occur—when the members of the group become conscious of the past, and when

tradition takes shape in a rule of succession, we may expect the rule to be that, on the death of the head, the eldest surviving son (or occasionally the eldest surviving brother[1]) of the deceased succeeds; that (as the rules develop and provide for cases where there are no such persons) in default of sons or brothers,[2] the succession goes to sons of sons, or sons of brothers; and that in default of all such persons as have been mentioned, a more distant member of the patrilocal clan succeeds. This is the common type of the fully developed rules of "patrilineal" descent.

On the other hand, a group practicing the matrilocal marriage will consist of a male, the head of the family; his sisters, their husbands and children; perhaps an unmarried brother of the head; his maternal female cousins and their husbands and children; and perhaps remoter relatives connected through females. On the death of the head of the family, the strongest member will succeed him. This again will not be a female, nor an ascendant;[3] nor will it be the husband of a sister, for the husband will usually be older than the sisters of the late head, and probably older than the late head himself.[4] Hence, when a rule of succession for such matrilocal groups is evolved it could hardly be other than this, namely, that on the death of the deceased head his sister's son succeeds; or, in default (as the rules develop), a son of the deceased's mother (that is, a brother of the

[1] In some communities the eldest surviving son succeeds or in default of sons the eldest brother; occasionally the eldest brother succeeds, or, in default of brothers, the eldest son.

If the eldest son is dead, the second son succeeds, not the son of the eldest. A grandson would rarely be the strongest member of the group.

[3] Very rarely ascendants do inherit in the first place: see, as to Ashanti (succession to males), Rattray, p. 41. The succession is to (1) mother's brother; (2) in default to brothers in order of age; (3) mother's sister's son; (4) sister's son; (5) sister's daughter's son; (6) mother's sister's daughter's son, etc. These are rules of a very advanced people.

[4] Furthermore, these matrilocal communities are not as well organised as the patrilocal, and the husbands are sometimes a doubtful quantity. In some communities, they do not permanently leave their own groups.

deceased); or, in default, a son (or grandson by a daughter) of a maternal aunt of the deceased. This is in fact the common type of the fully-developed "matrilineal" rules of descent.

So far we have spoken of the rules of descent of the headship of a family group. But such property as the group holds is held by the head as a kind of administrator on behalf of the group, and on his death the new head succeeds to the property, still holding it on behalf of the group. Consequently the rules of descent, to which reference has been made, have a second aspect as rules governing the devolution of property on death.

There can be little doubt that this is in outline the origin of the rules of descent and inheritance. Among almost all tribes where marriage is patrilocal, descent is also patrilineal.[1] Among almost all tribes where marriage is matrilocal, descent is also matrilineal.[2] Again, cases are known where matrilocal and patrilocal marriages occur in the same community, and where the rules of descent are matrilineal in cases where marriage is matrilocal, and patrilineal where marriage is patrilocal.[3] That there are a few communities where marriage is of the one type and the rules of descent are of the other type is not surprising, for groups which may have practised different forms of marriage may coalesce to form larger units; or perhaps in some other way the form of marriage may have changed, but the rules of descent, to which great religious significance comes to be attached, may have remained unaltered. If this is so, since change in the form of marriage is on the whole from matrilocal to patrilocal and not vice versa, we might expect a few cases where marriage is patrilocal and the rules of descent matrilineal, but practically no

[1] See instances in Hobhouse, Wheeler and Ginsberg, p. 150.

[2] See Westermarck, *Human Marriage*, vol. I, p. 296; Hobhouse, Wheeler and Ginsberg, p. 150 f.

[3] Robertson-Smith, *Kinship and Marriage in Early Arabia*, p. 74 f.; Marsden, *History of Sumatra*, p. 225; Westermarck (*ibid.*).

cases where marriage is matrilocal and the rules of descent patrilineal; and this is what we in fact find.[1]

With the differing details of the forms of rules of descent there is no space to deal. Patrilineal descent, like patrilocal marriage, spreads in the later stages of primitive law, and in the 3rd Agricultural and 2nd Pastoral Grades, and among the Codes, is far more common than the other.[2] But as with marriage so with descent, there are differences between neighbouring localities and closely connected tribes sharing a similar culture, similar religious practices and even similar economic conditions. For example, the Nyika[3] tribes of East Africa have in general the patrilocal marriage and patrilineal descent, with certain traces of the matrilineal. The Wadigo, alone of these tribes, have the matrilocal marriage and matrilineal descent.[4] Again, among the peoples of the Kassai basin[5] (to take an extreme case of local variation) in the Baboma tribe brothers inherit property and, in default of a brother, the widow. But chieftainship, among the same tribe, in the absence of a brother goes to a son, or, failing a son, to a daughter. Among their neighbours the Basonge, power is inherited by an elected member of the male line. Among the Basonge Meno property is inherited by children in order of age, irrespective of sex. Among the Bankutu property descends in the male line, but there is evidence that the female line once had claims; whereas among the Bapindji property descends in the female line.[6] Perhaps in all these cases we may see the

[1] Three cases of matrilocal marriage with patrilineal descent are recorded by Westermarck (*ibid.*).

[2] In the 2nd Pastoral and the 3rd Agricultural Grade it is found in about 85 per cent of the tribes. [3] A3.

[4] See E.A., vol. I, p. 98 f. In practice, the strongest nephew by a sister inherits in the first instance. There are among the rest of the Wanyika several traces of matrilineal inheritance. For example, where there is no male capable of succeeding, widows and unmarried daughters are taken charge of by the nearest male relative of their respective mothers. [5] A3.

[6] *J.C.L.*, vol. XI, N.S., p. 199. Perhaps equally strange is the rule of Borough English, by which, until the other day, land in certain boroughs descended to the youngest son.

process of the transformation of matrilineal into patrilineal inheritance.

The examples just given remind us, at the same time, that there are certain special considerations affecting property, as distinct from power, which may create differences in detail between rules of descent of the headship of a group and rules for the inheritance of property. Power, for example, must descend to one person, but everyone must be maintained. Both sets of rules had their origin in much the same circumstances, when local communities were small and property extremely scanty. But when we reach the 3rd Agricultural Grade differences in detail appear, firstly between the rules of descent of the headship of a community and rules of inheritance of property in the same community, and secondly, differences between the rules of inheritance of property in different tribes. Confining ourselves, for the rest of this chapter, to the patrilineal inheritance of property, we see that throughout the tribes of this grade the types of rules in force may be classified into three.

In the first type, the new head of the family (the eldest surviving son, or occasionally the eldest surviving brother[1] of the deceased) succeeds to the whole of the family property, but a duty[2] is at the same time laid upon him to support its members.[3] This is merely the rule of descent of headship that has already been mentioned, regarded from the aspect of the property of the family.

Next we see the result of a process whereby the same rule of descent of headship has been varied, in its application to property, by making the new head more like a modern English executor and trustee. In this

[1] Even in this type of succession, the eldest son succeeds four times as often as the eldest brother.

[2] Which in the case of an unmarried younger brother usually includes an obligation to pay a bride-price for a wife. Compare C.H., § 166.

[3] Namely, the other sons, the widow, and unmarried daughters—for the married daughters, where marriage is patrilocal, have gone out on marriage.

second type of rules of inheritance, the new head—the eldest surviving son,[1]—succeeds to all the property as before, but for the benefit of all the adult male members of the patrilocal family equally, or with the obligation of dividing the property equally among them. He remains, however, guardian and trustee of the women and young sons. There is a third type of inheritance, under which the eldest son loses his function as executor and trustee, and all the sons, or occasionally all the children, succeed equally to the estate of the deceased, except that among most tribes the eldest son gets a larger share than the others.

Examples of each of these types may be taken from East Africa, and show the gradations between the types, and the foundation of each in the descent of headship. Among the Wanyika,[2] as has been said, apart from the Wadigo, patrilocal marriage and patrilineal inheritance are found. In the majority of these tribes, the eldest surviving brother succeeds as sole heir, under the duty of providing for widows and children of the deceased. He receives the marriage price for daughters and remarried widows. If there is no surviving brother, the eldest surviving son takes, then other sons, nephews and grandsons in turn, but all subject to the same obligation. It is interesting to observe that if there is no brother, and the children are of tender years, a cousin takes instead; and that if there is a surviving brother of the deceased, but he is younger than the sons, the property[3] is immediately divided equally among the sons. Ascendants never inherit, and females only in the absence of all males. Among the Wagiriama, the most important Nyika tribe,

[1] The deceased's brother drops out as the heir in the first instance, and only takes in default of adult sons. He still, however, takes the widow in most cases, and sometimes is guardian of the daughters, even if there are sons.

[2] E.A., vol. I, p. 98 f.

[3] Excluding widows and daughters, whom the eldest surviving brother takes. In practice among the Wanyika the surviving brothers often share the widows and daughters between them.

the eldest son succeeds[1] for the benefit of his brothers equally. This is an example of the second type, which is found in a number of tribes of East Africa, as elsewhere. Among these tribes the eldest surviving son takes in the first instance, and usually divides the property equally among his brothers.[2] If there are no adult sons, the uncle usually takes, and himself divides at the appropriate time,[3] and in any event he usually takes the widow. The eldest son or brother of the deceased, as the case may be, remains guardian of minors and daughters of the deceased, as under the previous type of inheritance, receiving the bride-price in respect of the women who marry. The third type is represented by tribes where the sons inherit equally—save that the eldest son usually receives a larger share[4]—and, more rarely, the daughters also inherit, or inherit in default of sons. In default of children, the eldest surviving brother succeeds, or the brothers. The widow usually goes to the eldest brother of the deceased.[5] But even under this third type of inheritance the sons do not necessarily divide the estate immediately on the death of their father, but commonly continue as one household for an indefinite period.

We have seen, therefore, throughout the tribes, how the form of marriage determines the constitution of the family group, and how the latter in turn determines the rules of inheritance. In short, the earliest rules of

[1] Except as to widows, which go to brothers of the deceased.

[2] Jaluo Nilotic Kavirondo (E.A., vol. I, p. 106), Akikuyu (*ibid.*, p. 109 f.), Akamba of Kitui (E.A., vol. II, p. 117 f.). Among the latter, the son divides under the supervision of his uncle.

[3] e.g., Akikuyu.

[4] e.g., Wataveta, E.A., vol. I, p. 104; Akamba of Thaaka, E.A., vol. II, p. 120.

[5] These three types of inheritance seem to occur among the A3 tribes in the following approximate proportions: Type 1, 35 per cent; Type 2, 25 per cent; Type 3, 40 per cent. Below the A3 tribes Type 1 prevails. When we reach the late Middle and Late Codes (see later) Type 3 is universal. This change from Type 1 to Type 2, and from Type 2 to Type 3 is an aspect of the gradual process of dissolution of the clan. Among the most advanced tribes there is little evidence that (as might be expected) inheritance by the eldest son accompanies feudalism.

inheritance arise simply from the fact that the property of the group remains in the group. In some frequent rules of inheritance we may see further evidence of the same process by which the possession or situation of property creates its own manner of devolution on death.

It is exceedingly common, in a community where (as usual) polygamy is practised by some individuals, to find a partial breaking-up of the patrilocal family. The wives live each in a separate household within the larger household; and for their maintenance the husband (the head of the family) will distribute among them during his life a considerable proportion of his stock.[1] When the sons grow up they hold and manage the stock, and on their father's death the stock of each house is divided (often by the eldest son) among the sons of each house; but the eldest son[2] is commonly entitled to certain cattle from houses besides his own, and the whole of the cattle of a childless house.

In other communities where the household is not divided in this way, there is no room for such a system, but it can clearly be seen how the rules of inheritance by and from sons, daughters and widows flow naturally from the constitution of the family group. In the lower grades the members of the family group are generally considered to hold as their own the few things that they in fact independently hold or acquire. In the 3rd Agricultural Grade the spread of the patrilocal marriage and the weakening of the clan begin to concentrate in the person of the head of the family the control over the members

[1] See, for example, in E. Africa the Masai (E.A., vol. I, p. 105), Nandi, Akamba of Kitui; in Uganda, the Lango; in S. Africa, the Kaffirs; and often in Nigeria. The position of the eldest son varies a little between these different peoples.

[2] The eldest son mentioned is not necessarily the eldest of all, but may be the eldest by a special or "great" wife, who need not be the first, and among some communities, e.g., Kaffirs, is never the first wife, but is chosen and married as "the great wife". See *Cape Commission*, pp. 46, 50. Contrast, among the Hebrews, Deut. xxi. 15–17.

and the property held by them. Now, amongst more than half the tribes, women are not considered to hold property as their own.[1] They are usually adequately supported by their husbands, fathers or brothers (partly because of the bride-price which has been paid or will be received) and on marriage they go out of the family, leaving the family property behind them. Yet commonly the ornaments, cloth and household utensils which they hold still descend on death to their daughters, or in default to their sisters, and they are considered to hold these as their own.[2] Apart from such property, daughters (since in the patrilocal marriage they leave the group) usually do not inherit.

The marriage price, however, receivable in respect of daughters, is of importance. In systems where the eldest surviving brother succeeds to the property of the family with a duty to support the members, he maintains the daughters and receives the bride-price in respect of them. In other cases the bride-price goes generally to the sons who " keep " their sisters.[3]

Widows, upon the death of their husbands, by what is in substance a species of inheritance, go to the brothers of the deceased in most communities where the patrilocal household is to be found. The widow remains in the group,[4] and the rule assigns her to the member who, because he belongs to the same generation as her husband, would be the most likely to want her and take her. Even where it is the eldest son, not the eldest brother of the

[1] See *post*, p. 266.

[2] e.g., in E. Africa, Nandi, Wateita; and for Nigeria, see *J.C.L.*, XI, N.S., p. 94 ff. Sometimes other property of a woman is inherited by her sons and daughters, or, in default, by her brothers and sisters. Among the Nandi a woman's plantation is inherited by her sons and daughters (Hollis, *The Nandi*, pp. 72 f.). Among the Ashanti (Rattray, p. 40 *et seq.*) married women may hold any property, including land; men only succeed to women in default of women, and women only succeed to men in default of men. The succession to women as well as to men is matrilineal.

[3] Among the Nandi, cattle paid to a man during his life as bride-price for a daughter is inherited by the girl's younger brothers (E.A., vol. III, p. 142).

[4] This is well brought out in Deut. xxv. 5.

deceased, who succeeds to the family property, still the widow usually goes to the eldest brother, or, if more than one, they are sometimes divided among all the surviving brothers. In some cases the youngest widow goes to the eldest son,[1] in a few cases they are the sons' to give in marriage and receive the bride-price. But a widow is entitled to be kept by her children, and the inheritance of a widow by her brother-in-law is sometimes limited to the case where she has no children of mature years.[2]

On turning to the Codes we notice developments that are connected with the rise of ecclesiastical Courts. At the end of the period of the Early Codes the priesthood has already a great practical interest in the law of inheritance, for it relies upon the death-bed gifts of the penitent for much of its growing wealth, and, when it proceeds to claim upon the gift, finds itself continually at strife with the next of kin of the donor.[3] During the period of the Early Middle Codes the priests establish (through their power of ecclesiastical censure) a widening practice of trying disputed questions of inheritance themselves ;[4] so that when (at the beginning of the Late Middle Codes) a division takes place between the fields of activity of the secular and the ecclesiastical Courts,[5]

[1] e.g., Jaluo Nilotic Kavirondo ; and Akamba of Kitui where the eldest son receives her from his uncle.

[2] e.g., Bantu Kavirondo. This inheritance of widows by the brother of the deceased—the practice known as the levirate—remains till the end of the Middle Codes. Aethelberht, §76, deals with the man who " takes a widow who does not belong to him ". Cf. Salic Law, XLIV. The Hittite Code, II, § 79, defines the succession to the widow in default of a brother. Among the Hebrews (see Deut. xxv. 5) a child born to the widow and her brother is called by her first husband's name and inherits as a son of her first husband. The levirate is also dealt with in Manu IX, 69. The Twelve Tables, A.C. and C.H. contain nothing on this topic, and presumably the practice had disappeared.

[3] See for Mediæval Europe, *P. & M.*, vol. II, Chapter VI. See also *post*, p. 249. In the Early Codes the only mention of inheritance is at the very end of the Salic Law (Chapter LIX) and Aeth. (§ 78).

[4] Compare, with the law of eleventh-century England, the H.C., where the rules of succession to the widow on the death of her husband (levirate) are dealt with in clauses of the recent ecclesiastical addition (II, § 79).

[5] Among the Hebrews about 400 B.C., and shortly before the issue of the

the latter are left in possession of the exclusive jurisdiction as to succession on death. There are therefore in the Early and Middle Codes no statutory provisions as to succession ;[1] but at the end of one of the Early Codes, among its non-statutory rules, is set out substantially the whole system of inheritance of land,[2] and a system of succession to land and goods is also contained in the priestly writings of the Pentateuch[3] and the maxims of the Twelve Tables.[4] In the Late Codes there are a number of statutory provisions dealing with isolated points of the law ; and the rules of inheritance found among these peoples may be compared with the systems contained in the Late Middle Codes.

The law of the Hebrews, Romans, Assyrians and Babylonians shows a steady progress in the law of inheritance from one system to the other, but there is a large area of common ground. Looking at these systems as a whole, we see that the eldest son has lost his exclusive right of inheritance, and the third type of

present Pentateuch ; in England by the Constitutions of Clarendon (A.D. 1164). We must except, however, from the ecclesiastical jurisdiction in England, succession to land.

[1] The H.C. (I, § 28) also contains one clause which may be concerned in part with inheritance (the meaning is doubtful) and may be statutory, but it is in a group relating to marriage, which is its real topic, and it also in part concerns land.

[2] *Lex Salica*, Chapter LIX (*De alodis*). The drafting is poor, as usual. Its rules appear, on the whole, to be a combination of a matrilineal and patrilineal system, probably signifying a stage in a process of change, and reminiscent of some other systems of that kind, such as those described earlier in this chapter. Tacitus, *Germ.*, c. 20, says that among the Germans the uncle thought as much of his sister's son as the father of his son. " Sororum filiis idem apud avunculum qui apud patrem honor ". He also speaks of the remarkably high position of women among them. It is sufficient for the present purposes to say of Chapter LIX, *De Alodis*, that the sons probably inherited in the first place ; but too much reliance should not be put on that chapter.

[3] Not the Heb. Code, but Deut. xxi. 15–17 (the old law-book, which deals only with an isolated point) and Num. xxvii. 8 f. (one of the latest parts of the Pentateuch) which sets out most of the system. Cf. Num. xxxvi.

[4] See *post*, p. 253. Even these passages of the Lex Salica, Numbers, and Twelve Tables do not say what is obvious and well known. All three passages are concerned to answer the same question, namely, what is to happen when there are no sons. Compare with *De Alodis*, § 1, Num. xxvii. 8: "If a man die and have no sons . . .", and Twelve Tables : " Si intestatus moritur, cui suus heres nec escit . . ."

rule is in force in each country; and the problem that besets the law is as to the position of the daughters. The sons succeed to their father's land and goods, and the daughters have a limited right of inheritance. Among the Hebrews,[1] and possibly in a mutilated early Assyrian fragment,[2] the eldest son receives a larger share than the others; but though his position may also have been in some respects a favoured one in Rome and Babylon, there is nothing in the Twelve Tables or the Code of Hammurabi to differentiate his right of succession on intestacy from that of his brothers. Among all these peoples, the Hebrews,[3] Romans,[4] Hindus,[5] Assyrians[6] and Babylonians[7], it was common that the sons, on the death of their father, did not immediately divide the estate, but kept and managed it whole for an indefinite period. Among the Hebrews the daughters were maintained by their brothers, and were given a right to succeed both to land and goods if the deceased left on sons.[8] In the Roman law, at the time of the Twelve Tables, there was a slight difference: the sons succeeded to the property of their father for the benefit of themselves and any daughters living with the deceased, and if there were no sons the nearest patrilocal relative took the property for the benefit of the daughters.[9] In the

[1] Deut. xxi. 15 f. The Hebrews permitted polygamy.
[2] Vat. 10001, Text No. 2, § 1, in regard to certain land.
[3] See, e.g., Deut. xxv. 5: "If brethren dwell together . . ."
[4] See *post*, p. 253.
[5] See Manu IX, 104 f.
[6] The fragment just referred to deals chiefly with various rights between brothers holding an undivided estate.
[7] The C.H. in several places implies this, e.g., in the phrase "after the father has gone to his fate, when the brothers divide," §§ 165, 166; and see § 178. This cultivation and management in common is not a new development. The point is, that as the larger kinship group, the clan, disappears, common management by the family stands out more vividly. In fact, from the late Middle Codes onwards the system of common management by brothers slowly disappears.
[8] Num. xxvii. 8 f., xxxvi. The right of the daughters to inherit is obviously regarded as an innovation. They must marry within the tribe, however. In Lex Burg. also (Tit. 14, 1) the daughter inherits in default of sons.
[9] See, further, *post* p. 253.

Code of Hammurabi[1] the sons succeeded jointly for the benefit of themselves and their unmarried sisters living in the house. An unmarried daughter who had been left no marriage-portion by her father was entitled to " share in the goods of the father's house a share like one son."[2] But she was not entitled to have the land divided up for her, any more than was her Roman sister. Furthermore, land held on military tenure and certain other feudal tenures could not be given to a woman or assigned to anyone for debt, and probably descended to the eldest son.[3] If so, the position is strangely like that in England at the corresponding period (thirteenth century). Here land held on military tenure descended to the eldest son,[4] other land mostly to the sons equally—and in either case the daughters lived with their brothers and were supported by them. Goods, however, were inherited by the sons and daughters equally.

There is also a second new development of which the commencement may be traced in the Code of Hammurabi. Trade has vastly increased, the population is more mobile, and a concentration towards the cities now begins. The clan disappears; and a narrowed family group emerges as the basic social and economic unit. Its members are the husband and wife and their children of both sexes ; nor is there any reason why the daughter should be excluded on marriage any more than the son, for the rule under which the married pair take up their home with either the husband's family or the wife's

[1] The Assyrian Women's Code does not contain much referring to rights of succession.

[2] C.H., § 180. Often the father would, instead, have left her a piece of land as a marriage portion, see § 178, and a married daughter would have been given a marriage portion. The latter would also receive a settlement from her husband. The rights of succession of widows and their children are carefully provided for in the Code. See § 177 for an enactment that has never been improved upon.

[3] C.H., §§ 28, 29, 36 to 39.

[4] A new development in England of the twelfth century, and probably in Babylon.

begins to disappear. This new constitution of society inevitably colours and moulds family relationship, and we see a movement towards a fourth type of succession, under which the inheritance goes, in the first place, to the widow, sons and daughters, married or unmarried. The basic unit of inheritance becomes the "cognatic" not the "agnatic" family of the mature Roman law. This change is not effected till after the period of primitive law has ended, but even as early as the time of Hammurabi (when wills have become fairly common) fathers of families do in fact leave their property to their cognatic relations.

Hitherto, in this chapter, we have dealt only with what in modern times is called the law of intestate succession.[1] It has been seen that automatically, from the natural facts of the devolution of property on death, arose rules that it should so devolve on death. But it is not to be supposed that no man expressed wishes or gave instructions as to the distribution of his property after his death. From the time when property first becomes considerable in quantity (namely, from the 3rd Agricultural Grade and even before) although rules of inheritance have long since evolved, we find that among many tribes the head of the family on the approach of death commonly calls the members together and announces his wishes regarding the disposal of his property both in goods and land, partly to avoid disputes and partly to avoid injustice.[2] There is of course no writing, but these wishes are obeyed. They indeed go some way to shape the rules of inheritance, for the fact that men usually ask that their

[1] The rules of inheritance where the deceased leaves no will.

[2] Apparently there are no cases below the A2 peoples, and even then almost entirely in the South Seas, where nature is very bountiful (see, e.g., Hobhouse, Wheeler and Ginsberg, pp. 269, 271; also the Torres Strait islanders, and the Maori, Firth, p. 350). For an average A3 people, see the Akikuyu, Routledge, p. 143 f. For an example of more advanced A3 peoples, see the Kaffirs, Cape Commission, p. 48. Among the most advanced peoples, see the Ashanti, Rattray, p. 238.

property shall be distributed in a certain way helps to create a rule that it should descend in that way in the absence of provision to the contrary. Furthermore, the constitution of society moulds the relations between its members, and hence the dying man does not feel a desire to leave his property to persons other than his relations, or even to make a radical departure from the customary rules of inheritance. But it is apparently taken for granted among most of these peoples that the father of the family can do as he likes with his property; and often his wishes will depart in details from the customary system of inheritance—for the rules of primitive law are not invariable—and will seek to adapt that system to special circumstances.

The statutory Codes make no reference to testamentary succession till we come to the Late Codes. This is not strange: these instructions are a domestic matter, and rarely, if ever, come before the Courts until the end of the Middle Codes. But other literature shows the progress made in the struggle of the will against the family, from the beginning of the Middle Codes. From the middle of the eight century on the continent of Europe, and from the middle of the ninth century in England, writing is being used by a few great personages (chiefly royalty and bishops) for the purpose of gifts to the Church. A man writes: "I give such and such after my death".[1] The disputes that arise are usually between the Church and the family who would have succeeded,[2] and ecclesiastical writings give instructions that witnesses be present and sign, so that the heirs of the donor cannot dispute the gift to the Church.[3] But apart from these few great men, there is no advance upon the usage of the

[1] "Dono post obitum meum." This is merely the same "wishes" or "will" of the A3 tribes, in written form.

[2] See *P. & M.*, vol. II, p. 314 f.

[3] Compare *Lex Baiuwariorum* I, i (*ante* p. 74), with the Dialogus Ecgberti (Haddan & Stubbs, *Councils* iii, 404).

tribes. Among the Hebrews, the Biblical literature shows a regular practice, when a man feels the approach of death, " to set his house in order ", giving such and such property to such and such child after his death.[1] Religion performs its normal function in regard to law, namely, that of resisting change, and the Hebrew law-book forbids the father to give the double portion of the eldest to another son.[2] In the Roman law-book occurs a maxim, to which we shall return, declaring that the " instructions of the deceased shall be law." Among the Babylonians of the time of Hammurabi, when all transactions of importance were evidenced by writing, testamentary documents were not infrequent; and a number of the clauses of the Code refer to cases where the deceased father has given to a member of the family a deed giving him certain property after the death, and a dispute as to the effect of the gift has arisen between that member and the rest of the family who would have succeeded but for the gift. Here, as in Roman law, the absolute right of the father to give the property as he wishes is clearly implied, but there is no suggestion of anyone wishing to leave property to a stranger. Clause 150 provides that " if a man to his wife has set aside field, garden, house or goods, has left her a sealed deed, after her husband her children shall not dispute her, the mother after her to her children whom she loves shall give, to brothers she shall not give." The husband may leave all his property to his wife, and she may leave it as she wishes among the children, but may not part with it to her own family. Similarly the Code provides, in another clause, that " if a man has apportioned to his son, the first in his eyes, field, garden and house, has written him a sealed deed, after the father has gone to his fate, when the brothers divide, the present his father gave him he

[1] See Gen. xxiv. 36; 2 Sam. xvii. 23; 2 Kings xx. 1; Deut. xxi. 15–17.
[2] Deut. xxi. 15–17.

shall take, and in addition he shall share equally in the goods of his father's house."[1] Two further clauses deal with gifts to a daughter. If a father has left a plot of land to his daughter for a marriage-portion, but has not written " after her wherever is good to her to give ", " has not allowed her all her choice ", her brothers shall manage her estate for her; she may not assign it, and her brothers succeed to it after her. But if her father did give her the power, she may leave it or dispose of it in any way she wishes, and her brothers have no claim.[2]

At the commencement of the previous chapter it was said that, in primitive law, the rules of marriage, inheritance and property have a common origin in the conditions of primitive society, and that the rules upon one topic closely affect the rules upon another. Let us end this chapter by tracing that connection in the rules of the Roman law as they survive in the Twelve Tables and in the law of the classical period. The conservatism of the Roman genius, and the rapidity with which Rome attained material prosperity, render her system of law supremely suitable for this purpose.

Until the middle of the third century B.C., the clan (or *gens*) and tribe were real entities at Rome. At this date—and in some rural parts of Italy for centuries afterwards—the complete Roman (like the modern Hindu) household must normally have consisted of the head, or paterfamilias, his wife, his married sons and their families, and his unmarried sons and daughters, and also, perhaps, an unmarried sister or two of the head, whom he was supporting, and a brother or two. In some looser marriages, however, the wife lived wholly or partly in her father's house; and, similarly, a married daughter[3] of the head might still be residing wholly or partly with him. A son or two might have left the family to find

[1] § 165. Compare Rattray, p. 238.
[2] C.H., 178, 179.
[3] And also a married sister of the head.

their livelihood elsewhere, but this would be exceptional. When, between 250 and 150 B.C.,[1] the law became crystallised and technical,[2] and, in the new conditions characteristic of the Late Middle Codes, sought to define by rules the relations between the head and the household, it made him the absolute master and the judge of the members of the household living with him, and absolute owner of property held by them. His children and his sons' children, except such as he released, were in his "potestas" or power. The adult sons, nevertheless, still retained their complete independence of personality so far as the public or constitutional law was concerned, and were eligible for any public office. As regards the wife, an artificial boundary line was fixed soon after 200 B.C.,[3] and she was treated by the law as a member of the household if she slept permanently in her husband's house; but if she slept away three or more nights in succession in any one year, she was treated as a member of her father's household, and was not under her husband's control (or "manus"), nor did her property vest in him. Similarly a married daughter of the head, who lived with her father, or absented herself from her husband's house for three successive nights in the year, was treated by the law as a member of her father's household.

Until the third century B.C. the system of inheritance at Rome must have been a form of patrilineal inheritance with which we are now very familiar, and have called in this chapter the third type. The adult sons of the deceased succeeded to the property of their father, with the obligation of providing for the members of the family, that is (apart from themselves) the unmarried daughters, infant sons and widow living in the house.

[1] The process of definition was not complete by 200 B.C., as is shown by the Twelve Tables.

[2] For this general process in history see *post* Chapter XXIX.

[3] In the Twelve Tables, we are told. (See *ante* p. 225.)

In practice—as in a modern Hindu household—the sons continued for an indefinite time to manage the estate as an undivided whole. If there were no adult son of the deceased, the brothers or other nearest adult agnate (i.e. patrilocal relative) or, failing such, a member of the "gens", took the property together with the same obligation of providing for the infant[1] sons, unmarried daughters and widow. If there were no widow or children, a brother or other nearest agnate, or a member of the clan, took the property absolutely.

When we reach the Twelve Tables of about 190 B.C. the law has undergone little change. Apparently the paterfamilias is still succeeded by his adult sons (or grandsons by a deceased son), who take for the benefit of the household; and in default, the nearest patrilocal collateral succeeds for the benefit of daughters, infant sons and widow living with the deceased. "If", say the Tables, "a man die intestate, having no heir of his own, the nearest agnate shall have the household.[2] If there be no agnate, one of the clan shall have the household."[3] [4] We

[1] Infant in the rest of this chapter signifies a person under the age of puberty.

[2] "Si intestatus moritur, cui suus heres nec escit, adgnatus proximus familiam habeto." Such a use of "suus" is characteristic of the time of Plautus and Cato. In later times "suus heres" becomes a technical term and includes all members of the household.

[3] "Si adgnatus nec escit, gentilis familiam nancitor" (or "gentiles familiam habento"). When the gentile succession died out at the end of the first century B.C. it still in fact went to individuals.

[4] "Familia" signifies the "household" in the sense in which that word is used in this book in regard to the period of the Late Middle and Late Codes. It includes (*a*) the persons in the household, namely, the family (see e.g., filius familias, etc.) and the slaves (see famulus, famulor) and (*b*) the property. Compare the old formula spoken by the "familiæ emptor" (Gai, II, 104; see *post*, p. 257): "Familia pecuniaque tua endo mandatelam tuam," etc. Here the distinction is between "familia" (the family including the slaves) and pecunia ("cattle") the property of the household. In the words of the "familiæ emptor", "familia" must include the widow, daughters and infants over whom control is to be assigned. Similarly, in the phrase of the Twelve Tables (*supra* note [2]) "familia" consists of the widow, daughters and infants, for there are, *ex hypothesi*, no adult sons. I should add, however, that no later Roman would have agreed with the contents of this note. To their mind, "familia" in the Twelve Tables meant slaves and property only. If that is so, "familia pecuniaque" in the phrase of the "familiæ emptor" should be translated as "slaves

are told, however, by the authorities that the Tables provided for the tutela (trusteeship and guardianship) of women and infants. These authorities may only mean that the passages of the Tables, which have just been mentioned, impliedly referred to tutela as well as to goods.[1] If, however, it is meant that there were express references in the Tables to tutela, it would seem probable that by 190 B.C. the law had become more technical, and that the adult sons were now regarded as holding equal undivided shares on trust for themselves, the unmarried daughters, male infants and widow. In any case this development must have taken place within a very few years after 190 B.C. Otherwise there was no real change in the Tables. The sons were still wont to postpone for some time the division of the estate, but the Tables (as we are told by several authorities) contained a rule that any heir could ask to have it divided. The practice of joint management, however, died out very slowly in country districts, and two centuries later we still hear of the brothers and sisters administering an inheritance without division.[2]

For centuries afterwards the civil law of inheritance, though it went through a process of development in detail, remained essentially the same. No widow who was not in manu of the deceased, no daughter who had married out with manus, no son who had been emanci-

and property". This discussion does not affect the question what was the early law of Rome, so much as the question whether that early law survives in the passages of the Twelve Tables.

[1] If "familia" in the Twelve Tables includes the women and infants, then obviously the passages quoted in notes (2) and (3), *supra*, impliedly provide for tutela, which is indeed a common institution among the tribes. There is no sufficient reason to suppose that "tutela" was expressly mentioned in the Tables. The reading "uti legassit super pecunia tutelave suæ rei ita jus esto" (*Ulp.*, XI, 14) is not Latin—the tutela was of persons, not property. "Uti legassit suæ res" is the version of Gai, II, 224 (see also Pomponius, D. 50, 16, 20). Cicero, *De Inv.*, II, 50, 48, gives "uti super familia pecuniaque sua". Tutela is not mentioned in the formula of the will by mancipation in Gai, II, 104.

[2] See the case in Valerius Maximus, IV, 4, 8. The system (known as consortium) was very common in the second century B.C.

pated in his father's lifetime, had any right of succession whatsoever, for they would not, in the earlier period, have been members of the household. On the other hand, as the deceased, in the earlier period, would have been supporting (as heir to his father) any unmarried sister he might have, and she would have been living in his house,[1] so now in default of children of the deceased a sister, who is unmarried or who has not married with manus, has the right to inherit from her brother.[2] On the other hand any more remote female relative than a sister could not succeed in any event,[3] for under the earliest rules of inheritance at Rome women did not inherit but were only supported.

At the time of the Twelve Tables it is plain that the practice of leaving property by will was very familiar to the Romans.[4] No doubt for centuries the Roman father, on the approach of death or on the eve of battle, had called his family together and given instructions for the disposal and distribution of his property after death. When this transaction took regular forms in the third century B.C., there was the same difference from the practice of Babylon that we find in all Roman transactions.[5] In order that a testator may prevent the next of kin from disputing that he has given instructions for his property to be distributed in a certain way, he must call in independent persons to bear witness to his instructions. The next of kin will be in possession of the property after his death, and will be lawfully entitled to it in the absence of provision to the contrary; and so

[1] And at the time of the Twelve Tables he would have managed the property for them both as "consortes".

[2] She can similarly inherit from her sister (who would also have been living in their brother's house).

[3] Gai., III, 14; *Ulp.*, XXVI, 6. Compare Num. xxvii. 8 f. The theory that females more distantly related than sisters originally inherited but were disqualified by later legislation is baseless and incredible.

[4] See the clauses of the Tables, "uti legassit," etc., and "si intestatus moritur," etc.

[5] See *post*, p. 440.

witnesses are more necessary to a will than to any other transaction. But oral testimony is fallible (especially in early times) and the Babylonians and others left their instructions in writing, sealed by witnesses, and deposited them in the hands of the beneficiaries. The advance of the Romans to material greatness was so rapid that their progress in the arts did not keep pace. Until 240 B.C., when the use of writing began to spread among the population, the Roman had to be content with witnessed[1] oral transactions, which, however, were conducted with all the more care because they were oral. By 300 B.C. the will had developed two regular forms: either the paterfamilias declared his wishes in the public assembly (*comitia curiata*) or in the presence of the army.[2] These methods may have worked satisfactorily when Rome was a small town; but from about 270 B.C.,[3] when the Romans were scattered throughout Italy, the two forms of will-making inevitably began to fall into disuse. The father, however, continued to give property orally after his death to the various members of his family in the presence of independent witnesses.[4] From 270 B.C. to 200 B.C. the "mancipium" took shape as a formal, oral conveyance, essential to transfer the property in valuables,[5] and by 190 B.C. it became clear law that the terms orally announced by the transferor at the time of the transaction were binding in law.[6] Accordingly by 190 B.C. these gifts of the testator were being made by mancipium,[7] the oral counterpart of the written deed of the

[1] At the time of the Twelve Tables and in classical Roman law, "to make a will" was "testari" ("to call in witnesses"); a "will" was "testamentum" ("witnessing") and "to die without making a will" was "mori intestatus" ("not having called in witnesses").

[2] Gai., II, 101.

[3] After the war with Pyrrhus.

[4] "At the sudden imminence of death" (Gai., II, 102).

[5] For the history of mancipium see *post*, Chapter XXXIV.

[6] In the Twelve Tables: "Cum nexum faciet," etc., see Chapter XXXIV.

[7] The clause of the Twelve Tables "uti legassit" may well refer to such a practice, and is generally thought to do so. If so, the practice was probably recent.

Babylonians, Hebrews, English and others. Meanwhile the law of inheritance on intestacy was becoming extremely inadequate. In default of adult sons, a brother or other nearest agnate inherited on the terms of supporting any infant sons, unmarried daughters and widow who lived with the deceased. Hence the especial concern of the testator was usually lest he should die without adult sons, and Romans with wives and young families were rapidly adopting the practice of transferring (call it selling or giving[1]) all their property, and their children and wives under power,[2] to a trusted friend on the express terms that from the testator's death the children and wife were under the control of the transferee (or "taker of the household")[3], who would hold the property on their behalf. The "taker of the household" now took the place of the nearest agnate who would have succeeded on intestacy, but as the institution grew, and testators sought to depart more widely from the rules of intestate succession, such wills were made in all cases, whether there was an adult son or not. At the same time, as the use of writing spread, it entered into the will, and between 190 and 150 B.C. it became the practice not to declare publicly the terms of the transfer, but to set them out in waxen tablets. The "taker of the household" said: "Be your household (*familia*) and money taken by me with this copper, in your entrusting and my custody, so that you may duly make your will according to law." And the testator, holding the tablets in his hand, replied: "As is written in these waxen

[1] Gai., II, 102, "mancipio dabat". The transaction was in fact regarded from the other aspect as "taking". See *post* Chapter XXXIV.

[2] We have now reached the period of the late Middle Codes, when sales of children and wives were common. They are found in the Hebrew Code (Exod. xxi., 7), the Twelve Tables ("si pater filium ter venum duit, a patre filius liber esto," Gai., I, 132; *Ulpian*, X, 1); and in the Assyrian and Babylonian Codes, *passim*. In the classical Roman law a free person formally conveyed was said to be "in mancipio".

[3] "Familiæ emptor." For the history of emptio, see *post*, p. 443 *et seq.* See Gai., II, 103.

tablets, thus do I give, thus instruct[1] and thus make my will;[2] and thus do you, Romans, bear me witness."[3] The object was still to obtain publicity as against those who would succeed on intestacy. In the will was named an heir or heirs, and the dispositions of property and guardianship were set out. The familiæ emptor was now a merely formal transferee, but in legal theory the only parties to the mancipation are still the testator and the familiæ emptor.

This was the civil-law will of the classical Roman Law of Gaius' time, and the other forms of will-making which have been mentioned had then disappeared. Even, however, at this late date all the legal intricacies that surround the will bear witness to its origin. The first and foremost provision of a Roman will was the institution of an heir, either the heir indicated by the law of intestacy or some other person. "The institution of an heir," says Gaius, "is to be understood as the source and foundation of the whole will." He received the whole estate, on terms of distributing according to the will. "Until an heir has been instituted it is useless to bequeath a legacy," for unless there was a valid appointment of an heir, there was no one to pay the legacies; indeed, unless there was a valid institution of an heir, the will was a nullity. In short, by the will an heir was appointed in place of the civil-law intestate successor. The second essential characteristic of the will was this, that if any civil-law heir was passed over, he must be expressly disinherited. In the struggle of testamentary against intestate succession, the latter yields only inch by inch. If the will does not disinherit a son "in potestate," he is entitled to succeed as the next "suus heres" or universal

[1] "Lego." In Roman law the word signifies "bequeath" (our "legacy"); but the word has two other meanings in the second century B.C., firstly, to "instruct", and secondly "to entrust". And in fact to give by will was to "entrust" one's property to someone, giving "instructions" for its disposal.

[2] Literally "call witnesses".

[3] See Gai., II, 104.

successor, and therefore the will is bad if he be not disinherited expressly. If a daughter is passed over and not disinherited, as she could only have been a beneficiary, and not the heir, under the old system of succession, she comes in to share, but the will is not void. It is interesting to observe that even if a person who would have succeeded on intestacy is appointed heir under the will, he takes as he would on intestacy—that is, automatically at the death, and not (as a stranger who is instituted) only from the date of accepting the inheritance. In these respects as in others—for example, the institution of a slave as heir with a gift of freedom[1]—curious relics of the primitive law are to be found throughout the whole classical Roman law of testamentary succession.

[1] In Ashanti, in the absence of all heirs, male or female, the inheritance goes to a female slave (the descendant of the deceased, or his ancestor, and a female slave). Rattray, p. 43.

CHAPTER XXIV

PROPERTY

THE task of describing the views of primitive peoples upon the subject of property is an especially difficult one. The law of property does not correspond to any branch of primitive law :[1] indeed, the whole outlook of one who attempts to set forth the primitive law of property is necessarily the outlook of mature law. Is the ownership of property in the individual or in the family under primitive law? The answer is that primitive law has no such conception as ownership, and perhaps no such conception as property in general. Then what has the primitive law to say as to possession? But if the primitive law does not know ownership, it cannot know possession in our sense of the term, for our notion of possession[2] is a complement to the notion of ownership, with which it is contrasted.

We must then lay aside these technical generalisations of mature law. Ownership and possession must be put aside, and we must speak not of property in general, but of different kinds of valuable things, which must be treated separately. Even in mature law, property has hardly become a distinct branch of law. Though one kind of valuable thing of pre-eminent importance, namely land, has given rise to a separate department of law, there is scarcely a text-book of English law which devotes itself to the study of personal or moveable property as such, and none which devotes itself to land

[1] There is no Code which has a separate group of clauses dealing with the law of property as distinct from the law of land.

[2] And still more the Roman conception of possession.

and moveables. The law of property has, in the true and practical sense, no separate existence in mature law; it has at the most a few technical generalisations. Still less has a law of property a separate existence in primitive law; actions are not brought for a declaration that the plaintiff is the owner of a thing, but to recover the thing or its value. Technical theories (and indeed technicalities of any kind) have no place in primitive law until its close; but a few introductory observations of a general character may be made as to valuable things as a whole.

We have said that primitive law has no such conception as "ownership". It knows no name for the relation between a man and his goods. In England the word "ownership" is not found till 1583,[1] and the language of the Romans never evolved a word meaning "ownership".[2] Even words signifying "to own" appear to be late in all languages. In England the word "own" is found with the meaning of "to take" as early as 888; with the meaning of "to hold as one's thing" from 1000. Similarly the word "belong" is found with the meaning of "to accompany" and "to relate to" from 1340; and with the meaning of "to be the property of" (in an untechnical sense)[3] not before 1393. These changes in the use of words accompany stages in the development of the idea of ownership. So, too, in the tongues of tribes of the 3rd Agricultural Grade we find verbs meaning "to take,"[4] "to hold,"[4] "to accompany,"[5] and in the Middle Codes "to be master of,"[6] but nothing more nearly corresponding with "to own". A particular valuable object (for example, a bull) is considered to stand in a special relationship to a particular person so

[1] See *Oxford Dictionary* sub verb. "ownership".
[2] In the classical Roman law, the Latin for "ownership" is "dominium ex jure Quiritium" ("mastery by the civil law").
[3] Even to-day the word "belong" hardly signifies as much as ownership.
[4] English "own".
[5] English "belong".
[6] Hebrew "baal". Latin "herus", "heres" (from the root "to hold").

that it is called " the bull of X " or " my bull ". Because of the same close relationship, instead of the bull being called by the name " of X ", X may be called by the name " of the bull ", just as in England a man may be called " Whitaker " by the name of his field. Here is an abstract generalisation that we can safely extract from primitive law in the domain of ownership, namely, the existence of a special association between the person and the thing. If, therefore, we attempt to describe such rules of property as we shall find, we must describe them, in regard to each of the different classes of objects that exist, by saying what it is that the individual or group, standing closest in relation to things of a certain kind, does and may do in regard to them, that others may not do. We shall see that this especially close relation between person and thing is historically and essentially a local relation—that is to say, that the local situation of a thing is a prime factor in determining all the " rules of property " in regard to it, as it was in determining the rules for its devolution on death.[1] The verbs that we noticed as in use in this connection—to " take ", " to hold ", " to accompany "—show that this specially close relation is historically that between the thing and the person who is in local proximity to it. The words are more characteristic of our modern " possession " than " ownership ", but it is possession where there is no ownership, and is best considered as something between possession and ownership. The history of the process of development of the idea of ownership is this, that in the course of time the person or persons who hold a thing come to be considered[2] to be entitled to hold it, and this notion of the right to hold grows into the two conceptions of ownership and possession.

[1] See *ante* pp. 241 *et seq.*

[2] In accordance with the normal process of growth of law, whereby an act, repeated, becomes a thing that one is entitled to do or under a duty to do, as the case may be.

Who, then, are the persons that stand in this relationship to valuables, and what are the incidents of the relationship?

The chief valuables among advanced tribes are land, cattle (including flocks of sheep or goats), slaves, and (among peoples who use them) ships or boats. Land must be reserved for a separate treatment. The other types of property mentioned are not all of the same antiquity. Cattle are not employed till the 2nd Agricultural and the 1st Pastoral Grades. In the 2nd Pastoral and 3rd Agricultural Grades they constitute the chief standard of the wealth of a man and (in all but a few of the most advanced tribes) the highest measure of value. In the Codes cattle give way to a metallic currency for the purposes of exchange. Slaves are unknown among the 1st Hunters, but with the rise of organised warfare and the commencement of the practice of taking captives, we find slaves in perhaps a third of the tribes of the 2nd Hunters, and the 1st Agricultural and 1st Pastoral tribes. In the 3rd Agricultural Grade, which has wide scope for slave labour, we find most peoples in possession of some slaves,[1] which are universal among the peoples of the Codes. Boats (first in the form of canoes) are of great value among the peoples who fish from the 2nd Hunters upwards, and are of great importance in the late Middle and Late Codes.

But apart from the most valuable moveables, namely, cattle and slaves, and apart from land, come the heterogeneous mass of the rest of the moveables, consisting chiefly perhaps of four classes: firstly, articles of food, such as plants, vermin, beasts of the chase or crops; secondly, articles of purely personal use, such as articles of attire, weapons and utensils (including, in the case of a woman, household utensils); thirdly, household furniture, such as tents and pottery; and fourthly, agri-

[1] See figures in Hobhouse, Wheeler and Ginsberg, p. 236.

cultural equipment, such as ploughs. Perhaps these four classes become important in the order in which they are stated, from the 1st Hunters to the 3rd Agricultural Grade.

The articles of purely personal use are used by one individual alone and therefore—for in primitive law what is done ought to be done—are regarded as belonging to him alone. He may do with them what he pleases, within reason, whether he is the head of the family or a subordinate member; and this is characteristic of all grades. As was seen in the last chapter, household utensils and articles of dress belonging to a woman commonly descend upon death to a daughter.

Articles of food are of many different kinds and of varying value, and questions in respect of many of them can rarely arise, for they do not exist for long. Probably it is true to say that those of less value are generally regarded as belonging exclusively to him who acquires them. Among the 2nd Hunters the practice of giving a portion of the kill as a present to someone outside the family has given rise in cases to a customary right to receive such portion. Within the family, questions of such a kind cannot arise, but since a father (and in a matrilocal community a maternal uncle) is under an obligation to support his children (or nephews and nieces) in regard to crops, they may be considered, in a sense, to have an interest in them. In some of the lower communities (especially where food is plentiful) the unjustified taking of food from another's store is considered not as theft, but as a miserable confession of incompetence or as displaying an infantile idiosyncracy; but it would not be right to say, therefore, that the crops belong to all. The position of the most valuable crops, as well as of household furniture and agricultural equipment, is much the same as that of cattle and slaves. Let us regard them as a whole and notice the changes that take place in the course of their history.

Among the 1st Hunters property is little. The goods within each family group are acquired, used or consumed by its members, and especially are they acquired and used by the head of the family, its administrator and moving spirit. Members of other families do not use them. On the death of the head of the family, as we have seen, the goods remain within the group. Trade scarcely exists, and there is little alienation or exchange of property. Any ideas possessed by these peoples on the subject of property are rudimentary indeed. If we say that the goods are the property of the family, administered by the head on behalf of the members, we are introducing technical notions unknown to these peoples, and are perhaps at the same time underestimating the importance and authority of the head of the family. But the result is not far from the true position.

In the 3rd Agricultural Grade Courts make their appearance, and thereafter legal remedies for injuries steadily advance. At the same time the quantity and importance of property increases, and in the 3rd Agricultural Grade there is a certain amount of trade, credit and debt. The question arises where creditors are to look for satisfaction of their claims, and there is now some litigation as to property, in which the head of the family represents the members. On the other hand, disputes between members of the family as to property are uncommon. At the same time rules of law are becoming more defined, and in the result the head of the family tends to loom larger in the eye of the growing law, and to oust the members. The weakening of the local kinship group increases the importance of the head within the family, and there is a movement from a system of family ownership of property administered for the family by the head, to a system of private ownership by the head of the family, the members retaining a certain interest. This statement again errs in introducing foreign, technical

conceptions, but it defines the direction of the changes that are taking place in the vague outlook of primitive peoples on the subject of moveable property.

The picture in the 3rd Agricultural Grade is not altogether uniform. In some communities economic conditions are such that sons, and even female members of the family, work independently and acquire separate goods which they are considered to hold as their own, and may deal with as their own. We may also see cases where a man may deal more freely with what he himself acquires than with what comes to him by inheritance. We have already noticed the existence of private property in such personal goods as articles of dress; but the general tendency is towards individual ownership by the head of the family. For example, there is, as we ascend through the grades, a steady increase in the proportion of cases where women members of the family are not considered to hold property as their own.

Among the 1st Hunters there is little property, and no evidence to show that it is exclusively held by males. Agriculture seems to commence largely as the province of the women, and there are few if any communities of the 1st Agricultural Grade where property is exclusively held by males. But in the 3rd Agricultural Grade in at least half of the cases it is so held, and in the 2nd Pastoral Grade perhaps in all cases. Among pastoral peoples there is little or no opportunity for women independently to acquire property, and in the 3rd Agricultural Grade the new institution of trade is chiefly the province of the men. At the same time patrilocal marriage is the general rule in these two grades, and as the women go out on marriage, leaving the family property behind them, they do not inherit. The rules of marriage and inheritance play a great part in creating rules of property.[1] In the

[1] Where inheritance is matrilineal, the women do not appear to lose the capacity to hold property; see, e.g., the Ashanti (Rattray, p. 40 *et seq.*).

Codes this process continues, and although a law of ownership is probably not arrived at till the end of the period of primitive law, the changes in the ideas of men on this topic can be clearly seen. Until the Late Middle Codes women do not usually inherit anything except a few household utensils and personal articles, and they have scarcely any opportunity of acquiring property except such as they acquire for their husband or father by the use of his land or cattle. Even in the Late Middle and Late Codes, when they do acquire a limited right to inherit, yet the husband on marriage does in fact come into control of his wife's moveables. Hence, in the Late Codes,[1] when technical rules of property law begin to appear, the husband usually becomes on marriage the owner of all his wife's moveables. This is apparently the position in the time of the Assyrian Code,[2] the Code of Hammurabi, the Romans of the first half of the second century B.C.,[3] and the English of the thirteenth century A.D.[4]

Somewhat different considerations apply to the proprietary position of the sons, for in the Late Middle Codes, when trade spreads, they have a better opportunity than the women of acquiring goods by their own efforts, and they begin to leave their father's house on marriage. But even among some of the most advanced tribes, the sons are not considered to

[1] There is no indication of this in earlier Codes.

[2] *A.C.*, § 36; and cf. §§ 3, 4 and 6. In § 3 a slave who receives anything from the hand of the wife of a man is guilty of theft.

[3] There is no such principle expressed in the Twelve Tables, but the trinoctii absentia to a certain extent implies it. The principle, however, remains in later Roman law.

[4] See *P. & M.*, vol. II, p. 432. This stage is apparently not reached in England till the thirteenth century, and the rule survives till 1870. In other systems of law, at a later date, we see quite different rules, which have not crystallised till a stage later than that referred to above. Compare the law of Gortyn (1st Code, § 5): "The father shall have power over the children and over the goods, over the division, and the mother over her own goods." Cf. also the classical law of Athens. On the continent of Europe in the late Middle Ages various systems of "community of goods" are to be found.

hold property as their own until they set up their own house on marriage.[1] In the Codes there is even less information in regard to sons than women, and though, at the end of our period, the sons while residing with their father are not thought of as having goods of their own,[2] no theory upon this topic is arrived at by the primitive law.

In the mature Roman law this proprietary monopoly of the father and husband was, with characteristic logic, firmly consolidated and permanently fixed. Everything brought in by the wife "in manu" and the children "in potestate" was the absolute property of the paterfamilias; even the trumpery articles acquired by the subordinate members of the family, like those acquired by slaves, were "peculium",[3] the property of the father and master. But whereas among the Hebrews the women were given a certain right to inherit absolutely and till marriage held as their own whatever they inherited, the Roman law placed and kept the unmarried woman under perpetual tutory, and the authority of her guardian and trustee was necessary to give legal validity to her acts.

When we turn to the history of property in land, we are dealing with a very different subject matter. The considerations set out in the foregoing discussion of moveables apply also to land, but two important new factors must also be taken into account. First and foremost, there is the interest of the community in land within the community. For this public interest there are many obvious reasons; unlike moveables, land is the essential source of livelihood in all grades, the Hunting, the Pastoral and the Agricultural. It is fixed in extent, and all members of the community must have a place to live and an opportunity to acquire a livelihood. Other

[1] e.g., Wagiriama, E.A., vol. I, p. 100.
[2] See C.H., § 7.
[3] Note the diminutive—"bits of property".

individuals, perhaps all the community, must be allowed sundry rights of various kinds over land, for example, rights of way. The community has an interest in the right use of land by certain or all individuals; for example, border land exposed to the attacks of another group must be defended. The second new feature is the complex character of the interests to which land gives rise. It is capable of user of different kinds by different persons at the same time, e.g., cultivation and transit, hunting and pasture, fishing and drawing water. It may be the subject matter of rights of different kinds by different persons at the same time; the right of a chief or a clan and the right of an occupying family, and so forth.

The public interest in the land of the community gives rise to public property in land. This is a simple and natural process. Members of the public at large practise certain courses of conduct over the general land of the community, for example, passage-way, drawing of water, the taking of unused land, and hunting; and what is done comes to be considered as the right of any member of the community to do. The extent of such public rights must vary according to the character of the land and the mode of livelihood of the community, and may in some places be so great as to give rise (in the mind of the observer, and sometimes in the mind of members of the tribe) to the notion that all the land belongs to the community, and that the rights of individuals or groups are dependent or partial. Communal property in land may seem strange to us, who are familiar with a brief interval of a few hundred years during which the theory of the ownership by the Crown of land in England has slowly died away, leaving now the individual (at any rate since 1925) in what seems at first sight the absolute ownership of land. But apart from the large and increasing proportion of land owned by, or subject to

rights of, the State or local bodies, the control of the community over the individual "owner" of land has been steadily growing through Rent Restriction Acts and many other means. The form taken by that control is an ephemeral matter: looking at the general history of property in land, it is of first importance to notice that the extent of communal property in land does not vary from the 1st Hunters up to the 3rd Agricultural Grade, and has throughout a wider field than what may be called private property.

In the lowest grade of culture it is not surprising to find a number of cases where we can observe no signs of property in land. There are two main reasons for this: one is that notions of ownership of land are very vague; and obviously the notion of a personal control of a moveable is easier than that of a personal control of land. The two ideas are of a different character, and a vague sense of property in moveables probably arose somewhat earlier than the corresponding conception in regard to land.[1] The second reason is, that in those communities where there is no property in land, what vague notions exist in regard to land are probably in the direction of communal property, and these cases are best treated as cases of rudimentary communal property in land. Even in the lowest grade these represent a very small minority of the tribes of that grade, and there are only a few instances in other grades.

Apart from these cases, communal property takes various forms—tribal property; the property of groups intermediate between the tribe and the family, namely, clans,[2] villages or other local groups; cases where the

[1] There do not appear to be any tribes of whom it can be said that there is no property in moveables.

[2] Where property is in the clan (the larger kinship group), we have something, intermediate between the family and the community, which is difficult to apportion between the two; but these cases are treated here as cases of communal property. If they were put in the class of family and individual property, the result would of course be to show a considerable decrease in that

tribal land is vested in the chief; and combinations of all these. We have said that the amount of communal property in land is constant throughout the grades. We must except here (as in the rest of this chapter) the 2nd Hunters and the 1st and 2nd Pastoral Grades. These tribes do not lie on the high road of development, for the 2nd Hunters have specialised in developing a purely hunting culture, and the Pastoral tribes have specialised in the production and development of a pastoral culture, and the economic circumstances of these tribes have in numerous cases taken them in a different or reverse direction of progress to that of the rest of the tribes. The grades, however, standing on the high road of progress do show a constant proportion of communal property in land.[1]

The form, however, which the communal property takes, changes through the grades. It changes in two ways. First, as we have seen, the larger kinship and other local groups in the more advanced grades weaken, and hence, as would be expected, the extent of the property of such intermediate groups dwindles.[2] At the same time come changes in government, to be described further in later chapters, and the organs of government become increasingly strengthened, centralised and specialised. In the 1st Agricultural Grade judicial organs begin to form within the executive, and in the 2nd Agricultural Grade

class through the history of the tribes (except for H2, P1 and P2). See the following pages.

[1] The following percentages, showing the proportion of communal property in land in each grade, are taken from a large number of tribes: H1, 65 per cent; A1, 55 per cent; A2, 57 per cent; A3, 60 per cent. As against H1, 65 per cent, H2 shows an increase to 85 per cent. Again, P1 shows 54 per cent; P2 an increase to 85 per cent. It is natural and to be expected that in the course of development of these specialised hunting and pastoral cultures the extent of communal property would increase. In those cultures there is only a limited use for family or individual property.

[2] In H2, P1 and P2 the change in the extent of ownership of intermediate groups is in the opposite direction. H1, 32 per cent; A1, 13 per cent; A2, 15 per cent; A3, 9 per cent. H2 shows an increase from H1 to 36 per cent. P1, 22 per cent, P2 an increase to 30 per cent.

there commences a rapid centralisation and development of administrative functions, in the form of a system under which the land of the community is vested in the chief, and the population holds directly or indirectly from him.[1] In other words, the older notion that the land is the community's tends to take the form of a notion that the land is the chief's. This is especially so where a community has moved into new territory, and where the land has been allotted by the chief to each of the various families to occupy.[2] So commences feudalism, which, when a class or classes of nobles become differentiated in the later 3rd Agricultural Grade, resembles what we know in mediæval Europe. Finally it developes elaborate incidents;[3] and the interest of the occupying individuals, which, in the 3rd Agricultural Grade, was something of the nature of a right of occupation, in the Codes hardens into something like ownership. Consequently, in the Late Middle and Late Codes feudalism appears to be receding, and it is only in regard to a part of the land, held by soldiers on the terms of performing military service, that we hear of the property of the Crown. In the Hittite Code occurs a section dealing with military and several other tenures;[4] and although military holdings may also have existed among the Hebrews we are not told of any in the Pentateuch. In early Rome down to 270 B.C. (and to a lesser extent until 200 B.C.) we are told that portions of the conquered Italian territory were allotted from time to time to "coloni" to hold on the terms of military service, but there is nothing of feudalism in

[1] Cases of "ownership" by the chief (together with varying rights of occupying families or individuals): H1, nil; A1, nil; A2, 8 per cent; A3, 27 per cent. There is a parallel growth in H2, P1 andP2. H1, nil; H2, 3 per cent. P1, nil; P2, 33 per cent. These figures are taken from Hobhouse, Wheeler and Ginsberg, p. 251, where figures are also given for the (slower) development of nobility.

[2] e.g., among Kaffirs. Compare the change that took place in England at the Norman conquest.

[3] In Ashanti (Rattray, p. 223 ff.) is found a complete system of feudal aids, services, escheats, forfeitures, suit of court, etc.

[4] *H.C.*, I, §§ 41–57.

the Twelve Tables. Nor is there anything in the Assyrian fragments, though it is probable that in Assyria, as in Hammurabi's empire,[1] land was held upon military tenure.

Hitherto we have spoken of the history of communal property in land. To it we should oppose, if we are to speak of the general history of the tribes, not individual but family property. Here we enter upon an aspect of the history of landed property which is precisely parallel to that of property in moveables. We have seen among the tribes the effect of the dissolution of clans and local groups, and this, as in the case of moveables, brings a change over from a system of family property administered by the individual for the family, to a system of individual property in which the members of the family have an interest.[2] But if we group together cases of so-called family property and of so-called individual property in land, we find that these cases form a stationary proportion of the whole throughout the grades.[3] Among some tribes only family or individual property in land is found; but more often they are found in systems where the whole land of the community is vested in the tribe or in local groups or in the chief. The cases of pure family or individual property become fewer as we progress through the Grades. At the same time, in the combined systems of public and family, or public and individual property, the right of the family or individual is partaking by degrees more of the nature of a limited

[1] *C.H.*, §§ 26–39. As in the *H.C.*, these clauses apparently refer to some other public officials in addition to soldiers.

[2] The following figures, taken from a considerable number of tribes, show the ratio of the cases where observers speak of individual ownership of land, to the cases where they speak of family ownership. H1, 50 per cent; A1, 80 per cent; A2, 250 per cent, A3, 400 per cent. H2 shows a slight increase over H1, to 80 per cent. The pastoral tribes again show the reverse movement: P1, 150 per cent, P2, 70 per cent.

[3] H1, 35 per cent; A1, 45 per cent; A2, 43 per cent; A3, 40 per cent. As against H1, H2 shows a drop to 15 per cent. The pastoral tribes also show a drop: P1, 46 per cent; P2, 15 per cent. If we include clan property in this group, there is a substantial decrease from H1 to A3.

ownership and less and less of the nature of mere occupation. In the Late Middle and Late Codes where, as has been seen, feudalism seems to be more or less universal but limited to military tenures, family rights in regard to land have given place to individual property. But even in the Codes sundry rights in regard to land remain vested in members of the family or clan. Firstly, for example, in some systems a vague, undefined, rarely exercised right of alienation or mortgage of land by the head of a family gives place to an unlimited right of alienation, subject to a right of pre-emption or redemption vested in the next of kin.[1] Secondly, several advanced systems give a man the first claim to marry his heiress cousin.[2] Thirdly, there remains in the Late Middle and Late Codes the practice under which, on the death of the head, the sons postpone for a time or indefinitely the division of the estate.

In detail, as distinct from this broad survey, it is natural to find enormous variety in the law between one type of property and another. In places, for example, where land in general is the subject of family ownership, we may find individual ownership of trees and crops, which may freely be bought and sold.[3] Again, we can see changes taking place in this or that detail of the law of certain tribes: at Otua, for example, in Nigeria, oil palms which were formerly always private property have become communal. But we find no evidence here, any more than in our broad survey, of any general change from communal to individual property. Individual pro-

[1] e.g., among the Hebrews; see *passim* in the Old Testament, e.g., Ruth IV.; Lev. XXV.

[2] See, e.g., First Gortyn Code. The object was to keep land and cattle in the control of the family. Daughters on intestacy inherited land and cattle only if there were no sons. If there were sons, the daughters' right of inheritance was limited to a share (half as much as a son's) in other property. (See First Gortyn Code, § 5.) See also Num. xxxvi. 6, which provides that the heiress must marry within the tribe.

[3] e.g., among the Wanyika of E. Africa, and in the Soso country of Nigeria.

perty is frequently found in the most unlikely places: in some parts reaches of rivers and fish swamps are private property.[1] There are even tribes among whom any person who cultivates land for one season obtains private property in perpetuity;[2] and there are savage peoples among whom individual property in land is so widespread that all land except the common pathways is the subject of individual rights.[3] The practice of letting land does not of course become a common institution until we reach mercantile civilisations, but it reaches back to the beginning of agriculture.[4]

The conclusions arrived at in this chapter are opposed to the prevalent theory upon this topic, which was popularised by Maine and for which he was largely responsible. This is the theory that land was originally owned by communities, and that from communal ownership (in comparatively modern times) sprang private ownership. To this theory he devoted a large part of his works,[5] and in support of it he adduced chiefly the example of the so-called Village Communities of India; and it was in no small degree his reputation for Indian learning that gained acceptance for his view. Unfortunately Maine's account of the Indian Village Community was based on an imperfect acquaintance with a limited district,[6] and the industry and research of Baden-Powell[7]

[1] e.g., in parts of Nigeria. [2] e.g., the Wateita of E. Africa.

[3] The Torres Strait Islanders are such a case.

[4] The following figures are from data in Hobhouse, Wheeler and Ginsberg, at p. 247. Proportion of peoples in each grade among whom land is leased: H1, nil; A1, 2 per cent; A2, 3 per cent; A3, 7 per cent. In H2 there is a rise from H1 to 6 per cent. Among purely pastoral peoples there appear to be no known cases. In the time of Hammurabi leases of land were an everyday occurrence.

[5] See especially his *Village Communities in East and West.*

[6] According to Baden-Powell (*The Origin and Growth of Village Communities in India*), Maine came to India at the end of 1862 as a member of the Viceregal Council in charge of the Legislative Department, and remained till 1869, residing in Calcutta for the most part. His evidence is taken from Northern India, chiefly from the N.-W. Provinces and Oudh.

[7] B. H. Baden-Powell, *The Indian Village Community* (Longmans, Green & Co., 1896); *The Origin and Growth of Village Communities in India* (Swan, Sonnenschein & Co., 1899).

paints a picture which supports at every point the views expressed in this chapter.

Maine's description of these joint Indian villages was that land in the village was owned in common; and his view was that even where allotment of land in severalty had taken place, the notion of a common cultivation was maintained by minute rules regulating the tillage of the several holdings.[1] In fact the joint village is not the universal nor the oldest type of village in India. Apart from cases where the common holding of land is the result of a special voluntary association, it is traceable only among the superior tenures of the Aryans and later tribes who settled in Northern or Upper India. Over far the greater part of India the village of separate holdings prevails; nor, even in these so-called joint villages, is there of necessity any joint ownership of the land. Apart from villages in which the families or individuals each have separate holdings, two types of ownership of the land are to be found. In one, the village is a portion of a territory where land is owned by the clan, and the village itself derives a delusive appearance of being held in common from certain features of clan life and union. Within the village itself such further or other ownership as appears is family ownership. In the other (more frequent) type, the village constitutes the extent of the possessions of an ancient acquirer and founder, the descendants of whom have succeeded and hold by joint succession. The parent of all these forms of village-communities (if they have one parent) is family ownership.

[1] See *The Origin and Growth of Village Communities*, p. 99.

CHAPTER XXV

CRIMINAL LAW

In the previous three chapters were traced the history of three closely interconnected topics, the law of marriage, inheritance and property, which together may be called a law of rights. In this and the following two chapters we turn to what may be called a law of wrongs, namely, the law of crimes and of civil injuries. These last two departments of the law are to a certain extent interconnected in that the history of both is especially shaped by the growth of central executive authority in the community.

Although the distinction between criminal and civil wrongs appears to be familiar and universal, any attempt accurately to define that distinction is fraught with great difficulty. Everyone can distinguish an action for damages for trespass as an action for a tort (or civil injury), as against a prosecution for murder which is plainly criminal; and on the other hand there are a large number of intermediate types of proceedings, the classification of which has sometimes given the greatest difficulty to English judges.[1] The information upon which criminal proceedings are initiated must usually come from private individuals; and throughout English legal history criminal prosecutions have usually been instituted by aggrieved persons. Even at the present time when a Director of Public Prosecutions, a police force, and a number of government departments and officials of local authorities exist for the purpose of prosecuting crimes,

[1] See the decisions as to what is a "criminal cause or matter" within the Judicature Acts (now sec. 30, 2 of the Judicature Act, 1925).

nevertheless there remains a large proportion of offences (and in particular most cases of assaults, frauds and libel) which would never be prosecuted unless the proceedings were undertaken by and at the cost of private persons; and in these cases the contest is between the private prosecutor and the defendant, and the rules of procedure differ little from those of civil actions. In these and many other cases the same act of the defendant, which constitutes the crime, constitutes also a civil wrong against the prosecutor. The purpose of most criminal proceedings is to inflict imprisonment or a fine upon the defendant, and not to compensate the plaintiff; but who is to say that a complainant may not feel just as much compensated when the accused is incarcerated or fined, as when he himself wreaks a violent revenge on him or receives damage from him? In most actions of tort also, the defendant may be punished, for "vindictive" as well as compensatory damages can be given to the plaintiff whenever appropriate. In this country it is rarely that, in the same criminal proceedings, punishment is inflicted on the defendant and compensation awarded to the plaintiff for the injury done to him; but there are a few such cases, and in the law of some foreign countries procedure of this kind is common.

It is not, therefore, right to see the distinction between crime and civil wrong in the different character of the proceedings taken, or of the sanctions applied. Nor is it satisfactory to say that a crime is an offence against the community, while a civil wrong is an offence against an individual. This definition of a crime is merely derived by analogy from the definition of the civil wrong, and takes us little further. What is an offence against a community? Why are some wrongs criminal in one country and not in another? And is not any wrong against an individual an offence against the well-being of the community? The true distinction is something very

different: it is that in the case of a crime, the sanction is enforced at the discretion of the State, and can be remitted only by the State;[1] while a civil wrong can be compromised by the parties (if they are of full age).

But here we are concerned with the origin of the distinction, and indeed it has a historical and purely practical basis. A crime is not so much an offence against a community, as that which the community at some past time *regarded* as an offence against it, and therefore resolved to punish. Hence offences which seem to us far-reaching and serious in their effects may be civil injuries, and trivial wrongs may be crimes; and hence, too, though a person directly affected by a crime should accept compensation, the community is not satisfied, and the criminal liability remains until the offender is punished or pardoned by the State. Hence also the sanction which the community chooses to inflict is more commonly one which has as its direct object the punishment of the culprit and the deterrence of other offenders, rather than the compensation of the injured;[2] but though the proceedings directed to be taken are in modern English law generally of a separate order, specialised for the purpose in view, there is no logical reason why, in the same proceedings, the defendant should not be punished for his crime, and the plaintiff compensated in accordance with the civil law.

Partly from a chapter in Maine's *Ancient Law*[3] has been drawn a widespread conception that in primitive law there is no separation between crimes and civil injuries. But it is not so; the distinction is universal, from the time when civil and criminal law are first found, until

[1] Austin, *Lectures on Jurisprudence*, Lect. XXVII; Kenny, *Outlines of Criminal Law*, 11th Ed., p. 14.

[2] There is also a large group of criminal offences in English law, where the proceedings result in rewarding the informer; and there is at least one instance as early as the *C.H.* (§ 2, Witchcraft). These date from a time when no police force exists.

[3] *A.L.*, Chapter X.

the end of the primitive law. In the earlier period of their history the difference is far easier to observe, and far more important, than in the days of mature law; but towards the end of the period of primitive law, when the criminal and civil law are undergoing a great transformation, they do for a time approach one another closely, and it is from this stage that the misapprehension is derived.

We have already seen that, before Courts appear in the 1st and 2nd Agricultural Grades, there is rudimentary criminal law: the community, that is to say, regards certain acts as offences of such importance that public opinion calls for punishment of the offender. Public action, when it takes place, is based on common knowledge or belief; and there is scarcely anything in the way of a trial. There is, at any rate in the lowest grade of culture, little in the way of organised public action, but more commonly some person or persons, when opportunity offers, visit the offence with the appropriate punishment. Nor is the imposition of the sanction speedy or automatic, but it is often delayed until the matter becomes a scandal; and even so the guilty individual may often escape unharmed if he is sufficiently thick-skinned to live down public opprobrium, ridicule or neglect, or sufficiently strong and cunning to avoid the avenger's hand. There are, for example, recorded cases of persons committing incest and avoiding retribution; and in some parts of the world, when the commission of a crime becomes public, the offender escapes punishment by suicide, so that there is again no public action. Yet for all this we must call these offences crimes, and must recognise the existence of a few ill-defined rules according to which certain offences are (or should be) visited by sanctions. In the 1st Hunters these offences are chiefly witchcraft, incest and bestiality, the main crimes of the primitive criminal law. Among the

2nd Hunters, who have developed a specialised culture of their own, the list of criminal offences lengthens, chiefly by the addition of a few sacral crimes.[1] There are usually no other criminal offences to be found before the rise of Courts, and there is no law of civil injuries.

In the 1st and 2nd Agricultural Grades the Courts and a law of civil injuries appear; yet until we reach the Centre of the Middle Codes and the tribes of a corresponding level of culture there is no difficulty whatsoever in distinguishing a criminal from a civil offence. Firstly, there are, generally speaking, no wrongs which are at the same time civil and criminal. The list of crimes has hardly been increased, and the civil wrongs are chiefly homicide, wounding, rape and adultery, and theft, the sanctions for which, when sanctions become defined, are pecuniary payments to the aggrieved individuals or families. Secondly, all the basic modern characteristics of crime and civil injury are to be seen in the law during this period. A civil claim, even for homicide, is entirely the affair of the parties, and if settled by them is at an end: a criminal offence is the concern of the public.

Again, in English law it is a general rule—though not well defined nor universal—that no crime is committed unless there is " mens rea ", a guilty state of mind. Most civil wrongs, however, in the law of England may be committed irrespective of intention. To constitute a trespass it need not be shown that the defendant intended to commit a trespass; to constitute a libel or slander it need not, as a rule, be shown that the defendant intended to libel the plaintiff or anyone else. The same difference is found also between civil and criminal wrongs in the primitive law, and it arises from the fundamental difference between the two branches and between their origins. In fact the offences contained in the list of

[1] See *post* pp. 291–2. There are also a few sacral crimes to be found among the 1st Hunters.

crimes of the early primitive law—namely, witchcraft, incest and bestiality—are offences which by their very nature cannot be committed without an intention to commit them. The civil law of wrongs (as we shall see) must contain such sanctions as will preserve peace between the defendant and the plaintiff. But there is no reason why the community should be wroth and inflict punishment on an unintentional offender. There is, for example, a recorded case among a people in the lowest grade of culture, where a man was not punished for incest, on the ground that he was weak-minded.

In the Codes, even as late as the Hittite Code, there is very little criminal law. The development of the law has been chiefly in the direction of the expansion of the civil law, and the volume of criminal law remains very small. The circumstances in which crimes are committed are simple, and there is little or no need to legislate for special sets of facts; and the sanctions are well known, being for the most part capital. But to a certain extent there remains outside the Codes that residuary class of criminal offences which involves an act of disloyalty or insult to the Crown, a class which is not often the subject of legislation. The sanctions for such offences, even until modern times, are too often shaped by the whim of the Crown, and imposed with little semblance of a trial.

Until we reach the Hittite and Burgundian Codes the sanctions of the civil law remain almost entirely pecuniary, and there is a plain distinction between civil and criminal sanctions (whether the latter are fines payable to the Crown or are corporal). In the Central, Late Middle and Late Codes and among the tribes above the Kaffirs the sanctions of these civil wrongs slowly become, in serious cases, corporal instead of pecuniary, and at the same time the civil wrongs, in serious cases, are slowly being transformed into criminal offences. The process takes place by stages and is not complete till after the

end of the period of primitive law. The details of the process will be seen more clearly in the following chapters, when we come to trace the history of the law of civil wrongs. In the 1st and 2nd Agricultural Grades, the growth of centralised executive power produced the Courts and a law of civil injuries. It is the continued and more rapid growth of that power (together with circumstances which will appear in the following chapter) that slowly turns serious forms of the civil wrongs into criminal offences. This process has two aspects. Firstly, we may regard it from the point of view of the development of the law of civil injuries, and examine the alterations that take place in the civil law. Secondly, we may examine the process from the point of view of the history of the criminal law, that is, from the point of view of the extension of the royal power, and see how that extension increases the territorial and juridical area within which an act of violence is considered an affront to the king's dignity and therefore a crime. In the present chapter we shall deal with the second of these aspects, leaving the other for the two following chapters, but the process is a connected whole.

Nevertheless, even in the Late Middle and the Late Codes, when this process of change is at its height, we must not readily infer a complete fusion of the criminal and civil law. One cause of misapprehension is the notion that the civil, unlike the criminal law, compensates the plaintiff and does not punish the offender. This is not even true of the modern English law of torts, for in the action of trespass (which covers all the civil injuries of the primitive law except homicide) " vindictive " or " exemplary " damages can be given whenever circumstances call for them. When we find, therefore, a rule among most tribes and in many Codes that the sanction for theft of a certain thing is multiple restitution, there is no reason to seek to explain the rule by

the theory that primitive law confuses civil wrongs and crimes. Nor need we be disturbed at the thought that a sanction for a civil wrong may be corporal. Next, when the Twelve Tables provide that " if he breaks his limb, unless he makes his peace with him,[1] let there be like for like ", this is a rule of civil law, for it may be compromised by the parties. Similarly, in modern English law, a trespasser may be forcibly ejected by the rightful occupier, using no more force than is necessary; but trespass is merely a civil wrong, and this is a rule of the civil law. In the Hebrew law a man found guilty, in the city of refuge, of intentional homicide is handed over to the next of kin to be killed; and this, as we have seen, is more of a civil than a criminal offence. In one of the earlier Assyrian fragments[2] it is provided that if one of the brothers managing an undivided inheritance is guilty of killing,[3] " the master of those that are killed shall, if he wishes, kill him, and, if he wishes, shall be merciful and take his part of the inheritance." This by ordinary standards is still a civil wrong for the parties may compromise it, at any rate within the limits named.[4] But when we turn to the Late Codes, especially the Sumerian and Babylonian legislation, what are we to say of provisions like the following? The Code of Hammurabi provides that if a man has struck the daughter of a patrician and has caused a miscarriage, he shall pay ten shekels for what was in her womb;[5] but " if that woman has died one shall put to death his daughter ".[6] If, on the other hand, the injury was done to the daughter of a plebeian, he shall pay five shekels of silver, and if

[1] i.e. usually by money compensation. [2] Text No. 2, § 2.

[3] It does not appear clearly whether the killing is of free persons, slaves or animals, but it probably does not include free persons.

[4] Similarly, among the Hittites, the law of Telepinus left it to the next of kin to inflict death or not as he pleased; while the *H.C.* (I, §§ 1–4) fixed the sanction at delivery of a specified number of persons, twice as much for intentional as for unintentional homicide.

[5] *C.H.*, § 209. [6] *C.H.*, § 210.

the woman has died " he shall pay half a mina of silver."[1] Note that these clauses imply proceedings by the father of the woman against the man who struck her, and justice is being done between the parties by inflicting on the defendant the same injury as that suffered by the plaintiff, for example, the death of his daughter. In another place the Code lays it down that if A has (negligently) built a house for B, and it has collapsed, and B has been killed, A shall be put to death; but if it is B's son who is killed, " one shall put to death the son of that builder ".[2] Again, it is provided elsewhere that where A proves that something in B's possession belongs to him, and B proves that he bought it from C, C shall be put to death as a thief, and B shall retake from C's estate the price he paid. But if C is already dead, B shall take five-fold from C's estate.[3] Again, it is enacted that if a man " has broken a patrician's limb, one shall break his limb ".[4]

Are these capital and talionic sanctions civil or criminal? It must be remembered that they constitute, as a rule, the sole remedy given by the Codes in these cases. Are we to imply, as is expressed in the clause of the Twelve Tables, that these are the sanctions " unless he makes his peace " with his opponent—for if so, the rule is one of civil law. Or has the wrong advanced a step further and become a criminal wrong for which the sanction will be imposed by the King if the party does not bring proceedings, though the sanction is in the nature of a maximum sentence, and the King can in fact impose as lenient a sentence as he thinks fit in a proper case? We are not expressly told, but the correct answer is probably intermediate between the two. By now progress had been made to the following point. These capital and other corporal sanctions were now what public

[1] *C.H.*, §§ 211, 212.
[2] *C.H.*, §§ 229, 230.
[3] *C.H.*, §§ 9, 12.
[4] *C.H.*, § 197.

opinion considered fair and right as general principles, and no milder rule would suffice to compensate the aggrieved individual. But while the practice varied as between different types of wrongs, these offences were from time to time compromised by the parties in extenuating circumstances. The King, however, where he had information of the commission of the offence, and where it was serious enough to constitute an affront to the royal dignity or a challenge to the royal power, would himself visit the like punishment on the offender, whether individuals initiated proceedings or not. What those circumstances were we shall presently consider. So far as our information goes they were much the same as in the corresponding period in England, namely, the thirteenth century, which lies in the full light of history and can be examined in the practice books and other records of the time. It is best to say of the period of the Late Codes that while it is in all probability still possible to distinguish crime and civil offence, the distinction is for the time being of a theoretical rather than practical importance, and is not characteristic of the true spirit of the law.

But this stage is not reached till the end of our period, and until at least the Late Middle Codes it is quite easy to distinguish the crimes mentioned from civil injuries. The Codes, as we have said, do not always trouble to tell us whether the sanctions referred to can be remitted without the consent of the Crown, nor who applies them; these things were no doubt often too well known to need mention. Among the Kaffirs, however, where we can see the distinction in practice, it is even a crime to compromise[1] or fail to report[2] criminal offences. And in the Codes, it is provided in some cases that instead of the (civil) judges,[3] the "King" or the "King's Court"

[1] *Cape Commission*, p. 86.
[2] *Ibid.*, p. 8.
[3] Compare *A.C.*, § 15.

tries the offence ;[1] that the sanction is often not specified but is left to be fixed by the King or his Court ;[2] that the sanction is only remissible by the King ;[3] and that failure to report an offence of which one has knowledge is an offence.[4] In the process of transformation that begins in the Centre Codes, the details often vary. Sometimes there is an intermediate point when the offence is both a civil injury and a crime, but neither the aggrieved individual nor the King can forgive the offender in such a way as to deprive the other of his rights ;[5] while in other cases the King has, within certain limits, an overriding power to pardon or punish.[6] As for the sanctions, sometimes a criminal sanction is added to a civil sanction and in the same proceedings the plaintiff is compensated and the defendant punished ; but more commonly there is only the one sanction, and the sole remedy of the aggrieved person is to see his enemy punished by fine,[7] mutilation or death. Imprisonment is, of course, practically unknown even in the period of the Late Codes, but in the Assyrian fragments a period of corvée is often met with among the sanctions.

In the rest of this chapter let us follow the history of the primitive criminal law from another angle, and examine in turn the various offences, in the order in which they make their appearance.

Witchcraft is one of the crimes found universally among the tribes from the lowest grades upwards, and in most of the Codes. The offence seems to involve three elements. One is the offence of poisoning by direct or indirect methods of some sort ; another the use of magic

[1] *H.C.*, I, § 45 (b) ; II, §§ 73, 74, 83, 84, 85 ; *A.C.*, §§ 41, 48.
[2] *H.C.*, I, § 45 (b) ; II, §§ 73 to 86. Assyrian Text No. 2 (Vat 10001), § 3.
[3] *H.C.*, II, §§ 73, 84, 85 ; *C.H.*, § 129.
[4] *A.C.*, §§ 41, 48.
[5] e.g., in the law of homicide in England, early thirteenth century, see *post* p. 298.
[6] e.g., in the law of adultery, see *post* p. 294.
[7] Sometimes received by the aggrieved person, sometimes by the Crown.

power for an evil purpose (especially to cause the death of a person);[1] and the third, an offence of general evil living.[2] Partly because witchcraft is in fact practised among the tribes, the belief in the guilt of witches is difficult to uproot, and while it is true that this belief leads to widespread and cruel injustice, yet it does on the whole, and especially in the days before Courts arise, operate to remove from the community persons who violate its canons of decent conduct. In primitive law the reputation for witchcraft is not by any means confined to the female sex. By the nature of the crime it is rarely possible to secure evidence of its commission; and even among some of the more advanced tribes the person believed guilty, either because such is his reputation, or because the sorcerer of the tribe denounces him as guilty, is killed by the community without further trial.[3] But among most peoples of the 3rd Agricultural Grade and in the Codes the ordeal, appearing in its customary rôle of filling the deficiencies of proof, is applied in various forms to this purpose; and in the Code of Hammurabi and even in Modern Europe—in England up to the eighteenth century—the trial of witches by the ordeal of water becomes a widespread practice.[4] The usual sanction of witchcraft is death, but lesser punishments are found.

In the Codes, witchcraft undergoes the same changes as do most of the other crimes of the primitive law. In the period of the Early Middle Codes (the period of the real birth of religion as we know it) witchcraft becomes

[1] cf., in the Anglo-Saxon Laws, 2 Aethelstan, § 6; II Canute, § 4 (a).

[2] cf. the Roman word "maleficium".

[3] e.g., among the Kaffirs, *Cape Commission*, p. 68. As late as 1598 the jurist Bodin (*Démonomanie*, Bk. V, Chap. IV) maintains that "to adhere in a trial for witchcraft to ordinary rules of procedure would result in defeating the law of both God and man." Cited, Kenny, *Outlines of Criminal Law*, 11th Ed., p. 382.

[4] The ordeal is, as it were, half ordeal, half execution by drowning. In the *C.H.* it is only applied where there is no oral evidence (*C.H.*, § 2), as it is, in the same circumstances, where a wife is charged with adultery (*C.H.*, §§ 131, 132). Where a wife is caught in adultery, she may be bound to her lover and drowned with him (§ 129).

not only a criminal offence (that is, an offence against the community), but also an offence against God or religion,[1] and the priestly writings of the Early Middle Codes pay much attention to it.[2] The priests are imposing penalties upon those guilty of the offence, and in the course of so doing are trying disputed charges of witchcraft. Consequently when, at the commencement of the Late Middle Codes, a separation takes place between the jurisdiction of the secular and of the ecclesiastical Courts,[3] witchcraft becomes cognisable exclusively by the latter, and, in the period of the Late Middle Codes, is only mentioned in the priestly writings.[4] In the Late Codes of the ancient Near East there is no sign of ecclesiastical Courts which retain jurisdiction over witchcraft or the other subjects which, in the Late Middle period, among the Hebrews, Romans, English and others, had been assigned exclusively to the priests. The Assyrian Women's Code provides capital punishment for the male or female found in the act of practising witchcraft, and makes it an offence to fail to report to the King the fact that one has seen the act or has heard of it from an eye-witness.[5] In the Code of Hammurabi, when a charge of witchcraft is made and not proved, the accused suffers the ordeal by the sacred river, and if the river overcomes him the accuser takes his house. If the river saves him,

[1] An offence which is at the same time a criminal and a religious offence is referred to in this book as a " sacral " offence, by which term it is commonly known. See *post* p.p. 291–2.

[2] In England, see *Edward and Guthrum*, § 11 (exile or death, " and the nation shall be purified "), 2 Athelstan, § 6 (death or trial by ordeal), 2 Canute, § 4a (= *E. & G.*, § 11).

[3] See *ante* p. 216. The date is about 400 B.C. among the Hebrews (it has not occurred in the *H.C.*) and A.D. 1164 in England. But the process begins in England as early as the Conqueror's time (see *P. & M.*, vol. I, pp. 449–450), after which the ecclesiastical Courts extend their jurisdiction.

[4] In England it is tried in the Ecclesiastical Courts. In the Pentateuch it is not mentioned in the Heb. C., but in Exod. xxii. 18 (following immediately upon the Code), where the language is priestly. Among the Romans the offence was triable exclusively by the pontiffs. The Twelve Tables contain the fragment " Qui malum carmen incantassit ".

[5] *A.C.*, § 48. These offences are tried by the King, see *post* p. 362.

the accuser is put to death and forfeits his house to the accused.[1] In England, however, the period of the Late Codes so rapidly succeeds that of the Late Middle, that the ecclesiastical Courts still retain their powers, and they continue to try witches for centuries afterwards, though from the period of the Late Codes the secular Courts also claim and exercise jurisdiction.[2]

Incest, which is also found amongst all tribes and in most of the Codes, is a breach of the marriage laws and signifies sexual intercourse between persons whose relationship is such that they are prohibited by the law from marrying one another. As is well known, the rules governing this relationship vary much from tribe to tribe. Incest is not always as serious an offence as witchcraft, and though, like witchcraft, it is commonly punishable by death,[3] occasionally the sanction is a mere fine.[4] In the Early Middle Codes incest, like witchcraft, becomes a sacral crime, an offence against the marriage laws and therefore of special interest to the priests ; and the priestly writings devote attention to it. In the Late Middle Codes it is exclusively triable by the ecclesiastical Courts,[5] but owing to the weakness and incompetence of these tribunals, is often very lightly punished or not punished at all.[6] In the Code of Hammurabi the offence

[1] *C.H.*, § 2. This is the reverse of the form of ordeal as generally used in Europe in recent times.

[2] So (in A.D. 1290) Britton, I, 179, Fleta, p. 113, who consider burning to be the proper sanction. See *P. & M.*, vol. II, p. 554. Even when the Ecclesiastical Court tried the offence, the death sentence was executed by the King's Court. During the Commonwealth well over one hundred persons were hanged for witchcraft in this country; Hutchinson, *Essay on Witchcraft* (1718), pp. 173 f.

[3] Of the man; sometimes (e.g., among the Lango) the woman is flogged.

[4] e.g., Kaffirs (*Cape Commission* p. 91).

[5] In the *H.C.* it is still tried by the King's Court, but it is a special concern of the priests, for it is one of the subjects provided for in the ecclesiastical section at the end of the Code (*H.C.*, II, § 73 ff.). In England after 1164 it is solely tried in the Ecclesiastical Courts ; as it was also among the Hebrews, for it is only mentioned in the religious writings and not in the Heb. C. At Rome, we are told, incest was part of the province of the Pontiffs.

[6] In the *H.C.*, if our translation is correct, it was only punishable where the incest was also rape. As to mediæval Europe, see *P. & M.*, vol. II, p. 543.

is apparently no longer tried by ecclesiastical Courts, and is punished with exile or death according to circumstances ;[1] but in England the ecclesiastical Courts long retain jurisdiction, and the punishment consists of penances, fines or nothing.[2]

The laws of most tribes make sodomy and bestiality a criminal offence punishable with death. In the Middle Codes it undergoes the same changes as does the offence of incest; and in the Early Middle Codes becomes a sacral crime of especial interest to the priests. This is clearly the position in the Hittite Code also, where the offence is only mentioned in the ecclesiastical addition.[3] Here we are told more than once that " if (or " when ") they bring him (the accused) to the gate of the Palace, the King can put him to death, and the King can let him live, but he may not appear before the King."[4] The defendant, therefore, is regarded as too unclean to appear before the King,[5] but the latter retains his jurisdiction over the offence. When the separation takes place between the Courts, bestiality is exclusively tried by the ecclesiastical tribunals in Mediæval Europe and among the Hebrews[6] and Romans.

Next should be specially mentioned a small group of crimes which are sometimes called " sacral offences ". They are found even in the lowest grade of culture, where, for example, the betrayal of mysteries by the initiated[7] is often avenged by death at the hand of fellow members. Until the stage of the Codes, their affinities are magical rather than religious and they are sometimes

[1] *C.H.*, §§ 154 ff.

[2] On the Continent the sanctions were more severe and sometimes capital.

[3] II, §§ 73–86.

[4] *H.C.*, II, §§ 85, 73, 74. But when committed between males or with certain animals, it is no offence at all.

[5] Compare, in the *A.-S.* laws, 1 Edward, § 3 (homicide).

[6] Exod. xxii, 19, following on the civil Code. The language is religious. Bestiality is not mentioned in the Code.

[7] Or, among Hz tribes, offences against the rules of the hunt, which are thought to endanger the food supply.

thought to endanger the welfare of the community by reason of some magical influence. But, more important, they are breaches of fundamental public canons of conduct. In the Early Middle Codes the sacral offences expand into a substantial list of religious crimes, and embrace also witchcraft, incest, bestiality and adultery,[1] which were hardly " sacral " among the lower tribes. It is characteristic also of the modern criminal law that it contains a list of wrongs having affinities with religion. Examples are to be found in the crimes of blasphemy and sacrilege, and in statutes directed against heretics ; and one or two of these offences should perhaps be considered as evidence of the creative influence of religion upon law. But regarding the group as a whole, it is more accurate to view them as laws which punish (as do other criminal laws) breaches of canons of conduct considered by the community to be of fundamental importance. Here is, perhaps, the true borderland between law and religion, for religion, too, is apt to erect into religious offences breaches of the most important rules of behaviour between man and man. Sacral offences as a whole, especially among the lower grades of tribes, are of an ephemeral nature and disappear leaving no impression on the law.

The types of criminal offences so far described, namely witchcraft, incest, bestiality and a few sacral offences, are found throughout the tribes from the 1st Hunters upwards. Apart from a slight extension of the list of sacral crimes there is very little further development till we reach the Codes and the tribes of a corresponding grade, from the Kaffirs upwards, while in the meantime the law of civil wrongs has come into existence and has increased to such an extent as to dwarf the criminal law in importance.

[1] For example, the addition at the end of the Hittite Code, II, §§ 73–86, deals only with incest, bestiality, adultery, succession to the widow, and (§ 85) sacrifice.

In the Early Middle Codes one of the civil injuries, namely adultery,[1] becomes also criminal[2] and forms one of the list of sacral crimes. Until then, adultery is usually a mere civil wrong, to which is attached a very light sanction, or none, according to the local standard of chastity, but even among a few average tribes of the 3rd Agricultural Grade, it shows signs of becoming a sacral crime as being a breach of the marriage laws.[3] One of the Early Middle Codes makes adultery a crime punishable by payment of full blood-money to the King.[4] At this period the priests are taking an active interest in charges of adultery;[5] and in the Late Middle Codes, while rape apparently remains triable by the secular Courts, adultery (that is intercourse with a married woman by consent) and probably also seduction (that is intercourse with a single woman by consent) become exclusively triable by the ecclesiastical Courts.[6] As in the case of the other sexual offences to which reference has been made the weakness and incompetence of the ecclesiastical arm produce the most unhappy results.[7] In

[1] See, for its history, *post* pp. 323 ff.

[2] It is also criminal among the Kaffirs (Cape Commission, pp. 475–6), Wataveta (E.A., vol. I, p. 103), and other tribes of the same stage of development (i.e. the stage of the Early and Early Middle Codes).

[3] See, e.g., Masai, where a warrior or boy who commits adultery with a woman of his father's age-rank is liable to be cursed and to pay a fine of two oxen to have the curse removed (E.A., vol. I, p. 105), and cf. the Jaluo Nilotic Kavirondo (*ibid.*, p. 106).

[4] Lex Fris., tit. IX, De Farlegani (A.D. 800) which provides in regard to a freewoman "componat ad partem regis weregildum suum." Compare Aeth., § 31, Lex Baiuv, 8, 1, 10; see *post* p. 326.

[5] In Europe from about A.D. 700 (see *P. & M.*, vol. II, p. 364 ff., 484, 543–4); among the Hittites (adultery occurs in the H.C. only in the final ecclesiastical addition); and among the Hebrews, see, e.g., Deut. xxii, 22 f.; Num. v, 11 f.; and Romans.

[6] In England rape remains triable by the secular Courts, fornication and adultery by the ecclesiastical. Among the Hebrews, adultery with a married woman was certainly triable exclusively by the ecclesiastical Courts, for it is not referred to in the Code or its additions; seduction (or rape?) of a virgin is mentioned at the end of the Code, as well as in the ecclesiastical writings, and may have been triable by both, or by the ecclesiastical Courts alone. Among the Romans there is very little information. Probably the Pontiffs had exclusive jurisdiction in adultery.

[7] Especially in England, where the sanctions were whipping or other bodily penances, commonly remitted for money, see *P. & M.*, vol. II, p. 544.

the Late Codes of the Near East the secular Courts regain their jurisdiction, and adultery becomes what it had been in the Central Codes, a mixed civil and criminal offence.[1] But throughout the period of the Central, Late Middle and Late Codes the woman's husband also has a right to slay the guilty pair if they are caught in the act.[2] Now a charge of adultery might be a convenient way of securing the death of one's enemy. Intentional homicide is now also a criminal offence (as well as civil), and public opinion will not tolerate the promiscuous infliction of the death penalty upon the husband's mere allegation of adultery, aided by the evidence of his wife, who may be perjured or may have acted under his orders.[3] The law, therefore, in the Hittite, Assyrian and Babylonian Codes alike,[4] is as follows: If the husband finds his wife and her paramour in the act, and slays them both, he commits no offence; but if he brings proceedings against the adulterer[5] no heavier punishment can be inflicted on the latter than the plaintiff inflicts on his own wife; and if he pardons her he must also pardon the man.[6] But the King may, if he please, pardon the adulterer and probably the wife.[7] In the intervening

[1] In England, a little later, a form of the action of trespass (a partly civil proceeding) lies for damages for "criminal conversation" against the adulterer. The action survived till 1857.

[2] In England, see Alfred, § 42 (7) and Leis. Will. 35, which provide that a husband, father, son or brother may kill the adulterous pair if caught in the act. See also II Canute, § 53. In the thirteenth century the right to kill seems to be giving place to a practice of emasculating the adulterer (see *P. & M.*, vol. II, p. 484). There are still traces of the old rule in the modern English criminal law, as there were in the Roman Digest (48, 5, 22). Similarly among the Hebrews, the sanction is death by stoning, so that the offence is criminal, but the passage (Deut. xxii, 22 f.) only refers to cases where the adulterers are caught in the act.

[3] See also the 1st Gortyn Code, § 2, for the mode of trial where the defendant says he was tricked. These trumped-up charges were all too common.

[4] H.C., II, §§ 83, 84; A.C., §§ 13 to 16; C.H., §129.

[5] In A.C., § 15, the proceedings may be brought "before the King or before the judges".

[6] In the A.C. for the same reason, namely, the possibility of collusion, where a man is charged with receiving goods from a married woman knowing they are stolen from her husband, the Code provides that the latter must treat his wife and the receiver alike (§§ 3, 4). See also § 25 for another sexual charge.

[7] Certainly in the H.C. the King can pardon the wife.

period, however, of the Late Middle Codes, if the husband brings proceedings they must be in the Ecclesiastical Court, and there is no question of death sentence or occasion for pardon.

We must now mention a group of crimes of the primitive law, which consists of various offences against the welfare of the community, or later, when central executive power has grown,[1] against the King. Perhaps we should rather say that they represent a residue of offences against the welfare of the community, of which offences the crimes already mentioned are but instances. As an example of this group, before the rise of Courts, may be taken the case of the Greenland Eskimo, who has made himself such a communal nuisance and danger that some person kills him after obtaining the general consent.[2] An example in the 3rd Agricultural Grade is afforded by the use, among the Akamba, of Kingole (a kind of lynch law) for habitual and persistent wrongdoers. To the same category belongs perhaps the offence of perjury, for among the Kaffirs and other tribes, when a Court gives judgment, it may (in accordance with a practice which might well be copied in this country) impose a fine upon a witness for a gross case of perjury committed before it. Throughout the more advanced tribes an offence to the dignity of the King is punished by him, and in the age of the Codes, as the royal functions widen, this offence increases exceedingly, and is especially represented in two classes of instances. The first class consists of disobedience to the King's order, and in Europe from A.D. 700 to 1200, while the King is seeking to extend the authority of the civil Courts, the sanction of outlawry becomes (for the first time) regularly employed to aid in its growth.[3] The second and more important

[1] That is, in Grade A3, especially among the more advanced peoples of that grade.

[2] See *ante* p. 193.

[3] The first mention is in Lex Salica, LV, 2. Outlawry or expulsion from the community is by its nature a sanction appropriate only to criminal offences.

class consists of such acts of violence—or in other words, civil injuries—as constitute affronts to the King and challenges to his authority. What is such an affront or challenge naturally depends on the extent of his authority and dignity, and as these grow, so spreads the criminal law. Its limits are at all times necessarily indefinite and arbitrary, but its growth has two aspects; it involves a territorial extension, and an extension to new offences. In the early days of the feudal system, when the King's power is limited (outside such land as is his own property) to a confined area at the centre of the social structure, this class of offences is confined to acts of violence towards his family, his servants or his property.[1] In the early part of the Lex Salica, for example, a fine[2] is payable to the King for ravishing a maid in the King's service.[3] In England in the somewhat later collection, known as the Laws of Aethelberht, is a large group of such criminal offences—acts of violence committed on premises where the King is present, or against persons in his service, or theft of his property.[4] These are "mundbryce", offences against "the King's peace", as distinguished from offences against the peace of any other man; and till the other day crimes were still charged in our indictments as having been committed "against the peace of our lord the King, his crown and dignity". As the area of the King's

There are one or two instances among H2 tribes, where the criminal law shows some development (see the case of the Omaha Indians, in regard to intentional homicide, Lowie, p. 401 f.). In the Codes expulsion is often the sanction for incest, see H.C., II, § 82; C.H., §154. Cf. also Lex. Rip., 69, 2. When homicide begins to become a criminal offence, the public law at first intervenes with a sentence of exile until the slayer has made peace with the next of kin—cf. the cases of the Omaha Indians (murder), Hebrews and Athenians (unintentional killing) and the Icelanders in Burnt Njal. In the period of the Late Codes in England it is in fact the sentence for most murderers, for the law is usually too weak to seize and hang them. See page 305, note 3.

[1] As among the most advanced A3 tribes, especially adultery with the wife of a chief, which is capital over a large part of W. Africa, and is a comparatively common offence because of the age of the chief.

[2] "Fridus" (peace-money) as distinct from "faidus" (fee, or compensation payable to a wronged individual).

[3] Lex Salica, Chapter XIII, 6; cf. Aeth., § 10.

[4] Aeth., §§ 2 to 12.

power spreads from the centre outwards, so the area of his peace widens. It extends to acts of violence committed on the "King's highway";[1] and in certain districts in which he is specially interested, or at certain seasons, he has special "pleas of the Crown" which do not belong to him over the whole country. Meanwhile —and here we turn to the second aspect—throughout the whole land the royal authority as such is slowly growing. At first, in the country at large, no act of violence is considered an affront or challenge to the King unless it involves something in the nature of premeditated, armed, and probably combined violence. A mere killing, for example, is an entirely private affair, of less interest to the King than to the relatives of the slain. At the time of the Norman Conquest in England the pleas of the Crown throughout the country are (apart from breaches of his special peace) forsteal (ambush), hamsocn or hamfare (attack on a man's house) and also receipt of outlaws and neglect of military duty.[2] The sanctions for these offences are "forfeitures" (or fines) to the King.[3] This offence of "forsteal" becomes slowly generalised (in one of its forms) into wilful homicide,[4] and so too at the corresponding stage among the Kaffirs, "killing a man angrily" is punishable by fine to the King.[5] In the Hittite Code the sanction for homicide ceases to be pecuniary and, instead, a number of persons are handed over to the next of kin;[6] and we know, too, that among the Hittites "killing a man angrily" was also, at any rate

[1] See, e.g., IV Aethelred 4, Leis Will., 26.

[2] Compare II Canute, 12 to 15, with passages in Domesday Book. See *P. & M.*, vol. II, p. 453.

[3] They are pecuniary because these acts are also civil injuries, for which the sanction is a pecuniary payment to the person aggrieved.

[4] Forsteal becomes (*a*) killing by ambush; and thence is extended to killing of malice aforethought; and (*b*) wounding by ambush, and hence felonious wounding.

[5] Cape Commission, p. 84. In some localities he only keeps a limited part of the fine and distributes the rest.

[6] H.C. I, §§ 1–4.

in certain circumstances, criminal.[1] In England in the twelfth century,[2] and in the earliest part of the Hebrew Code, and in the law of the Romans and peoples of the Late Codes,[3] wilful homicide becomes capital, and the law no longer gives any pecuniary penalty or compensation.[4] But the offence continues for some time to be civil as well as criminal. The Hebrew law and early Athenian law have been examined at some length,[5] and it has been seen how homicide is partly a civil and partly a criminal offence;[6] and in England, too, in the early thirteenth century it was still a mixed wrong, both a civil injury and a crime. The King could not by his pardon absolve the slayer from the suit of the next of kin, nor could the latter save him from prosecution or the gallows.[7] Finally in England in the middle of the thirteenth century, and probably in Babylon in the time of Hammurabi, homicide becomes purely a crime.

At the time of the Norman Conquest "forsteal" (wounding or killing by ambush) was, as we have seen, a plea of the Crown throughout England. The mere wounding, just as the mere killing, of one man by another was still a purely civil wrong, the sanction for which was pecuniary, as among the tribes, including the Kaffirs. But among the latter certain serious cases are punishable by fine payable to the Crown, as well as pecuniary payment to the injured,[8] and no doubt in an

[1] H.C., II, § 83.

[2] *P. & M.*, vol. II, pp. 459, 483.

[3] The Roman and Late Codes are, however, all silent on this topic.

[4] Hence in modern English law, until the Fatal Accidents Act, 1846, there is no civil action against anyone for causing the death of a human being.

[5] See *ante*, Chapter XV.

[6] Among the Hebrews, if found guilty of intentional homicide at the city of refuge, the slayer was handed over to the next of kin to put to death. Compare II Canute, 56 (a case of secret killing)—"the murderer shall be given up to the kinsmen". In Abyssinia this was the law till recently. See also the early Assyrian fragment, Text No. 2, §2.

[7] *P. & M.*, vol. II, p. 485.

[8] Especially wounding of a wife by a husband, or of a parent by a son. The head chief, hearing of the commission of the offence (just as in a case of "killing a man angrily") sends his messengers to collect the appropriate number of

undefined number of cases the position was the same in England, as it certainly was, too, among the early Hittites.[1] Only at the very end of the period of the Middle Codes[2] does the civil sanction for serious wounds become mutilation, and in the time of Henry II[3] (the corresponding period in England) wounding is a plea of the Crown. Throughout the thirteenth century in England, and in Babylon in Hammurabi's time, corporal sanctions have to serve the purpose of both civil and criminal sanctions.

Hamsocn or hamfare, the armed attack on a man's house, was, as has been seen, another plea of the Crown at the time of the Norman Conquest, and robbery on the King's highway was another. Among the Hittites it appears that the position was much the same.[4] Theft is a mere civil offence with a pecuniary sanction, both among the tribes[5] and in all the Codes until we reach the Twelve Tables, when we are told that a man caught in the act of stealing, if free, was scourged and enslaved, and if a slave was killed; but we assume that the property must be of a substantial value. In England, too, in A.D. 1166 a thief taken in the act of stealing property of a substantial value became guilty of a capital offence.[6] In the thirteenth century any theft of property of twelve pence in value—whether the thief is caught in the act or not—becomes capital, and in the Late Codes, too, death is the general punishment for theft.

cattle. The messenger, driving them off, may distribute some or all at random among the persons whom he meets. In some districts, indeed, the injured person has no civil remedy for assault (Cape Commission, p. 393).

[1] H.C., I, § 9; the fine was abolished at the time of the Code.

[2] i.e., in the later additions both to the Heb. C. and to the Twelve Tables.

[3] Assize of Clarendon, 1166.

[4] At any rate, H.C., I, § 45 (b) deals with the criminal offence of releasing a prisoner in fetters, charged with highway robbery.

[5] e.g., among the Kaffirs (Cape Commission, p. 379). But among them cattle-stealing was criminal; and, e.g., among the Akamba of Kitui theft of honey-barrels is criminal (E.A., vol. III, p. 118).

[6] By the Assize of Clarendon. Perhaps also by a decree of Henry I, but this is very doubtful. See *P. & M.*, vol. II, p. 494 f.

We have now seen how the criminal law, expanding in the stage of the Early Codes from quite a different starting-point and by different methods, has in the Late Codes, and in England of the thirteenth century, effected a junction with the civil law. This survey helps to answer our question as to the meaning of the Code of Hammurabi. The Code is, properly speaking, a civil Code. Intentional homicide, now a purely criminal offence, is omitted, as it is already in the Roman and Assyrian Codes; adultery, as we can see for ourselves, is civil and criminal; wounding is also civil and criminal and so too is theft of a substantial value. The policy of the law relies more on the individual than the King for the vindication of public order, and the civil and the criminal law are coloured by one another. It is now characteristic of the jurisprudence of the period that, while there is no fusion, there is a close approach of the civil and criminal law. It is as clear in England as elsewhere that this stage is not reached at any earlier date. Germanic law begins for us with Tacitus, who, writing of the Germans of his time, says that they have "a distinction between crimes and civil wrongs."[1] Crimes are capital; "traitors are hanged from trees, and cowards and those guilty of incest and bestiality are buried alive in the marsh." But homicide, for example (as Tacitus tells us not without approval)[2] was a purely civil injury, the sanction for which was payment of "a certain number of sheep or oxen". To us in England, primitive Germanic law ends with our first text-book of English law, which is attributed to Glanville and dates from about A.D. 1188. This begins as follows: "There are two kinds of pleas, one criminal and the other civil."[3]

[1] Tac., *Germ.*, c. 12: "Distinctio poenarum ex delicto".
[2] *Op. cit.*, c. 21 (cf. c. 12).
[3] "Placitorum aliud est criminale, aliud civile."

CHAPTER XXVI

CIVIL INJURIES

We have seen that in communities among whom Courts have not evolved, the only substantial rudiments of the later law of civil injuries consist of an ill-defined practice to avenge homicide. In one and the same community, in some cases killing is avenged by killing, in other cases a pecuniary payment is accepted, in others nothing is done. Lesser injuries may give rise to blows or gifts; theft may give rise to blows, restitution, gifts, amusement or contempt. We cannot say generally of these communities that there are recognised sanctions for such and such wrongs. Not because man becomes more violent as society progresses, but merely as an incident in the expansion of communities and the centralisation and growth of government, it becomes a recognised function of the chief and elders to hear and decide disputes between individuals. These disputes arise chiefly out of personal injuries and theft, and the decisions given upon them in the hearing of the public, after exhaustive discussion of merits and sometimes the citing of precedents, greatly assist the creation of recognised and defined sanctions for the commoner kinds of wrongs. So are evolved rules of the civil law of wrongs.[1]

The fixing of these sanctions is not solely the result of judicial decisions, for to a very limited extent the process of fixation begins before Courts arise. After

[1] The Courts begin among A1 and A2 peoples and these sanctions of the common civil wrongs (i.e. homicide, personal injuries, theft, and rape and adultery) have become defined among almost all A3 peoples.

the Courts arise, the acts of individuals in obtaining satisfaction by their own efforts (acts which we call self-redress), or in obtaining satisfaction by agreement with the wrongdoer and his family (probably just as important a source of these rules), of necessity contribute towards creating a definite standard for sanctions. Self-redress is permitted within narrow limits in modern law; but in primitive law, even after the evolution of Courts, its permitted area is, generally speaking, unlimited, provided that only recognised sanctions are exercised. As for agreement, all wrongs to the person or property (with rare or late exceptions) are civil wrongs and can be, and commonly are, compromised by consent.[1] These three chief agents in the fixing of sanctions, namely, judicial decisions, redress and agreement, work contemporaneously and interact upon one another. Judicial decisions, for example, create rules not only for the decision of future cases, but for redress and the settlement of disputes by agreement. Redress and agreements have enormous influence in determining what is the usual and proper payment to make for a certain wrong.[2]

In these circumstances fixed rules as to sanctions tentatively and empirically evolve. A number of characteristics of such sanctions naturally follow. Firstly, the sanction must be fixed in quantity, if it is to be a standard also for agreements and redress. A rule awarding such a sum as the injured person has suffered by the wrong, would be impossible. The area of such a rule, even in the modern law of torts, is very limited; but in primitive law it would occur to no one's mind.

[1] In Burnt Njal, for example, nearly all the slayings are settled between the parties by varying payments thought to be fair in view of the status of the deceased.

[2] The continued violence between groups, known as the feud, is of no special importance in primitive communities, and its real function is that it affords a reason for paying the customary sanctions, which it also helps to build up (see Tac., *Germ.*, c. 21). The feud is especially characteristic of inter-tribal disputes.

Even from the more serious personal wrongs[1] commonly no pecuniary loss is suffered; or if it is, it is hardly measurable; and never (even in the case of theft) is pecuniary loss a fair measure of the wrong suffered. The conception of "damages" is unknown till the end of the period of primitive law. There appears to be no trace of it until the earliest mature law, where it is only found in connection with claims by persons who are kept out of possession of their goods[2]; and similarly in English law it seems first to appear in the thirteenth century in claims to land or goods.[3] This sort of injury, namely, loss suffered by an owner who is kept out or possession of his property for a period, could hardly arise in primitive communities.

Primitive law, therefore, has sanctions of fixed quantity for each of the wrongs which commonly occur. Those sanctions are in almost all cases pecuniary.[4] Among the 1st Hunters property is too limited in quantity to be generally used in payment for wrongs, and there are no regular sanctions for wrongs. Among the tribes, however, of the succeeding grades, even where there are no Courts, property (which is rapidly increasing) comes more and more into use as a means of purchasing peace; and in the 3rd Agricultural Grade (apart from a few advanced peoples) the sanctions for civil wrongs are, with trifling exceptions, pecuniary. In this Grade the sanctions generally take the form of a number of head of oxen, sheep or goats; and among a few advanced tribes, and in the Codes, some metallic currency for the most part takes the place of cattle for this purpose.

[1] e.g., homicide, wounding, rape and adultery.

[2] First Gortyn Code, §§ 6, 10: Where the plaintiff's goods are wrongfully sold or pledged, double restitution is provided for, "and if there be any other damage, he shall besides restore the single value."

[3] Under the Assize of Novel Disseisin, and in actions of detinue, etc.

[4] The phrase "pecuniary sanctions" is used in this book as including payments of cattle, or other articles, or money, whichever standard is in force in the particular community. "Pecuniary sanctions" are opposed to "corporal sanctions", which include the sanctions of death, wounding or beating.

It is commonly thought, however, that the history of the matter was far otherwise; that an age of violent, unrestrained and unlimited revenge, was followed by a period of "talio," in which the law sought to limit the practice of self-help to equivalent retaliation; and that pecuniary sanctions are found only in the last stage of development. This impression is the reverse of the truth. Except to a small extent, among a few highly advanced peoples, the talio is unknown amongst the tribes of all grades. In the Early and Early Middle Codes pecuniary sanctions for all civil wrongs are universal; and it is only in the Central and Late Middle Codes—the period of the true birth of civilisation—that corporal sanctions begin to take the place previously occupied by payments. For this change there are no doubt innumerable interconnected reasons. Firstly, at this very point of time, we have seen that property becomes vested almost exclusively in the head of the household, and sons, women and slaves (the latter now grown quite numerous) have nothing of their own. The majority of the populace might commit wrongs with impunity[1]; and on the other hand, in this age of new commercial activity, differences in wealth become accentuated, and a rich man might offend with the loss of what he could well spare. But it is of greater importance that the solidarity of the community has continued to increase, and the state is no longer satisfied merely to provide facilities for civil trials: the notion of the desirability of the prevention of wrongs now appears for the first time, and as executive authority is not strong enough itself to ensure the punishment of all wrongs, the civil law begins to substitute corporal sanctions for money payments. The offenders shall suffer as they have wronged. It begins to be a dereliction of duty towards

[1] Corporal sanctions first appear in the Early Codes, where they are limited to slaves, see Lex Salica, Chapter 35, 5.

the community to accept money compensation for serious intentional wrongs. It may also be said, that in this way civil wrongs are taking on themselves a criminal aspect. Corporal sanctions, especially death, had always been familiar in cases of crime, and it is a natural expansion of the criminal law when intentional homicide becomes capital, and when, later, talionic or other corporal sanctions are introduced for personal injuries less than homicide. But there are also other reasons for these changes. There is a great quickening of a sense of social and moral justice: man now sees with great clarity the boundary line that separates right from wrong.[1] Wrong is horrible and should be punished. The solidarity of the family has grown enormously, and with it the duty to avenge violence committed upon a member; and the acceptance of money for such wrongs begins to seem horrible.[2] Moreover, the men of this age have fierce and passionate resentments, and there is probably a considerable increase in the frequency of acts of violence.[3]

It must not be supposed that, because the primitive civil law has sanctions of fixed amount, these do not vary in different cases. They vary according to the circumstances of the commission of the wrong, both when agreements are arrived at, and in the actual decisions of the Courts. It cannot be too often repeated

[1] This clearness of vision and fierce puritanism is vividly illustrated in the books of the Old Testament, and in the Late Middle and especially the Late Codes.

[2] As instances, may be taken the attitude of the English towards the legal systems of Scotland, Wales and Ireland, in which the sanctions for all wrongs (including homicide) were still pecuniary. See the earlier chapters of this book dealing with the laws of these countries.

[3] Culminating in the period of the Late Codes. See instances in England, *P. & M.*, vol. II, p. 557. The justices in eyre who visited Gloucester in 1221 were told of a list of offences which included 330 acts of homicide. These covered a considerable period of civil unrest. About fourteen men were hanged and 100 outlawed. In quiet times the justices in Northumberland in 1256 were told of 77 murders; 4 men were hanged and 72 outlawed. In 1279 in the same county they were told of 68 murders; two men were hanged and 65 outlawed. The size of the local populations was trumpery. Organised warfare, too, begins with the Central Codes.

that all the rules of the primitive law are plastic. The Hebrew, in his astonishment at the stereotyped and technical character of the mature Neo-Babylonian law, spoke of it as "the law of the Medes and Persians which altereth not."[1] The rules of primitive law are but general rules, and it is common in a tribal Court that though, for example, the law of theft is double restitution, single restitution is ordered in extenuating circumstances.

A further characteristic of primitive civil sanctions is that they are often greater in amount than the actual pecuniary loss suffered; but this is a characteristic also of most torts of the modern law of England,[2] and it arises from the nature of the law of civil wrongs. If its rules are born out of practices of self-redress, agreed settlements, and judicial decisions, they must take into account the feelings of the injured person or his vindicators. The sanctions must be large enough to satisfy them: they must provide "compensation" for the plaintiff's feelings as well as for the injury to his property. It is not surprising, therefore, to find, for example, in the ancient Hebrew civil law, that the penalty for theft of a sheep was four sheep, and of an ox five oxen. It is characteristic of the nature of the civil law of injuries that the multiple of restitution should increase with the seriousness of the wrong.

Just because the civil sanction must satisfy the injured person or his vindicators, the intention of the wrongdoer, at the time of committing the wrong, cannot be of overriding importance. No doubt the resentment of the plaintiff will be greater when the wrong is intentional than when it is unintentional, but he can hardly be expected to be content even in the latter case. Un-

[1] Daniel vi, 8 ff.

[2] From actions for damages for breach of contract there has spread into the law of torts a notion that the amount of pecuniary loss is the true measure of damages in all civil actions; but actions for damages for breach of contract are unknown in the primitive law.

intentional wrongs are naturally uncommon in a simple community, and it is best to leave the parties or the Court to vary the sanctions in these or other extenuating circumstances; but as precedents multiply and the law expands, it may create a separate sanction for a particular wrong when done "knowingly" or "angrily."[1] Generally speaking, however, the primitive civil law disregards the absence of intention more often than does the primitive criminal law[2]; and the same difference exists between the modern civil and criminal law of England. On the other hand, the modern civil law recognises, in many torts, the general defence of "inevitable accident."[3] The notion of a general defence is too technical a conception to be found in early law, nor is the absence of intention ever a complete defence; and we must look at the rules of the various injuries of the primitive law to see to what extent the sanctions vary in quantity according to intention.

As the law of civil wrongs develops, the family and its head occupy an increasingly prominent place in this branch of law. We have seen, in various connections, how in the 3rd Agricultural Grade the clan is slowly disintegrating, leaving the family in a position of greater independence and solidarity than before. Among the less advanced peoples of this Grade, the solidarity of the family can easily be exaggerated. The family is not a machine, and the relations between its members and towards those outside arise naturally from sentiment and economic conditions. Property is not yet very important, and a large proportion of it is held by the members individually, but they are to a great extent dependent

[1] This distinction is really limited to homicide; see the next chapter. Negligence appears for the first time in the Code of Hammurabi; but not in homicide or wounding.

[2] Primitive crimes presuppose intention by their very nature.

[3] But not the general defence of absence of intention to commit a wrong. A man trespasses on my field though he thinks it is his; and he may libel me, without knowing of my existence.

on one another and on the head of the family for mutual assistance, maintenance and protection. The father is the natural head of the group, and largely represents them *vis-à-vis* the rest of the community in disputes and litigation. Apart from the centripetal forces that exist within the family, its unity is increased by the fact that outsiders tend to regard it as a unit. The members of a family are prone to take the family point of view in a dispute between a member and a stranger, and even where this is not so, the family of the stranger rarely fails to regard the members of the opposing family as being " behind " any wrongful act done by its members. To a certain extent, therefore, the family is compelled to accept responsibility for its members and to exercise control over them. Furthermore by a theft the wealth of the members of the family is enriched and by countermeasures may be diminished.

From the more advanced tribes of the 3rd Agricultural Grade[1] to the Late Codes important changes, which have been examined at some length, progressively ensue. From the present point of view, they produce three main results: firstly an increase in the solidarity of the family, secondly an increase in the power of the husband and father, and thirdly a state of affairs in which no other member of the household in fact holds any property as his own.[2] Hence arise, in varying degree, a liability of the head of the family for the wrongs of the members, and of the members for his wrongs; while the head of the family, even more than before, represents the members in their claims against outsiders. Let us briefly trace these changes.

Among the majority of the more advanced tribes of the 3rd Agricultural Grade the women do not hold property as their own, and here the husband's liability

[1] i.e. from those (like the majority of the Kaffirs) of the stage of the Early Codes.

[2] See *ante* pp. 224f., 266f.

sometimes extends to his wife's wrongs.[1] In the Late Middle Codes the women obtain a limited right of succession to their father, and on marriage this property generally becomes the property of the husband. Hence, in the period of the Late Codes, the law usually renders the husband pecuniarily liable for his wife's wrongs and debts[2]; a fair rule for he has her property out of which to answer the claim, and he has the power to control her. Until the Late Middle Codes the proprietary position of the subordinate male members of the family[3] is uncertain and variable, and throughout the tribes there is no general rule of the liability of the father for the wrongs of sons. Among the most advanced tribes it is not unusual to find the head of the family discharging the liability of a son without any obligation to do so; but the practice is uncertain and any rules found are usually a matter of compromise and are not of general application.[4] Much the same applies to the wrongs of slaves.[5] Even in the Late Codes a rule of liability of the

[1] e.g., among the Kaffirs, including fines for assault (Cape Commission, p. 85).

[2] This rule is not found in the H.C. or Heb. Code, or the Twelve Tables, but probably represented the law soon after the latter compilation, and it survived in the mature Roman law (see *ante* p. 268). It is not expressed in the A.C., but is found in §§ 151, 152 of the C.H., and it also became the law in the thirteenth century in England (*P. & M.*, vol. II, p. 132), where it has survived into mature law. In later systems where the husband does not obtain ownership of his wife's goods but only control, he is not usually liable for her wrongs. See e.g., 1st Gortyn Code, § 5: "The father shall have power over the children and over the goods, over the division, and the mother over her own goods". During their lives he can refuse to consent to a division, but if there is a money judgment against a member of the family, it is provided that division shall be made to him.

[3] Including the brothers in the earlier part of the period.

[4] Among the Akikuyu, for example, if the person guilty of homicide is not to be found, his brother is liable to pay half the blood money. In Aethelberht, § 23, if a homicide departs from the country, his relatives must pay half the blood money. On the Gold Coast the law differs from place to place, and there is no general rule of liability of the head of the family for the male members, though a father is generally held liable if his unmarried son living with him commits adultery with another man's wife (Gold Coast Commission, p. 31 f.).

[5] In the early part of the Lex Salica (35, 5), if a slave kills a freeman, he is handed over to the parents of the deceased in place of half the composition, and his master pays the other half. In the more advanced Lex Burgundionum (Tit., 2) a slave committing homicide is killed, while his master is free if the slave killed without his knowledge, but suffers death if he was privy to the offence.

father for the sons living with him is nowhere expressed, though we may be sure that he often paid.[1] It must be remembered that by the time rules of vicarious liability have had time to crystallise the son is often leaving the household almost as soon as he is old enough to commit offences, while the wife remains a permanent member, so that cases calling for a rule as to the wrongs of sons are uncommon. The introduction of corporal sanctions in the Late Middle Codes (and earlier in regard to the wrongs of slaves) considerably affects the liability of the father and master. In the Late Codes corporal sanctions are now general for all serious wrongs, and for most wrongs committed by slaves; and for such offences by a subordinate member of the household, the mutilation or death of the offender is the proper sanction. The master of the household is the proper party to apply to for the person of the member, and the general rule now seems to be that the father must hand over the wife, the slave, or the son living with him, or pay a pecuniary sanction, which is partly in the nature of a fine.[2] To sum up, any general principle of the liability of the head of the family for the wrongs of his wife—and the same applies to her debts[3]—is not found before the period of the Late Codes; and the liability

[1] See as to England in the thirteenth century, *P. & M.*, vol. II, p. 530.

[2] There is no such rule expressed in the Codes. In A.C., § 5, there is an instance of it in regard to a wife in a case of theft. In Rome the rule that the paterfamilias must hand over the erring member of the household (i.e. the person under power) or pay a pecuniary sanction survived into the classical law. See Gai., IV, 75 f., where we are told this rule had various origins: in regard to theft it originated in the Twelve Tables (i.e. 190 B.C.), in regard to damage to property in the Lex Aquilia (169 B.C.), and for robbery and personal injuries in the prætor's edict (i.e. about the same period or soon after). In England in the middle of the thirteenth century (see *P. & M.*, vol. II, p. 530) a father was bound to produce a member of his mainpast (or household) charged with felony, or to pay a fine.

[3] Before the Late Codes there is no sign of any rule limiting the contractual capacity of married or unmarried women. In the period of the Late Codes such a rule is apparently reached in Rome (not in the Twelve Tables) and in England (*c.* A.D. 1250, see *P. & M.*, vol. II, p. 434 f.), but is not expressed in the C.H. (See §§ 151, 152).

of the head for his sons is not unlimited even at that period.

On the other hand, the liability of the subordinate members of the household for the wrongs and debts of the head appears as early as the Late Middle Codes. This earlier development is in part due to the fact that, whereas the subordinate members have few opportunities of incurring debts (as distinct from committing wrongs), the head of the family, from the period of the Middle Codes, has many,[1] and hence there is far more litigation raising the question of the liability of the subordinate members for the obligation of the head than vice versa. Among most tribes of the 3rd Agricultural Grade a wrong by the head of the family is, of course, satisfied out of his property. The great development of commerce in the Central and later Codes depends upon credit, and men without property commonly obtain credit by selling or pledging themselves or their children[2] (generally their sons) or less commonly their wives,[3] who will work for the creditor until the debt is extinguished by payment or by a period of service. Chiefly out of these facts arises a general right of judgment creditors, even in the absence of express agreement, to seize the person of their defaulting debtors or their wives, and probably even the children.[4] For these

[1] The notion of the liability of the household for the obligations of the head is perhaps also made easier in the Late Middle and Late Codes by being regarded as a quasi-inheritance of the obligation.

[2] In the period of the Middle Codes of Mediæval Europe (A.D. 750 onwards) the Church at first acquiesced in this practice. But partly because of the influence of the Bible, especially the Pentateuchal writings directed against debt-slavery, and partly because of the absence of conditions conducive to slave labour, slavery (including debt-slavery) came to an end before the twelfth century in England. Later, imprisonment of the debtor himself for debt became general and survived till 1869. In the absence of debt-slavery, as the wife and children had no property of their own there was no place in England for a rule of liability of the household for the wrongs or debts of the head.

[3] See Exod. xxi, 3; C.H., § 117.

[4] The children are also liable to be taken after their father's death, if he died insolvent. See a case in 2 Kings iv, 1. Similarly in the early mature Roman Law, if the paterfamilias died insolvent, the household were compelled to inherit, and were liable for, his debts.

reasons in the Late Middle and Late Codes, but not earlier, is found a considerable body of provisions limiting the period of service of debt-slaves,[1] and providing for their proper treatment.[2] The principle that the wife is liable to be taken in execution with her husband upon all his debts is expressly stated in the Assyrian and Babylonian Codes,[3] and while there is no express statement of principle in regard to the children[4] it is perhaps hardly necessary because the children can be sold or pledged. This liability of the members of the family is limited to pecuniary obligations for debts or civil injuries, but it has also a certain counterpart in corporal sanctions, for the head invariably represents the household in litigation,[5] and hence such provisions as § 230 of the Code of Hammurabi, which provides that if the defendant (a builder) has by his bad work caused the death of a son of the owner of the house (the plaintiff), the builder's son shall be put to death.

Throughout the period, and especially in the Late Codes, the head of the family (or household) is the

[1] No Codes prior to the Heb. C. refer to the matter, nor does the Heb. C. proper. The late priestly additions, however, provide for a six years' limit for male debt-slaves (Exod. xxi, 2 f., see also Deut. xv, 12 f., and *ante* p. 122). A limit must have existed at Rome in the time of the Twelve Tables, for they contained a provision that a son who had been sold by his father three times should be free of him. The Assyrian Women's Code is silent on this subject. C.H., § 117, provides for a limit of three years, not only for sons but also for wives and daughters. Among the most advanced tribes (corresponding to the Late Middle Codes) similar rules are found. Throughout Southern Nigeria children are pawned to repay a loan (generally sons, for the girls are married as wives or concubines for the bride-price). The person pledged is free when the sum is repaid, and in any case must be well-treated, and often the debt is extinguished after a fixed period of time. (See, e.g., Talbot, vol. III, pp. 633, 635).

[2] See Heb. C. (priestly addition), Exod. xxi, 7–11, 20–21, 26–27; Twelve Tables, the provision just cited and others; A.C., §§ 40, 49; C.H. § 115 f. See, as to the tribes, the previous note.

[3] A.C., § 33; C.H., §§ 151, 152.

[4] In the Bible is found the counterpart of this rule in religious doctrine, see the Second Commandment, "visiting the iniquities of the fathers upon the children". But the doctrine meets with powerful opposition. See Jer. xxxi, 29; Ezek. xviii.

[5] So even in the classical Roman law, a paterfamilias could sue for any injury to a wife in manu or a son or daughter-in-law in potestate (Gai, 3, 221).

appropriate judge in all cases of wrongs committed between the members or by a member against him. Very commonly they go unpunished.[1] On the other hand, should he abuse his position[2] (and equally should he be ill-treated by a subordinate member)[3] among the more advanced tribes the criminal law may intervene. But if the head should inflict on the erring member no more than the form of sanction considered appropriate at that period to the type of wrong in question, no complaint can of course be made by anyone. In the Late Codes such sanctions include mutilation and death.[4] It is not, therefore, to be wondered at that the Romans of the period of the Late Codes, when they reduced to a number of broad and fundamental principles the relations existing at the civil law between the members of the household, defined the paternal authority as being one of absolute power. This institution of *patria potestas* survived in the classical law, and the Romans of that period, finding it among but few of the peoples that surrounded them, regarded it as an essentially Roman institution. But such a view was only justified to this extent, that the extraction and conservation of legal principle was not a congenial occupation to the lawyers of Assyria and Babylon, and, on the other hand, most of the early peoples known to the Romans had not advanced to the stage of the Late Codes.

[1] See as to homicide, p. 316, note 1.

[2] e.g., in the case of ill-treatment of a wife, which is a crime punishable by a fine among the Kaffirs.

[3] Assault upon a parent is a crime punishable by fine among the Kaffirs, and was capital among the Hebrews (Exod. xxi, 15); as was also the cursing of a parent (Exod. xxi, 17). In the C.H., § 195, the man striking his father has his hands cut off.

[4] In the Assyrian Women's Code, a woman stealing from her husband or committing adultery is punished by him, by mutilation or death as he pleases. (A.C., §§ 3, 4, 14, 15, 16.) See C.H., § 129.

CHAPTER XXVII

CIVIL INJURIES (*Continued*)

BEFORE the evolution of Courts, the sanctions for homicide are left very much at large. It was said of the Andaman Islanders[1] that law was administered among them by the simple method of allowing the aggrieved party to "take the law into his own hands," which he usually did by flinging a burning faggot or sending an arrow. Everyone thereupon ran away till the quarrel was settled, but friends might forcibly intervene. If a man killed his opponent, nothing was necessarily said or done to him. Though a friend or relative of the deceased might avenge the death, usually everyone was so frightened of the murderer that none touched him or criticised him in his presence. He would, however, often keep away till assured that the grief and indignation of the friends of the deceased had abated. Among the Eskimo of Greenland the position is much the same, though if a slayer or other wrongdoer made himself sufficient of a nuisance to the community, some member, often privately obtaining the consent of everyone else, might put him to death. Much the same can be said of other tribes at a similar stage of development. Among some more advanced tribes who do not possess Courts, there may be traces of some general rule, but, in fact, while the death of the head of a family or other male of importance may be avenged by death, in other cases in the same tribe money is accepted, or perhaps, if the deceased is thought to have deserved his death, no sanction whatever is imposed.[2]

[1] Man, p. 42. [2] See, e.g., Malinowski, *Crime and Custom*, p. 117 (an A2 people without Courts).

In the law of the 3rd Agricultural Grade and the Codes, there are three main types of sanction for homicide. In one type the sanction is pecuniary[1] whatever the circumstances of the slaying may be. In the second type, a number of persons (of the household of the slayer, and usually children) may be handed over to the family of the slain in place of the slayer, and must be accepted. In the third type, the general rule is that the sanction for homicide is death, but the rule admits of lesser sanctions or forgiveness in certain extenuating circumstances. There appear to be no communities where the law provides for the death penalty in all cases. These three types of sanction are stated in their historical order in the progress of law. The first or pecuniary type is found throughout the tribes of the 3rd Agricultural Grade, except in a small minority of more advanced peoples.[2] In the Early and Early Middle Codes it is universal,[3] but disappears after the Hittite Code. The second type of sanction, namely, that in which a number of persons are handed over to the family of the slain, is less common. It is found among a few somewhat advanced tribes of the 3rd Agricultural Grade,[4] and was the general sanction for homicide in the Hittite Empire at the time of the Code.[5] Among the Wanyika the persons so handed

[1] Usually fixed, and in cattle among the tribes and in a metallic currency in the Codes. The sum is very high, and is usually about the same as the sanction for loss of both eyes, or between twice and four times as much as for loss of a limb.

[2] These peoples are of a stage corresponding to the Central Codes or higher.

[3] Except for slaves. As Tacitus tells us, it was also characteristic of the Germans in his time, that is centuries before they produced written law. On the Continent until the Lex Burgundionum (Tit. 2), in England until the twelfth century, and even later in the Scottish, Welsh and Irish laws, pecuniary sanctions for homicide remain.

[4] e.g., in E. Africa, Wanyika, E.A., vol. I, p. 98 f. (2–10 persons, or in default the slayer handed over to be put to death), Waboni (one person given for accidental homicide), also Wateita; and a large part of Nigeria, see, e.g., Talbot, vol. III, pp. 625–6. These peoples correspond approximately to the Central Codes.

[5] H.C., I, §§ 1–4 (killing "in anger" a freeman, 4 persons; a slave, 2 persons. "If only his hand does wrong", for a freeman, 2 persons; for a slave, 1 person).

over are said to occupy a somewhat menial position, but they are not slaves; and in some parts of Nigeria a person handed over in place of a slain eldest son inherits as an eldest son. Among the Wadigo (one of the Nyika tribes) boys on coming of age are permitted to return home, but girls remain.[1]

The third type of sanction is found among a few of the most advanced tribes,[2] and is universal in the late Middle and Late Codes. Death was the prescribed sanction for intentional homicide in the Hebrew Code[3] and the Athenian law of Draco's time, and, we can be certain, in the Twelve Tables, and among the Assyrians, Sumerians and Babylonians.[4] In the Leges Barbarorum the capital sanction first appears in the Lex Burgundionum, and in England in the middle of the twelfth century.[5]

These three types of sanction, however, shade into

Pecuniary sanctions are also found in the Hittite Code, limited to certain districts and persons.

[1] Among the Wagiriama (another Nyika tribe) two persons (usually children) are handed over. If the deceased is a brother or father of the slayer, only one person is given; if the slaying is of wife or child there is no penalty. Homicide within the family often goes unpunished in primitive law, for the head of the family is the judge; pecuniary sanctions, where the family property is vested in the head, are inappropriate, and the infliction of the death penalty would only add further to the misfortunes of the family. Similarly among the Akamba of Kitui the killing or wounding of a member of the same family or village is visited by a half of the normal compensation; and among the Lango (p. 211) the killing by a man of his mother is unpunished. In other cases, killing within the family may be punishable by death, even where the sanctions for homicide are generally pecuniary, see, e.g., Lango (*ibid.*).

[2] e.g., Gallas in E. Africa, Zulus in S. Africa, Ashanti in W. Africa (= Late Middle Codes). [3] Exod. xxi, 12, one of the oldest clauses of the Code.

[4] See, e.g., C.H., §§ 206 f., where it is implied.

[5] The following table shows approximately the relative preponderance of the three types of sanction for homicide at the different stages of development:—

	Persons		
	Pecuniary.	*Handed Over.*	*Death.*
A3 tribes*	73%	13%	14%
Early and Early Middle Codes ..	100%	—	—
Hittite Code	10%	90%	—
Late Middle and Late Codes (including England, 1150 and onwards)	—	—	100% (intentional homicide).

* Each set of figures taken from the tribes in this chapter is derived from between 50 and 100 scattered communities as to which the information available is of undoubted reliability.

one another to a certain extent. Among a few tribes where the sanction is pecuniary, a marriageable daughter or sister of the murderer may be accepted by the brother[1] or other next of kin of the deceased. Among tribes where the sanction is pecuniary,[2] or where the rule provides for a number of persons to be handed over,[3] it is sometimes provided that the slayer may be put to death in default of compliance. Among some advanced peoples it is sometimes expressly left to the next of kin to determine whether they will demand death or accept a pecuniary payment[4]; and it must also be remembered that so long as homicide remains a civil wrong, the enforcement of the full sanction of the civil law must be at the discretion of the next of kin, influenced though they may be by public opinion.

The notion of the varying seriousness of different homicidal acts takes shape in most tribes of the 3rd Agricultural Grade in a recognised distinction in the amount of the sanctions[5]; and sometimes there are two distinctions within the same system of law. As homicide is a civil offence, it is not surprising that the most common distinction[6] is based on the class to which the slain person belonged, for this distinction affords some indication of the extent of the loss to the family group of the slain. Among the tribes, where social strata are not yet well differentiated, the distinction is usually between the slaying of a man and the slaying of

[1] e.g., Lango, p. 211.
[2] e.g., Kavirondo, E.A., vol. III, p. 141.
[3] e.g., Wanyika, Wateita (E.A., vol. I, p. 98 ff.).
[4] In homicide generally, among, e.g., the Wataveta (E.A., vol. I, p. 102), and in the Hittite law of Telepinus (see *ante* p. 39). In the Late Middle and Late Codes, for certain offences falling short of intentional homicide; see, e.g., Heb. Code, Exod. xxi, 29 (death caused by a goring ox known by its owner to be vicious); and see also the Assyrian fragment, Text No. 2, § 2.
[5] Except among the least advanced tribes. Among the latter the compensation may vary in practice according to the means of the slayer: see as to the Bantu Kavirondo, E.A., vol. III, p. 141. It is often provided among the tribes and in Codes that the killing of a thief by night is excused.
[6] Found in about half the A3 tribes.

a woman[1] (and, very occasionally, between the slaying of a man and the slaying of a boy). In the Early Middle Codes, as social classes become fixed and increase, distinctions based on class multiply, and the members of each social stratum (as well as of the sexes) have their own price or wergild. But everywhere, in the Late Middle and Late Codes, these distinctions have disappeared from the now capital offence of intentional homicide.[2]

But the sanctions of civil law are not merely compensatory, but are also punitive; and a second type of distinction in the sanctions of homicide depends on the quality of the homicidal act—the extent to which it is reprehensible in the general view. These distinctions are, as might be expected, a strange medley. By far the most common, even among the tribes, is the distinction between intentional and unintentional homicide,[3] but it is not the only distinction of this type. Occasionally the difference is in the weapon used, for example, a difference between killing by poison, by knife and by club. There was widespread among the Germanic peoples of mediæval Europe, from the eighth century onwards,[4] a distinction between "murder" and other

[1] Where the blood money is usually about half.

[2] This same history of development—in the course of which these class distinctions disappear—can be seen also among the A3 tribes. Dividing the tribes into those where pecuniary sanctions exist for homicide, those where persons are handed over, and those where the capital sanction is found, we find the following approximate percentage of tribes where class distinctions (usually according to sex of slain) are found in the sanctions:—

	Tribes with pecuniary sanctions.	*Tribes where persons are handed over.*	*Tribes where capital sanctions are found.*
Proportion of tribes possessing this distinction	80%	33%	nil (in cases of intentional homicide)

[3] It is found in about 40 per cent of the A3 tribes. This figure has probably been somewhat swollen by European influence.

[4] It is found in the late parts of the Lex Salica (Tit. XLI, 2); and in the Lex Ripuariorum and Lex Frisionum of A.D. 800, but it does not appear in the A.-S. laws till Edward and Guthrum, § 11 ("they who secretly compass death") of 1000 or later. In the Anglo-Saxon period England was in legal development usually a century or more behind the Continent.

homicide. "Murder" involved an attempt by the slayer to conceal the fact of homicide—for example, by hiding the body,[1] or running away after the deed was done[2]—or by failing to publish the fact[3]; but intention to kill was irrelevant, and stabbing in the back was not "murder." This is the earliest distinction of this type to be found in the history of English law.[4] A later distinction is between killing by means of an ambush, and on meeting the victim. The offence of killing by ambush appears among the Hebrews in the Code,[5] and it appears in England as the crime of "forsteal". By the middle of the twelfth century in England it becomes generalised into the offence of killing "with malice aforethought"[6]; and by the same process among the Hebrews, in a priestly addition to the Code[7] and in one of the latest passages of the Pentateuch,[8] the capital offence of killing by ambush becomes by extension the capital offence of killing with malice. In England, as among the Hebrews, malicious killing is, at this point, still a civil as well as a criminal offence, and both offences of killing by ambush and killing with malice survive side by side, but the former has now become an example of the latter.[9] Distinctions differently expressed, but

[1] Lex Salica, XLI, 2; Lex Rip., Tit. XV.

[2] Lex Fris. Tit. XX; nine times the ordinary wergild was payable.

[3] See Burnt Njal, *passim*. Similarly, in North Albania before the War the murderer at once proclaimed his deed (Durham, p. 66).

[4] Originally the sanction was pecuniary in both cases, but varied in amount. The distinction survived in England in the thirteenth century. Glanville, XIV, 3, says: "Duo autem sunt genera homicidii. Unum est quod dicitur murdrum, quod nullo vidente, nullo sciente perpetratur." Compare the religious passage in an ancient biblical chapter, Deut. xxvii, 24: "Cursed be he that smiteth his neighbour in secret." This may therefore also be a relic of an early distinction of the Hebrew law, the old legal rule surviving as a religious rule of later days.

[5] Exod. xxi, 13. It is to be noted that this earliest reference to the sanctuary confers the right of refuge on any person other than him who killed by ambush, presumably because the latter's offence is also criminal.

[6] "Malitia præcogitata" = "a wickedness previously planned." See *P. & M.*, vol. II, p. 468.

[7] Exod. xxi. 14.

[8] Num. xxxv, 9 f.

[9] This appears clearly in Num. xxxv, as well as in the Code, in its present state.

roughly amounting to that between intentional and unintentional killing were to be found in the Hittite Code ("killing angrily") and probably in the law of all subsequent stages.[1] At the close of the period of primitive law there are three kinds of homicide, intentional killing, unintentional killing, and killing in self-defence.[2] The last is excused, but needs to be excused, while some sanction for unintentional homicide long remains. Negligent killing is unknown to the law, but in the Code of Hammurabi are special provisions applying to deaths caused in various sets of circumstances which amount to negligence, and the sanction is death, mutilation or a money payment according to the circumstances of the wrong or the status of the deceased.[3]

We must now leave homicide,[4] and turn to personal injury less than death, that is to say, wounding. Before Courts arise, there are no recognised sanctions for wounds. Among the tribes who possess Courts, those sanctions are almost always pecuniary, indeed considerably more often than are the sanctions for homicide. In the Codes, too, the sanctions for wounding remain pecuniary longer than do the sanctions for homicide. In the Leges Barbarorum and the Anglo-Saxon laws they are pecuniary, and the change to corporal sanctions

[1] i.e., Twelve Tables, Draco, Assyrians, Sumerians and C.H. (see C.H., §§ 206, 207). In the tribes with a capital sanction for homicide, the distinction is sometimes vague. This distinction therefore increases among the tribes and Codes as follows: A3 tribes, 40 per cent; Early and Early Middle Codes, 0 per cent; Hittites, 90 per cent; Late Middle and Late Codes, 100 per cent.

The same history of development is shown among the tribes themselves:

	Tribes with pecuniary sanctions.	*Tribes where persons handed over.*	*Tribes with capital sanctions.*
Proportion of A3 tribes possessing this distinction ..	50%	45%	100% (?)

[2] e.g., in Athens, and in England (thirteenth century). See *P. & M.*, vol. II, p. 479.

[3] See C.H., §§ 207, 210, 212, 214, 218, 219, 229, 230.

[4] See further as to the late primitive law of homicide, Chapters XV, XXV.

does not appear in England till late in the twelfth century. In the Hittite Code and the Hebrew Code proper, there are still no corporal sanctions for wounds, and it is only in a very late and ill-drawn interpolation of the priestly period that the famous rule is enunciated of "eye for eye, tooth for tooth, hand for hand, foot for foot," etc.[1] Similarly in the Roman school-book, all sanctions for wounds and assaults are pecuniary; but there is also included what is obviously a new maxim, inconsistent with the rest, that "If he broke a member,[2] unless he makes his peace, let there be like for like (talio)." In the Code of Hammurabi (and, we may be sure, among the Assyrians and Sumerians) corporal sanctions are general in the more serious cases, again taking the form of like for like in the case of loss of eye, tooth or limb.[3] The sanctions for mere assaults, where they are found, are (except in special circumstances) pecuniary throughout primitive law. In England the talionic principle increases its sway throughout the thirteenth century, and Britton (1291) holds the view that there should be "talio" for all wounds.[4] Among the tribes this form of the sanction is only found among a very

[1] Exod. xxi, 23–25. See, for the text, Chap. XII *ante*. See also p. 000.

[2] The pecuniary sanctions refer to "bones" not members. The latter obviously include limbs, eyes or teeth.

[3] Whipping or mutilation are the sanctions for assault on a father by a son, and assaults on social superiors (§§ 195, 202, 205); and talionic penalties apply to assaults on patricians causing loss of eye, limb or tooth (§§ 196, 197, 200). Simple assaults on equals or subordinates, injuries to plebeians or slaves, and assaults causing abortion are all punishable by money payments. The talio also appears in the late Heb. law and in the Late Codes, as applied to the wrong of making false charges. The defendant suffers the sanction which he sought to bring upon the plaintiff, see Deut. xix, 19; the Sumerian fragment Lutz, No. 101, § 9 (see Langdon, *J.R.A.S.*, 1920, p. 489 ff.), and C.H., §§ 1–5. It is to be remembered that among advanced tribes perjury is often a crime (punishable by fine).

[4] Britton, I, 123–4. The learned authors of *P. & M.* (vol. II, p. 489) observe: "but here he is hebraizing and introducing an element that is foreign to the law of our race", and they add in a footnote (*loc. cit.*): "When crude retaliation appears in a mediæval code, the influence of the Bible may always be suspected. What we call characteristic punishment, e.g., castration for adultery, or loss of a hand for forgery is a very different thing." These observations show a complete misapprehension of the course of the history of law.

few highly advanced peoples, among whom wilful homicide is capital.[1]

Almost universally the sanctions for wounds are measured by the character of the loss to the body,[2] and among most tribes where the sanctions are pecuniary, there is a short tariff of about half a dozen items, representing the loss of eye, leg or arm, finger or toe, nose, ear, tooth (or some of these), with perhaps a smaller amount for a mere assault. On this basis the sum payable for any particular injury is worked out.[3] In the mediæval Codes of the eighth to the eleventh centuries are found, in documents containing collections of ideal rather than existing laws, a prodigiously elaborate and orderly list commencing at the top of the body with an injury to the hair of the head, and ending with an injury to a part of the small toe; and sometimes—under a later hand—recommencing high up in the body with a number of interpolated items.[4] When, later, corporal sanctions are introduced, the distinctions are again of the same simple character. Throughout the primitive

[1] Among the A3 tribes pecuniary sanctions for wounds represent 88 per cent of all cases, corporal sanctions 12 per cent. Talionic sanctions represent only 8 per cent of all cases (included in the figure of 12 per cent).

The following table of the relative preponderance of pecuniary and corporal sanctions for wounds shows how late the latter appear:

	Pecuniary.	*Corporal.*
A3 Tribes	88%	12%
Early Codes	100%	—
Middle Codes (except late addition to Heb. C. and Twelve Tables)	100%	—
Late Codes (approx.)	60%	40%

[2] But in the original Heb. Code and among a few tribes there is no penalty for wounds other than a liability to maintain the injured person during his incapacity, and to pay the doctor. The sanction therefore varies with the length of time taken to heal the wound (H.C., I, § 10; Exod. xxi, 18; and, e.g., Nandi, *E.A.*, vol. III, p. 142).

[3] Among the Bedouin of Sinai (a very advanced people) the sum is assessed on this basis by a hereditary wound-expert, *Bedouin Justice*, p. 116.

[4] See, e.g., Aeth., §§ 33 to 72; Lex Frisionum, Tit. 22; Lex Alamannorum, Tit. 59 *et seq.*; Lex Baiuvariorum, Tit. 3, 1; and the Irish and Welsh laws. Contrast the simplicity of the earlier Lex Salica (see Chap. XXIX); or the more advanced Hittite Code (I, § 7 *et seq.*); and the simple corporal and pecuniary sanctions of the Twelve Tables and the Code of Hammurabi.

law, distinctions of other kinds are scarcely found,[1] even between intentional and unintentional injury, though the latter distinction is found in one or two instances in the Late Codes.[2]

The third main topic of the primitive law of civil injuries is that of wrongful sexual intercourse. In our modern English law this topic is divided into the wrong of intercourse with a woman, whether married or unmarried, against her will (namely, rape); and intercourse with a woman by consent, which latter is divided into adultery, where the woman is married, and seduction, where she is unmarried. These divisions do not tally with the divisions to be found amongst all tribes. In the law of some tribes, unlike our own, there is no difference in the sanctions for rape and for adultery;[3] in others, unlike our own, there is a difference between the sanctions for rape of a married and of an unmarried woman. The whole subject, therefore, must be treated of together in order to obtain a comprehensive view of the primitive law in this respect.

As in regard to other civil wrongs, so in regard to rape and adultery there are no recognised sanctions before Courts emerge. In the developed law of the tribes the sanctions for rape and adultery vary much from tribe to tribe, as they continue to do even among the Codes. The chief reasons are probably to be found in the variety between the forms of marriage; in the variety between local standards of marital and pre-marital chastity; and in the varying degree of the control of the husband over the wife and the corresponding variance

[1] A distinction between injury to a man and to a woman is very rare.

[2] This distinction is probably not found among the tribes. It is found in a Sumerian fragment (Clay, §§ 1,2) in regard to the wrong of striking a woman causing an abortion; and in the C.H., § 206 in regard to a wound caused by a blow in a quarrel. It is found in England in the thirteenth century, see *P. & M.*, vol. II, p. 468.

[3] Adultery, in this chapter only, unless the contrary is stated, includes seduction of an unmarried woman.

in the extent of his right to prohibit interference and his resentment at interference. So, for example, highly advanced tribes may be found[1] among whom there are two forms of marriage; one a strict patrilocal marriage; the other a looser marriage resembling concubinage, where a smaller or no bride-price is paid, where the wife returns to her people after her husband's death, and her children look for their rights of succession chiefly to their mother's family. It is common to find that the price payable for adultery with a wife is less in the latter form of marriage than in the former. Again there are tribes among whom sexual intercourse, at least with persons of a certain age-class, is no wrong; and among many tribes seduction (and even rape) is a common prelude to marriage.

It is sometimes said of primitive peoples that among them a woman's virtue is merely an asset of her father or husband,[2] and that hence there is no difference in the eye of the law between rape and sexual intercourse by consent. This is not an accurate summary of the position, even at the end of our period. The primitive law of wrongs stabilises natural sanctions. As the civilised man, so the primitive man feels wronged when his wife or even his daughter has been seduced with her consent[3]; more strongly does he feel wronged by rape of a wife or daughter; and it is of course the husband or father who makes the claim. Hence although many tribes may be found among whom the sanctions for rape and adultery are the same, for every such tribe three may be found where the sanctions are different.

Reviewing the developed law of the tribes as a whole, apart from the substantial number of cases of inter-

[1] As, for example, in parts of Nigeria.

[2] See. e.g., *Bedouin Justice*, p. 135 f., but this is a very advanced people.

[3] Especially when the daughter becomes pregnant. Again, tribes may be found (e.g., Wateita of Dabida, and Nandi) where the seduction of a daughter gives no claim.

course for which there is no punishment at the civil law, we observe firstly the great preponderance of pecuniary sanctions,[1] and secondly, the modest size of the sanctions. Corporal punishments are few indeed and chiefly consist of thrashings;[2] for the so-called unwritten law, under which a man may slay an adulterer found in *flagranti delicto*, is uncommon among the tribes. Corporal sanctions are perhaps twice as frequent for rape as for adultery; and where pecuniary sanctions are found, they are commonly about twice as high in cases of rape as in adultery, and higher where the woman is married than where she is unmarried. Generally speaking, the pecuniary sanctions for all these types of wrongs are surprisingly low. As compared with the prices of wounds, the price of adultery commonly represents something approximately equivalent to that payable for the loss of a toe.[3]

From the claim for rape or adultery must be distinguished the claim by the husband whose wife has eloped with the defendant. Among peoples where the bride-price marriage has fully developed, it is the general rule that the defendant is entitled to keep the woman

[1] Apart from the cases where there are no sanctions for rape and adultery, the following are the approximate proportions of pecuniary and corporal sanctions among the A3 tribes:

Pecuniary.	*Corporal.*
85%	15%

In comparison with homicide, which becomes capital among the Codes as soon as does adultery with a wife, the corporal sanctions might be expected to be higher. But here, unlike the case of homicide, the influence of Europe is not in the direction of the capital sanction. Adultery, however, as has been seen, does become criminal among the tribes at the expected point.

[2] The talio for adultery appears among a few highly advanced peoples of W. Africa (compare A.C., § 56). The injured husband's remedy is to treat similarly the wife of the adulterer. If the latter is not married, the husband may wait till he marries; and if the husband dies, it is a brother's duty to take his place. Alternatively the husband may similarly treat the wife of a brother of the adulterer.

[3] But among many tribes the sanction is increased in certain circumstances; e.g., if the wife dies in childbirth a sum equivalent to her blood-money or bride-price may be payable. The reasoning is, of course, that the adulterer's wrongful act has caused her death. This rule is not uncommon (see, e.g., Akamba of E. Africa, Lango of Uganda).

upon paying to the plaintiff the bride-price which he paid on marriage.[1]

In the Codes, great changes progressively manifest themselves in this branch of the law. We have seen, in many instances, how the period of the Codes witnesses a growing importance and consolidation of the household, and how an enormous power and control over the members of the household becomes vested in the father and husband. We have also seen, in regard to each civil wrong, how the preponderance of pecuniary sanctions diminishes and disappears in the Codes, and how the criminal law expands. In the sanctions for adultery with a wife all these changes are vividly illustrated. In the Early and Early Middle Codes, the modest pecuniary sanctions which we found among the tribes increase to the amount of the wife's wergeld or blood-money,[2] and the offence becomes criminal[3] as well as civil. In the Hittite and later Codes,[4] as in England from the Norman Conquest, the husband may kill the pair if he finds them in the act.[5] If on the other hand the wife was raped, the punishment for the man is again death, but the wife of course is free.[6]

In regard to rape of an unmarried woman, a similar process of change appears in the pages of the Codes. In the Lex Burgundionum,[7] for example, heavy fines

[1] Less often the bride-price is repayable by her father (or brother). If, on the other hand, the woman has deserted her husband and returned to her father, the price is of course repayable by the latter.

[2] cf. Aeth., § 31 (the adulterer pays the amount of the woman's wergeld and procures the husband a second wife with his own money); Lex Baiuvariorum, viii, 1, 10; and see Lex Frisionum, Tit. IX (*post*).

[3] cf. Lex Fris., Tit. IX, De Farlegani; which provides in regard to a free-woman "componat ad partem regis weregildum suum."

[4] The Hebrew Code itself contains no sanction for adultery with a wife, but the ecclesiastical writings prescribe death for adultery. Compare Lex Burg., Tits. 34, 35. As to England, see *ante* p. 294. [5] See further, *ante* pp. 293f.

[6] H.C., § 83; A.C., §§ 12, 16; C.H., § 130. In England, from the Norman Conquest, the sanction is death, or castration with or without blinding.

[7] XII, 1 and 2. In the Pentateuch the penalty is apparently only a heavy fine (Deut. xxii, 28). If the girl is betrothed, the sanction is death here (verse 23) and in the C.H., § 130.

are imposed for rape of a girl, and death in default of payment. The Assyrian Code[1] allows the injured father to inflict the talio upon the defendant's wife, or (if the defendant is unmarried) entitles him to a payment equivalent to three times the usual bride-price, and in either event he may demand that the defendant shall marry the girl. In England in the thirteenth century mutilation or death[2] are the sanctions for rape. On the other hand, in cases of the seduction of an unmarried woman, the penalties of the Codes are smaller and still pecuniary, but they are large indeed compared with those among the tribes. In the Hebrew Code the defendant pays the amount of a bride-price and marries the girl if her father wishes it;[3] in the Lex Burgundionum and the Assyrian Code the defendant pays three times the bride-price.

The last of the four great civil wrongs of the primitive law is theft. Among the tribes who do not yet possess Courts, there can hardly be said to be any law of theft. In some communities, especially those where scarcely any property is found except articles of food readily supplied by bounteous nature, theft is rare and may be regarded as an amusing peccadillo for which no sanction is imposed; among other peoples it may be violently resented. The increasing variety, quantity and importance of property in the higher grades of culture render theft more frequent and more serious, while for the same reasons the practice of imposing and accepting pecuniary sanctions for wrongs is general. In the developed primitive law of the tribes, the civil sanctions for theft as for other wrongs are in almost all cases pecuniary.[4] It is especially in regard to the theft of

[1] A.C., § 56. [2] In the middle of the thirteenth century Bracton, f. 147–148b, prescribes blinding and castration for rape. [3] Exod. xxii, 16, 17.

[4] The following percentages represent the approximate proportions of pecuniary and corporal sanctions for theft among A3 tribes:

Pecuniary.	*Corporal.*
87%	13%

cattle that the sanctions are defined, and the chief form of sanction is that of multiple restitution—for example, the payment of five cows for theft of a cow. This rule is easily understood: cattle represent the chief form of property, and also the highest medium of exchange; and thefts of cattle are the most common and serious form of theft.[1] Nor, for the reasons already considered at some length, could we expect to find a rule of simple restitution; on the contrary in some cases the multiple of restitution varies with the value of the class of article stolen. The sanction for theft of goods other than cattle is sometimes multiple restitution, and sometimes—since cattle are the highest medium of exchange—the payment of a specified number of cattle. Where corporal sanctions for theft are found, these usually consist of a beating, and sometimes we find a combination of a beating and multiple restitution. As has already been said, amongst a considerable number of tribes habitual thieves are punished by corporal sanctions, but these belong to the realm of criminal law. They may consist of death at the hands of the public, with or without some confiscation of property.

In the Codes we witness similar changes to those which we saw in the case of other wrongs, but at an even later date. Until the end of the Middle Codes the sanctions for theft remain pecuniary; and at the same time, from the Early Codes onwards,[2] corresponding to an increasing variety of the goods in use, these pecuniary sanctions become more and more differentiated as between types of property of different values. In the Hittite Code, the penalty for stealing a Great Bull (that is, a bull more than two years old) is 15 bulls (consisting of 5 great bulls, 5 of one year, and

[1] So theft of cattle is criminal among the Kaffirs, though the penalty is pecuniary; and among the Lango the thief caught in the act may be killed.

[2] See, e.g., the early chapters of the Lex Salica; and the Welsh laws.

5 under one year old). Similarly the penalty for stealing a Great Horse is 15 horses, and for a Great Ram 15 rams; for a plough ox, on the other hand, the penalty is only 10 plough oxen, and so forth.[1] Among the Hebrews 5 oxen are payable for an ox, 4 sheep for a sheep.[2] But in the Twelve Tables scourging and enslavement for a freeman, and death for a slave, were the punishments for the thief caught in the act of stealing cattle or any other property,[3] and in England, too, in the twelfth century, the penalty for theft varied between death and mutilation, and death was the punishment for the thief of bad repute caught in the act.[4] In the Assyrian Women's Code, so far as it deals with theft, the distinction between the thief caught in the act and other thieves is not mentioned, and death or mutilation are the appropriate punishments.[5] In the Code of Hammurabi death is the penalty for theft whether the thief is caught in the act or not,[6] and the same rule is arrived at in England in the thirteenth century. We must assume that these corporal punishments only applied to theft of goods of some value: in England the limit is finally fixed at twelve pence, and petty larceny is punished by loss of an ear or by the pillory.[7]

[1] H.C., I, § 58 ff. Formerly, the Code tells us, the sanction for theft of a great bull was thirty bulls.

[2] Exod. xxii, 1. In the Lex Burgundionum death is imposed for theft of horses and cattle (Tit. iv, 1) as well as for housebreaking and robbery with violence (Tit. xxix).

[3] See Gai., 3, 189. This was "manifest theft". For "non-manifest" theft the penalty was double restitution. Among the Lango (p. 212) the rule is much the same for theft of cattle, namely, death for the thief caught in the act, and the double value in other cases.

[4] Assize of Clarendon (1166), cc. 1, 12. See *ante* p. 299, and *P. & M.*, vol. II, p. 494 f.

[5] See A.C., § 3 ff., and the earlier fragments.

[6] Death is the sanction specified in all cases mentioned in the Code (§§ 6, 7, 10, 14, 15, 19, 21, 22 and 25) except one (§ 8). In the latter case the sanction is multiple restitution, and death in default of payment, but this clause is inconsistent with § 6. In § 10 death is impliedly referred to as the general penalty for theft: "the buyer shall be put to death as a thief".

[7] cf. A.C., § 5, referring to theft of property of a value of over 5 minas of lead.

In the manner exemplified in this chapter, civil sanctions for the common wrongs of primitive society gradually become defined, and the common differences in the circumstances of their commission gradually become reflected in distinctions between the sanctions. Among the vast majority of the tribes of the 3rd Agricultural Grade the four wrongs mentioned in this chapter cover the whole field of the law of civil wrongs, but this is merely because these are the only common types of injuries. Among peoples living in such economic circumstances, where, for example, the giving of commercial credit is unknown,[1] the other wrongs of our modern life, such as the causing of damage by fraud, are not possible; but should any injury of an unusual kind be committed, it would be visited with fair justice according to the merits of the case. The more common wrongs, however, by repetition give rise to defined sanctions, and among the most advanced tribes and in the Middle and Late Codes, sanctions for damage to property,[2] trespass[3] and slander become fixed; but this development is too late to be worth a detailed examination in this place.

[1] See *post* Chapter XXXII.

[2] See, for an example among A3 tribes, Lango (p. 212). In the H.C., and in the European Middle Codes, such rules are frequent; in Rome it is not till 169 B.C. (Lex Aquilia) that the sanctions for damage to property are stabilised.

[3] e.g., Gallas, E.A., vol. I, p. 101 (one bull, for trespassing in another's house). On the Gold Coast the law usually contains a sanction for trespass. These peoples correspond to the Late Middle Codes.

CHAPTER XXVIII

THE CONSTITUTION OF LATER PRIMITIVE SOCIETY

WHILE the history of crime and civil injuries is bound together by the fact that both, over a long period, are affected by the same changes in the constitution of society, yet these two departments of law are not thereby disconnected from the rest of the primitive law. The rules of marriage, inheritance, property, crime and civil injuries continue throughout the primitive period to be firmly founded on the constitution and economics of early society. Some outstanding characteristics of the forms of economic association before the evolution of Courts have already been described: let us now look at some general features of society in what may be called the feudal period. In the 3rd Agricultural Grade two types of tribal systems may be found. In one, represented especially among those that are least advanced, are to be seen a number of villages or local groups, each to a certain extent administered internally by their own elders with the aid only of public opinion; but there is no executive organ of government that binds together externally the various villages of the tribe. In the other, executive government is well marked throughout the tribe, and while each local group is ruled by a local chief or headman, one of the chiefs, who is ruler in his own district, is also head or paramount chief of the whole tribe. There are several intermediate types, in which central authority can be seen to spread outwards from the village to the tribe, but the second type mentioned is representative of the more advanced of the tribes of the 3rd Agricultural Grade and the peoples of the Early

and Middle Codes, and its system of administration is properly called the feudal system.[1]

The principle can be abstracted from the social relations to be found among these peoples, that physical control means legal jurisdiction, and conversely jurisdiction means power. This outlook is perpetuated in the language of many peoples; and it has a real historical basis, for the due exercise of physical control over persons or their property involves the necessity and power of determining disputes between those persons. We may begin with the family, and see how the physical power of the husband and father over his wife and children has made him the judge of disputes between them. The existence of this same power also renders him to an increasing extent responsible for the members of his family to his superior the local chief or headman. The latter is the immediate executive head of the families within his dominion, and hence he is also the judge in disputes between those families, except in matters of such importance as to be reserved to the head chief. Conversely, the heads of families within his jurisdiction are under a duty to report to him the commission of criminal offences which come to their knowledge, and in default of so doing may even render themselves liable.[2] The local chief is not, however, an absolute monarch, and must consult with the heads of families,

[1] The period of the Late Middle and Late Codes is still represented in many parts of the world, including part of West Africa; and especially modern Abyssinia, which well illustrates the law and life of the Late Codes. Under the Emperor, the Church is supreme, and ecclesiastics of various sorts form about one-third of the total population. The rest are heavily priest-ridden, and are of abysmal ignorance and superstition. Feudal barons rule from their castles, and do justice on circuit among their serfs and subjects. The women never venture abroad except heavily veiled. In the law of wrongs, death, mutilation and the talio are paramount, and persons mutilated for offences may be seen in the streets. Debtors appear in the streets shackled to their creditors. The civlisation of the country rests upon slave labour, but the condition of slaves at this stage of progress is not far different from that of children, and their condition is not in comparison one of great hardship. See article by Sir Percival Phillips, "The Feudal Life of Abyssinia," *Daily Telegraph*, 22 March, 1935.

[2] Cape Commission, p. 8.

or elders, who are his councillors, before taking any important action. So in his Court, too, he sits with the heads of the families within his area, whom he summons to hear disputes with him; and because it is a rule of constitutional law that they must be summoned, conversely they are under a duty to sit if summoned. They are in regard to the litigant, like the modern English jury, a Court of his country and his peers. In the Court of the local chief or headman are mainly tried cases of petty assault and theft, claims for taking away the plaintiff's wife, and claims for small debts.[1]

In the king or head chief is vested the supreme executive power, and therefore the supreme judicial power. We have already seen that the monarchy is constitutional, and that there are many safeguards against the exercise of unconstitutional despotism. In the Court of the head chief, the latter is president, sitting with his councillors, including one or more subordinate chiefs (for the subordinate chiefs must also sit if called upon) and a number of elders of the locality (for the head chief is normally both head chief and local chief in his own place). In countries where a self-contained military organisation exists, the Court will also perhaps contain one or two heads of companies[2] or other military units, who in their turn have jurisdiction over their subordinates. A head chief on the Gold Coast (like a modern English judge) would usually sit with not less than about twelve councillors.[3] Only in cases of special importance would he summon subordinate chiefs from a distance, with or without some of their councillors. In cases of no importance, especially in the more advanced communities, he would not sit himself, but the councillors composing the Court would consult him before publish-

[1] See, e.g., Gold Coast Commission, p. 28.
[2] cf. The Company Captains (Asafohin) of the Gold Coast.
[3] Gold Coast Commission, p. 27.

ing the decision, which they would announce as the decision of the chief.

It is a general rule of these advanced native Courts, that the decision lies with the councillors not with the chief. Very commonly, even in cases in which he sits, he does not retire with the councillors. It is exceedingly rare to find communities among which, if the councillors are unanimous, he can refuse to give judgment accordingly[1] ; but it is not common to find communities among whom a majority of the councillors give the decision of the Court. If the councillors disagree he can exercise whatever influence he has ; if they are unanimous the rule is that he must accept their advice. This is, in fact, only an aspect of the general constitutional position : the councillors have a right to be consulted, and he cannot decide policy contrary to their views. In the Court of the head chief are tried major disputes, or, as they are called in England in the time of Glanville, Pleas of the Crown. In the main they are criminal offences ; but the less important criminal cases are usually tried in the local Courts, and the pleas of the Crown also include a great many civil pleas. These latter are especially disputes between the great men of the realm (the local chiefs) and appeals by way of rehearing from the Courts of the local chiefs.

The land law among these nations is but a part of the same constitutional system. Especially when the community moves to new territory, the king or head chief makes division of the land among the local chiefs of whom we spoke, and they in turn allot the land among the families.[2] The head of each family takes possession, and the land is worked by the family. Grazing is common to all. The local chief is responsible to the head chief for the due administration of the land as for all

[1] See Gold Coast Commission, p. 28.
[2] See Cape Commission, p. 443, and Appendix C, p. 47.

other matters,[1] and the family head to the local chief. In theory the king could deprive an occupier of his land for neglect of it, but, in fact, he does not, but merely "tells him he ought not to do such a thing, because his father did not."[2] Among the majority of these nations the land is held to belong to the king, but it is hardly ownership; he could not, for example, sell it.[3]

Such a feudal nation is commonly built up or enlarged by a process of federation between neighbouring peoples who by commerce, intermarriage and other influences have acquired an increasing community of outlook. When the confederacy is formed, the chief of the most important unit often becomes the paramount chief of the whole confederacy. The Ashantis, for example, have become a nation in recent times, and the chief of Kumasi (the Kumasihene) has become the paramount chief of the Ashanti confederacy (Asantahene). Such a paramount chief, together with the other chiefs who are his council of advisers and judges, tries civil disputes between those chiefs[4] and also offences against himself or the confederacy, that is to say, important criminal offences. This is the natural limit of his jurisdiction, and any attempt on his part to hear disputes between the followers of his fellow-chiefs would be strongly resented as unconstitutional. Indeed there are commonly quite considerable differences in the law of each of the units of the nation. Towards the end of the feudal period, these differences gradually disappear,[5] while the Court of the king or head chief extends its jurisdiction over the whole nation, covering civil as well as criminal

[1] Cape Commission, p. 49.

[2] Cetewayo, ex-king of Zululand, giving evidence before the Cape Commission, p. 523.

[3] *Ibid.*, p. 443.

[4] Including disputes between his own direct tenants, in his own tribe.

[5] The H.C., the law of England from the Norman Conquest to the thirteenth century (see especially Glanville), and the A.C. and C.H. are full of such differences. The purpose of Hammurabi's Code was to remove them.

offences; and now, when litigation is frequent enough to stabilise legal procedure, and technicalities first begin to appear in it, this process of unification leaves permanent traces in the law of many nations. Let us take, as an important instance, the procedure initiated by an oath or curse.

In these peoples of the stage of the Late Middle Codes religion is well developed, and one of the criminal offences tried by the Court of the paramount chief is that of falsely swearing—especially falsely swearing by the private oath of the paramount chief, or otherwise cursing him, for such conduct is not only an insult to his dignity, but if unremedied would be fraught with danger to him. In order to compel the weak and reluctant paramount chief to try civil disputes between any two obscure subjects of his, a practice grows up by which any person who has a civil claim swears his claim in the presence of witnesses, usually employing the oath of the particular paramount chief of whom he and the proposed defendant are both subjects. The question then arises who has committed the sacral (criminal) offence of falsely swearing, and such an issue falls within the jurisdiction of the paramount chief: he tries the offence and incidentally the civil claim.

This procedure is found throughout the Gold Coast[1] (for example among the Akwapims)[2] where it is applicable to any assertion of right; for instance, a claim to the ownership of land, or any accusation of wrong. Suppose a dispute as to the title to land, between A and B, subjects of X, an Omanhene or paramount chief. The Omanhene, as everyone else, has his own special form of oath or curse. A common form of oath is "Wukuda" (Wednesday) referring to a certain Wednesday when the Ashantis inflicted a grave defeat upon the Akwapims and others. Says A to B, "I swear Oman-

[1] Gold Coast Commission, p. 30 f. [2] See *J.C.L.*, vol. VI, N.S., p. 507 *et seq.*

hene X ' Wukuda ' that this land is mine." If B declines to swear, the claim is admitted, but if B swears the land is his, then either A or B has falsely taken the oath of the Omanhene. Any of the latter's subjects may take the parties before the Omanhene, and a Court is called, presided over by the Omanhene. Each side produces a surety (without whom no trial takes place) and the issue as to the ownership of the land is tried under the usual type of native procedure, namely, with witnesses ; and the Court declares its judgment. The successful litigant, having paid the Court fee, is entitled to recover it from the other side ; and the latter must also pay an additional fine to the Omanhene for having " gone contrary to " the Omanhene's oath, and he must pacify his opponent with sheep and rum. Similarly the procedure may be used when A charges B with a wrong. If the latter swears a chief's oath in denial, A must swear his accusation or is deemed to have brought a false charge for which he is liable to pay compensation. Or, if A is being beaten by B, he may swear upon B a chief's curse if he should not cease to beat him. If B continues, a trial takes place as before, as to whether A or B has right on his side.[1] Other curses of the chief may similarly be employed in all these cases, as for example the dread curse " May fetish Y kill Omanhene X or a member of his family." When this curse was used the unsuccessful litigant was formerly put to death. In more recent practice, as soon as either party swears the oath or informs the Court that he swore it, a sheep must be killed and rum poured out to appease the fetish ; and when the trial is completed many more sheep must be sacrificed and more rum poured forth, all at the cost of the unsuccessful litigant. The fine payable to the chief is larger in this than other cases.

[1] In this case the procedure operates just as a modern English claim for an injunction and damages.

Amongst the same people proceedings in trespass may be commenced by a method which is a variant of the procedure just outlined. A sees that someone has made a clearing on his land. Round the spot he hangs young branches of the palm, saying, " He who did this and did not make it known to me before he did it, if he comes here to do anything else, may fetish X kill him and his family." If the trespasser makes no claim, A must sacrifice a sheep to propitiate the fetish whose services have been thus employed. If, as is usual, the trespasser B appears and claims, an action proceeds before the Court as in the previous case; and after judgment the defeated party must appease the fetish, at his own cost, by a slain sheep and much rum, which is partly poured on the ground, and partly drunk by the Court.

This procedure has spread throughout the peoples of the Gold Coast, and although legal proceedings have also for a long time been begun by summons without the use of an oath, the procedure initiated by oath is said to be the more ancient. It is easy to see that, when the Court of the paramount chief has extended its jurisdiction over the whole nation, the oath can be dispensed with. The same procedure is found in the corresponding period in ancient Rome, where it was the common method of initiating a suit down to the middle of the second century B.C. and was known to the lawyers of the classical period as " legis actio sacramenti," that is to say " legal (or statutory)[1] action by oath (or curse)." So far as we know of it in Rome it was in essence identical with the procedure of the Gold Coast, and included the sureties and the fine, which in later times became a fixed amount, and which was forfeited to the State. Both sureties and oath point to the same conclusion, namely, that a weak and reluctant authority was being encouraged and pressed to assume jurisdiction. The

[1] See, for the meaning of legis, Gai., IV, ii.

procedure must have originated in the Court of the paramount chiefs of the Roman confederacy, together with the other rules which finally extended their sway over the whole nation, perhaps not very long before the date of the Twelve Tables. In the following half-century the action by oath developed extremely technical rules[1] and gave place to a procedure by summons, the formulary procedure of the classical Roman law.

The history of English law, at a slightly later period, supplies an instance of a somewhat similar process. In the time of Glanville[2] the jurisdiction of the King extended to little more than criminal cases which were pleas of the Crown,[3] and claims in debt.[4] Religious crimes and many other matters were tried by the ecclesiastical Courts. The Crown, however, as has been seen, had a residuary criminal jurisdiction in all cases where armed force was employed; and during the thirteenth century persons complained to the King's Court of wrongful deeds (" trespasses ") committed against them " by force and arms and against the peace of the King." Later, as the King's Court extended its jurisdiction, the allegations of violence became a mere formality and were even omitted, and the " writ of trespass " was employed by any person complaining of a tort, or, finally,[5] even of a breach of contract.

[1] In the Twelve Tables the procedure is not yet of a highly technical character; certainly there is little sign of the technicalities of which we hear later.

[2] A.D. 1188, a date corresponding to that of the Twelve Tables.

[3] Chiefly treason, homicide, arson, robbery, rape and forgery (Glanville, Chapter II).

[4] Also all civil pleas concerning baronies, and advowsons, and a few less important matters referred to in Glanville, Chapter III.

[5] Fifteenth century.

CHAPTER XXIX

TECHNICALITIES

In the previous chapters the history has been traced of each separate department of the primitive law. Looking at these parts as a whole, let us try to estimate the essential factors that determined their growth. We cannot pretend to summarise them in a few words, or even fully to understand; but there are plainly common factors that have determined the growth of all the departments of the law.

In a sense there is little in human life that does not play its part in the creation of law; in advancing or retarding, in pulling to this side or to that. No rule could exist imposing a certain pecuniary sanction for homicide, unless some men were prone to kill others in certain circumstances; unless some men resented the killing of others; unless men were prone to live and act in groups; unless the killers desired to live at peace with their neighbours; and so forth. We must not attempt to look too deeply for explanations where we shall not at present understand; we must start by assuming human nature. Looking on the face of things, however, we observe one salient feature: in each of the branches of the law, arising one by one at different stages of progress —marriage, property, inheritance, crime, civil injury, and, later, procedure and contract—we see a process by which isolated and repeated human acts tend to create standards and rules of conduct. Let us use a parable which is also an instance and illustration. Primitive man desires to go from one place to another through

rough and untravelled country. Guided by observation, experience, instinct, chance, he arrives at his destination, leaving little or no trail behind him. Others cross also from time to time, taking various routes. When all the circumstances are taken into consideration, one route is better than all others; and here a track begins to be traced on the ground. From now on, all who cross tend to use the same trail, and it becomes a road. The surrounding country is used for other purposes, and the custom to use this path for the journey evolves into a rule of law that this and no other road may be used. Looking at the road alone we are keenly conscious that its history is that of a long process of change at a quickening tempo from a faint to a well-defined and ever-broadening trail. But we must also remember the difficulties and tentative experiments of the earliest days; the other trails that never became visible; the thousand reasons that determined the route taken by our road. So with the sanctions for homicide, and all the other rules of primitive law. Slowly they appear, take similar form and become more definite, under the influence of all the circumstances of human life, over long ages in which the history of a people is a moment. Man has built up his law, as he has built his whole civilisation, by slow, tentative and painful steps, testing the new, slow to reject the old. While this process, as we have seen, has not occurred at the same time in each department of the primitive law, it can also be observed in the law taken as a whole.

Since the rules of primitive law are determined by so many factors, it is not surprising to see them taking independently the same form among widely-sundered communities in different ages, standing at similar stages of economic progress. The direct influence of other systems of law must be accounted a less important source of advance in primitive law. Mediæval Europe

affords a striking instance of this truth: while the codification of Justinian was available for any learned man to read, it went entirely unnoticed until, in the eleventh century, the peoples and laws of Europe had independently progressed to a stage at which the Roman law had practical meaning for them.

In this advance of law, we have said that its rules slowly become more certain. In part this follows the increase in the size of communities. At the lowest grades of culture communities may be found among whom no important offence of violence has been committed within living memory. On the other hand, a substantial population and a considerable amount of litigation is required in order to create a continuous tradition of precedents. Again, an important effect of the invention of writing and its application to legal uses, though it also lent itself to great abuse, was to render the rules of law more certain and less variable, as permanent record took the place of recollection. But throughout the primitive law, the rules remain for the most part exceedingly elastic. The great change that does appear at the close of the era of primitive law is rather a change of a different character.

To the increase in populations, the growth of commerce and the spreading use of writing, must be added, as an effective factor, the devolution of judicial functions upon officers of justice. A subordinate judge has no power to depart from the laws which are his instructions. Furthermore the whole system of judicature, including the rules of law which it applies, becomes an increasingly important and self-contained department of the State. In the enactment of new laws *legal* reasons for their enactment become common and influential. New rules are enacted not because they are just—though in the long run their effect will be salutary—but to assist the trial of cases. Examples may be taken from late

Codes. Hammurabi, for example, enacted[1] that when a merchant invests money in a foreign enterprise with a mercantile agent, each should take a receipt for money paid or repaid to the other: "If an agent has forgotten, and has not taken a sealed memorandum[2] for the money he has given to the merchant, money that is not sealed for shall not be placed to his credit." A still later Code, the 2nd Gortyn Code, which stands beyond the terminus of primitive law, commences as follows:—"When an ox has gored another ox, the injured owner has the right, if he wishes, to give his animal and to take that of his opponent. If the opponent does not agree to the exchange, he shall pay the single value." This is a simple provision, of a kind not unfamiliar in primitive law. It continues, however: "If the injured party does not lead up the injured beast, or (if it is dead) does not bring it or show it, as has been written, there shall be no claim." Similarly it is provided, in the case of horse, mule or ass, that the "injured owner, if the beast is dead, or if it is impossible to bring it, shall summon his opponent within 5 days, in the presence of 2 witnesses, for the purpose of showing the beast, in the place where it is. On the question whether he has properly brought the beast or summoned his opponent to show it, the injured proprietor and his witnesses shall be believed on their oath."

Here, then, while in other respects we have characteristic primitive law—there are even separate rules for ox, boar and the rest—we have arrived at an entirely new phenomenon in the law, namely, technicalities. We can see from these clauses that the technicalities are only possible because the rules of the law have much increased in number and have become less pliant. They are no longer to be taken as mere general indications; they mean precisely what they say. Sometimes

[1] C.H., §§ 104, 105.

[2] A clay tablet (usually sealed and witnessed).

other reasons of public policy besides the more effective trial of actions influence the enactment of new laws. A limit may be imposed on the gifts which a man is permitted to make to the female members of his family[1]; the assignment by a public official of his feudal holding is prohibited[2]; or the amount which may be left by legacy is restricted.[3] Technicalities seem to appear first in branches of the law where the human element is less prominent—in commercial transactions, in property and legal procedure—before they appear in the substantive law of crime and civil injuries. These technicalities mark the end of the period of primitive law.

As they grow in number, the laws become difficult for the citizen to know. We can hardly, as yet, speak of a legal profession anywhere, but the law is even studied in schools, by citizens anxious to be familiar with it, for example, in the Neo-Assyrian period (eighth to seventh century B.C.), and in Rome at the beginning of the second century B.C. In the schools short statements or maxims are devised for the purpose of teaching the practice of the law, and the execution of legal transactions; and such maxims, together with collected statutory legislation, form the main substance of the school books, such as the Roman Twelve Tables, that have already been described. Now we are passing over the boundary that separates the primitive from the mature law. When, later, the rules of substantive law increase still further in number, and classifications of these rules are evolved for the purpose of teaching and memorisation, the whole nature of the progress of law becomes changed. The law has ceased to live in the outer, everyday world, to be variable, changed easily by changing circumstances; it lives in a world of its own; it progresses chiefly by logical application of an observed

[1] First Gortyn Code, § 12.
[2] C.H., § 38.
[3] Lex Voconia, Rome, 169 B.C.

underlying principle to new facts; it is stereotyped and difficult to change except by legislation, which is little resorted to. This was the change that was reached, for example, in the Roman law in the middle of the second century B.C., and in mediæval Europe, after the rediscovery of the Digest, in the twelfth and later centuries.[1]

We have seen that the progress of law is historically largely an aspect of the progress of government and the growth of populations. It is not a coincidence that the great systems of law of the past have been those of the great builders of Empire, the Babylonian and Assyrian, the Roman, and the English. The primitive law of Rome began to progress rapidly from the time when she became the mistress of Italy.[2] The next hundred and twenty years saw the establishment of schools and the growth of an intensive study of the law; but at the end of that period, not only had her Empire and her people greatly multiplied, but there was established, as later in England, a number of jurists held in the highest esteem, to whom was entrusted the entire administration of the law, as lawyers, as judges, and as ministers of justice. Hence the law was now left to grow in a world of its own by methods of its own. This is mature and modern law. Its development is "internal," grounded on classification and underlying principle, synthesis and analysis: here begin technical conceptions in the substantive law, purely legal conceptions increasingly divorced from the real nature of things—ownership and possession, partial interests in land and other property, causes of action and so forth.

These changes from the primitive to the mature law are not sudden but gradual; nevertheless they are hardly to be noticed until we reach the Late Middle and Late Codes. And now the law has sometimes become

[1] In the thirteenth century in England.

[2] In about 270 B.C.

so fixed and certain, that principles derived from the rules of this stage may remain permanently established in the mature law of a nation. So, for example, a number of rules of the modern English law had their birth in the economic conditions of the early thirteenth century; in the Talmud, from the isolated provisions of the Hebrew Code, were extorted principles that form a systematic law of torts[1]; and in the classical Roman law, principles extracted from the scattered fragments of the Twelve Tables were made to cover almost the whole field of law. But the process of the extraction and conservation of legal doctrine was not carried to the same length among all peoples. Even in the Middle Codes there is perhaps more evidence of its commencement in ancient Rome and in mediæval Europe than elsewhere; and the Athenians and the Babylonians did not go far in this respect even in their mature law.

The views expressed in this chapter as to the nature of the change from ancient to mature law are diametrically opposed to the theories to which Maine's *Ancient Law* has helped to give currency. According to those theories, primitive law, as contrasted with mature law, was essentially technical, stereotyped and unchanging. In a passage to which reference has already been made, Maine wrote that after the promulgation of Codes there were three great methods by which law was developed, namely, in their historical order, fictions, then equity, then legislation.[2] We have seen, however, that legislation was long anterior to the earliest Codes, which are but collections of prior legislation enacted from time to time.[3] What then of fictions and equity?

The notion of a "legal fiction" as a method of development of law is not helpful. The term "legal fiction"

[1] See the tractate "Baba Kamma" in Canon Danby's translation of the Mishna (Oxford University Press, 1933).

[2] A.L., p. 29.

[3] See *ante* Chapters xx, xxi.

connotes various things that are heterogeneous and disparate, and is far too vague for profitable use by a lawyer. A legal fiction is not so much an implement of legal development as a term of abuse, comprehensively signifying the state of affairs that is thought to exist when the law does not correspond with real fact. Legal fictions are not indicative of age, so much as change. I know of no real legal fictions in primitive law; and, on the other hand, they are notoriously common in modern English law. One sort of fiction is found, where it is only the legal form, and not the legal doctrine, which fails to accord with reality. The English lawyer, for example, still pleads in his Statement of Claim in a slander action that "the Defendant falsely and maliciously spoke and published certain words of the Plaintiff." In fact, the Plaintiff need now never prove the falsity of the slander—that is assumed in his favour—and need not prove malice, unless and until the Defendant alleges and proves that the occasion was privileged. Strictly, the Defendant is not permitted to deny malice or to deny that the statement is untrue. No doubt if the Plaintiff omitted the allegations of untruth and malice in his Statement of Claim it would be perfectly good[1]; but the pleader never does. This is an example of a form which has become stereotyped and invariable, while, independently of the form, the law has advanced. The Romans, indeed, referred by the term "fictio" only to averments in a pleading which the opponent was not permitted to traverse. But many modern "fictions" are of a different character. Here the disparity between law and reality can easily be seen to be caused by the law developing independently along its own path. When a man, being asked for an article which will fulfil a certain purpose, sells something to his customer, it is merely common sense to say that he is thereby impliedly

[1] See, e.g., *Rules of the Supreme Court*, O. 19, r. 25.

alleging its fitness for that purpose, and agreeing to answer for it, if it be not so fit. After the doctrine of such an implied contract by the vendor has become firmly established, suppose a case to come before the Courts in which the article was unfit because of some hidden defect necessarily unknown to the vendor. The application of the doctrine can logically produce only one result; the vendor is liable; though in common sense he cannot be supposed to have agreed to anything of the sort. This is in fact the law of England. Similarly it has just been decided[1] that on a contract to do work and supply materials, the contractor is liable if the materials, through a hidden defect, are not fit for their purpose. Similarly, too, it was decided that on a contract for carriage of goods by sea, the shipowner's implied warranty of the seaworthiness of his ship extended to defects of which he could not know; and an Act of Parliament[2] was necessary to remove the decision from the law. It would be useless to multiply examples. The existence of so-called fictions presupposes two things; firstly, the law or legal form must have become stereotyped; and secondly, there must be change. It is because of the first requisite that there are no real legal fictions in primitive law. Until a thing has acquired an unpliant, unyielding form, it cannot be wrenched.

The systems of rules called in Rome the Prætorian Law, and in England Equity, demand the same two prerequisites. These systems arise from the strangely similar circumstances, already referred to, attending the development of the law in Rome and England. In Rome after 200 B.C. the rules of the law were becoming fixed and technical. The same state of things occurred in England in the thirteenth century. The minister of justice, the official in control of the issue of procedure

[1] Myers & Co. *v.* Brent Cross Service Co. [1934], 1 K.B., 46.
[2] Carriage of Goods by Sea Act, 1924, sec. 2.

—the Prætor at Rome from the middle of the second century B.C. and the Chancellor in England from the fourteenth century—began to grant new remedies, firstly to assist the working of the civil or common law. Soon he was building up a body of law which, though nominally subsidiary to the common law—for he could not alter that—in fact was superseding it on the matters with which he dealt, for he could by his remedies make the law useless to the litigant, or avoid an obstacle presented by it. In other systems the new rules would have been indistinguishable in nature from the general mass of law, and would have taken the form of amendments of the law; it was only because the civil or common law was stereotyped, and unchangeable by the acts of the Prætor or Chancellor, that equity remained a separate system. Gradually the rules of equity themselves came to suffer the fate of rules of law, and became stereotyped.

All these phenomena illustrate the process whereby the change from primitive to mature law is achieved. In previous chapters, in tracing the rules of certain departments of the primitive law, we have further illustrated it. It was said that the branches of the primitive law that are concerned with procedure, property and contract were probably the first to become fixed and technical. Similarly the earliest fictions are found in those departments, and the rules of equity are concerned with the same subjects. In the remaining chapters of this book, the development of the topics of procedure and contract will be traced in some detail through the primitive law. Both these topics are of especial importance to the present study, firstly because of certain fundamental misconceptions, wide-reaching in their effects, to which the writings of Maine have helped to give rise; and, secondly, because they illustrate with especial clearness the essential identity of legal history in all primitive society.

CHAPTER XXX

PROCEDURE AND THE ORDEAL

AMONG the axioms of Maine as to the characteristics of ancient law, none has had greater influence, or been more widely accepted, than his view as to the place and character of procedure. According to that view, formalism and a love of technicalities predominate in ancient law, and in the mind of early man the rules of procedure override in importance the rules of substantive law. Early man can only see the law through the envelope of its technical forms; and substantive law has at first the appearance of being gradually secreted in the interstices of procedure.[1] This view of the importance and character of ancient procedure has even had great influence in the solution of historical questions of legal interest. Yet it is a strange dogma. Was then procedure born, fully armed with technicalities, as Pallas sprang fully armed from the head of Zeus? And if substantive law grows up in the interstices of procedure, the latter, it would appear, must be earlier than substantive law, which is a strange result. What was the function of procedure before substantive law existed? We have seen, however, in the previous chapters—and the fact might, no doubt, be established by reason alone—that before Courts had been established, some law of a kind already existed, especially of marriage and inheritance; and there was also some criminal law. But at the end of the history of primitive law, and in the days of mature law, we find a developed law of procedure, including a few seemingly technical rules of various kinds; in

[1] *E.L. & C.*, p. 389.

particular, rules as to trial by ordeal and by oath of compurgation. By what process, then, did procedure become technical, and how did trial by ordeal and by oath achieve the place they finally occupied? As we trace the history of these things through the life of primitive peoples and through the Codes, we shall find that history strangely simple and uniform.

We have said that Courts first appear in the 1st Agricultural Grade. As they develop in the 2nd and 3rd Agricultural Grades they take finally the form which has been described at length in previous chapters. That form they derive naturally and inevitably out of the circumstances in which they appear. A complains to the executive, that is to the chief and council,[1] that B has injured him; and he seeks redress. B is summoned, and is asked what he has to say. He makes his answer, and (if necessary) calls his witnesses; and A and his witnesses reply similarly, after which the executive makes its decision, and issues its order. Nowhere can a technicality of procedure be found in the Courts of any primitive people, at any rate before the Late Middle Codes.[2] In the developed Courts of the 3rd Agricultural Grade fees must be paid, and the methods of business of the Court must, of course, be complied with; but there is no Court in which failure to comply with any procedural step entails failure in the suit. So far from the rules of procedure being regarded by early man as more important than rules of substantive law, rules of procedure have hardly evolved among the tribes, except as already mentioned. Throughout the tribes, with the exceptions to be stated, evidence is not given on oath, but by unsworn statement; yet to give false evidence is to commit perjury or slander (whichever it should be called) for

[1] Or, where there is no other executive, to the elders.

[2] The trial initiated by oath, found on the Gold Coast among tribes corresponding to the Late Middle Codes, has been described in Chapter XXVIII.

which a witness may be punished by fine imposed at the close of the case.

Ordeals come into legal procedure from outside, and continue to be used for non-legal as well as legal purposes.[1] The term "ordeal" is a somewhat inappropriate expression, derived from a limited group of the phenomena now under consideration. Ordeals constitute a method of trial of a primitive lawsuit by the use of superstition or witchcraft. They are of countless forms: the innocence or guilt of the party in question may be determined by observing the behaviour of an animal,[2] by employing various forms of witchcraft,[3] by oath of the party, and so forth. Where ordeals are employed, it is not uncommon to find some one type of ordeal in general use in a tribe or district. When trials first appear, it seems doubtful if ordeals are employed; but in the 2nd and 3rd Agricultural Grades they spread rapidly, and are found amongst most tribes of the latter stage. The ordeal by oath is, however, far less common than the other forms of ordeal and is confined to the more advanced of the tribes.[4] The oath usually takes one of two forms. One form is an imprecation: the person taking the oath says, "May this (animal, spear, etc.) kill me[5] if I do not tell the truth." In the other form some feared object is mentioned: "I swear by my sister's garment,"[6] "by this spear,"[7] "by the hyena,"[8] and so forth. The rarest form of ordeal is that involving a present danger of physical injury—such as the ordeal by poison or throwing into deep water.

[1] See, e.g., the oath in II, 23, 574. In various forms, ordeals can still be seen in use among our children at play.

[2] e.g., among the Lango.

[3] Often in E. Africa.

[4] Its extension accompanies the growth of religion as distinct from magic.

[5] Or, e.g., "may I die like this sengi" (beating a goat to death at the same time with a club)—Akikuyu.

[6] Masai (cf. Lex Frisionum, Tit. 12).

[7] Galla.

[8] Wagiriama.

Among a few of the most advanced tribes different ordeals are used upon different charges, and the dangerous ordeals are confined to those cases where the sanction is capital.[1]

As has already been said, evidence is given throughout the tribes by unsworn statement. But just as, in other mundane matters of life, when his normal secular methods of work fail him, primitive man betakes himself to the use of the supernatural in magic, witchcraft or religion,[2] so in the trial of disputes, where there is no evidence or no sufficient evidence upon which to determine the issue—and only in these conditions—the aid of ordeals may be called in for the purpose of ascertaining the guilt or innocence of the defendant. I have no knowledge of any instance of a tribe in the past or present among whom ordeals were employed unless evidence was wanting.[3] It was said in an earlier chapter that in primitive law, if the language of a later age may be permitted, the onus of proof is, as in most modern systems, upon the defendant. A charge is made against him and he is asked what his answer is. He tells his story, and if he has witnesses they give their evidence. If there is no case whatever against him, the claim or charge is dismissed; but there may be such a case, that he may reasonably be called on for an answer, and he may have no witnesses. Suppose he went into the bush accompanied by his fellow, and returned alone, and is now sued for homicide. He makes the answer,

[1] Chiefly, therefore, to cases of witchcraft; see, e.g., the use of poison, Talbot, vol. III, p. 620. Similarly in C.H. and A.C. the river ordeal is confined to charges of witchcraft and adultery (the latter being now also capital).

[2] See, e.g., Dr. Malinowski's *Magic, Science and Religion* (1925).

[3] See, for the Sinai Arabs, *Bedouin Justice*, p. 40. It is curious how rarely observers notice this, but there can be no doubt of it, for they give us, again and again, as the chief or only instances of its use, charges of witchcraft (an offence rarely or never witnessed), and charges of adultery (the only other offence rarely witnessed) where adultery is a serious offence—especially adultery with a chief's wife. See instances in Seligman, pp. 129, 194, 530 (also pp. 102, 334); and Talbot, vol. III, pp. 625, 665, 675.

perhaps, that his companion was eaten by a lion, or met his death by a fall. In such cases it is felt not to be satisfactory that the defendant should be allowed to clear himself by a mere statement; and ordeals are naturally called in to aid, among a rapidly increasing number of tribes through the 2nd and 3rd Agricultural Grades. The defendant must discharge himself by ordeal.

The sworn evidence of witnesses, as used in our modern Courts, is not found among the tribes, except for one or two of the most advanced peoples, who have almost certainly taken it from European practice.[1] And it is only, so far as I am aware, among a few highly advanced tribes, whose law is in part derived from old civilisations (such as the Bedouin of Sinai who stand near the centre of the Moslem world) that there appear developments of the ordeal, which are found in the Middle Codes of mediæval Europe. Among these Bedouin the ordeal is still only employed in the absence of evidence; but in some serious cases[2] it is no longer sufficient for the defendant to take the oath himself, and he must find a certain number of other persons, who will also swear to his innocence. Sometimes the opposite party is entitled to choose the members of the defendant's family or tribe who shall swear with him, and even the form of oath. Furthermore, new and more complex issues arise in their litigation, and the issue in question may be one as to which the onus of proof is upon the plaintiff, so that it is he who must swear.[3] Among these and other peoples, ordeals other than the oath may be seen operating with a success which may well shake the sceptic.[4] The solemnity of the ordeal,

[1] Among some Kaffirs a witness may swear "This is true in the name of the chief." Among the Akwapims of the Gold Coast a witness may swear "Wukuda", that he is telling the truth.

[2] e.g., a charge of theft of more than a certain amount.

[3] *Bedouin Justice*, p. 42.

[4] See op. cit., p. 108 f. for the best extant description by an observer of the application of an ordeal (in this case the ordeal of licking the red-hot spoon).

supported by its rare use, is impressive,[1] and its appeal is enhanced by its age and intrinsic merits; and furthermore the belief in its efficacy has a salutary effect in deterring a guilty party from taking it.[2] But we have travelled far from the tribes. To sum up, among the tribes, procedure is untechnical; evidence is unsworn; trial by ordeal takes place only in the absence of evidence other than the defendant's; the ordeal is undergone by the defendant; the ordeal by oath is used only among the more advanced tribes; and evidence on oath is only found among a few highly advanced tribes, who have perhaps derived it from civilised peoples.

When we turn to the Codes, instead of finding in their pages that the rules of procedure are treated as of paramount importance, overriding the rules of substantive law, we find, on the contrary, that the Codes, as a whole, contain very little that relates to procedure. Even that little is almost wholly confined to the Middle and Late Codes, and the earliest legislation contains nothing. Yet the volume of the Codes is very large, and several are almost complete systems of law. It is, therefore, a travesty to say that early man can only see the law through the envelope of its technical forms. But, since the "Codes" are merely collections of prior written legislation, and not true codes at all, it might be suggested as possible that, for some reason or other, legislation was concerned with substantive law, and procedural law was not altered; and that in fact, unlike the procedure of modern[3] tribes, that of ancient primitive peoples was technical. But this cannot be. The Codes do in fact include procedural provisions, where they apply the ordeal to the determination of certain disputes. It is

[1] Throughout Sinai the ordeal is imposed by a feed, hereditary expert (*ibid.*).

[2] So in the Leges Barbarorum we read of the party who fails finally to take the ordeal.

[3] The tribes described by old observers, so far as we can see, did not differ in this respect from modern tribes.

impossible to read them without concluding that the ancients, instead of seeing substantive through procedural law, regarded only the substantive law as of importance; and it is possible to read between the lines of every Code, that it constitutes legislation imposed on a background of law which provides for trial by evidence, generally unsworn; and that technicalities arise by growth only in the later stages of primitive law. Furthermore, these views, in regard to many of the Codes, may be tested by contemporary evidence. In regard to the Hebrew Code, for example, there are to be found, in the ecclesiastical writings of the Pentateuch and elsewhere in the Old Testament, descriptions of existing law and procedure; and here we are told in plain terms that among the Hebrews there were no rules of procedure, except that all disputes were heard and decided in the way already described.[1]

Let us now trace the history of procedure and the ordeal through the pages of the Codes, and note the changes that take place from the earliest legislation of the Early Codes to the end of our period. For this purpose, however, we shall reserve for a further chapter the legislation of mediæval Europe from the eighth century onwards, for in the eighth century there occurred on the continent of Europe in certain peculiar circumstances an abnormal development that is not found elsewhere.

The Laws of Aethelberht contain no word of procedure whatsoever. The early part of the Lex Salica[2] contains no word of procedure. It is important also, for reasons which will presently appear, to observe that neither of these lengthy Codes contains any clauses dealing with contracts (except marriage).

[1] There are only two passages in the religious writings that call for special mention; one describes an ordeal before a priest (Num. v, 11 f.), the other (also a rule of ecclesiastical practice) provides that no man shall be condemned for a sin at the mouth of one witness only (Deut. xix, 15).

[2] Chapters 2–36. As to the textual questions relating to this and other Leges Barbarorum see the next chapter.

The Code of the Hittite Empire contains one clause (I, § 76) relating to procedure, namely, to the ordeal. It is also the only clause of a contractual nature, other than those dealing with marriage. It provides as follows: "If anyone yokes (i.e. borrows or hires)[1] an ox, horse, mule or ass, and it dies, or a wolf eats it, or it perishes in some other way, then he (i.e. the hirer) must give him (i.e. the owner) another (for it); but if he says, 'It died by the hand of God,' then he must swear it." The simplicity of the language and contents of the provision is striking. The historical importance, however, of such provisions is so great, that, anticipating the subject-matter of another chapter, we must make a short digression to explain the context.

The provision deals with loan for use, or hire—one of a class of transactions for which the modern English law provides the convenient collective term of "bailments." They involve the handing over of property by the owner (or bailor), upon the terms that something shall be done with or to it by the receiver (or bailee), and that it shall be redelivered to the bailor on demand, or when the purpose is fulfilled, as the case may be. Other familiar types of such transactions are deposit, and pledge. Now because a bailment is the only form of transaction mentioned in an ancient Code, it does not follow that bailments historically precede barter or sale. In fact, they do not. The explanation is that the bailment raises a new problem in what is more accurately called the law of tort or civil injuries. The provision we are dealing with in the Hittite Code is in fact a provision of the law of tort, and it belongs to a branch of law which the modern English law of tort still claims for its own domain in problems of the kind we are considering. Now the transaction of sale (as of barter) is in early times essentially a ready-money transaction.

[1] Perhaps the true translation is "borrows" or "hires", and not "yokes"

The owner hands over his chattel to the other party in return for another chattel (if the transaction is a barter) or in return for money (if the transaction is a sale). Sale was essentially of this type even in the time of Hammurabi. Consequently in regard to such a transaction no problem can easily arise, either within the province of what we should call the law of contract or of tort. After the exchange of goods for money, or goods for other goods, nothing remains to be done on either side; and although even among the tribes contracts of loan are already to be found, yet it is characteristic of these loans that they do not, generally speaking, involve return of the specific article lent. I lend a bull to my neighbour on the terms that he shall pay me back a heifer, or I lend money on the terms that he shall repay me other money.

When we come to deal with bailments, however, in a time of greater wealth, when hiring and deposit of cattle and other goods are frequent, a new problem soon becomes troublesome. In these transactions it is common, for the first time, to find one person in possession of another's property. When the time comes to redeliver it, the bailee alleges it has been lost or destroyed without his fault. Generally the bailor will have no witnesses who can say how its met it fate. The dispute comes before the Court, and in answer to the owner's claim for the return of his property (whether it is cattle or other goods) the bailee says it has died, has been eaten by a wild beast, or stolen, or makes some other answer. According to modern English law, the onus of proof is on the defendant (the bailee) to satisfy the Court that he has not intentionally or negligently caused the loss; and it was chiefly for the solution of problems relating to bailments, that the conception of negligence was arrived at, in Babylonian law not long before Hammurabi, and in other systems at the corresponding stage.

But Hittite law, as early law generally, has not yet had occasion to invent this developed conception. The question then is this: The defendant has not returned the ox; he says it has been eaten by a lion; no one else knows anything about it. Ought he to pay or not? The Hittite, like the modern owner, declines to accept the mere unsworn statement of the bailee.[1] Obviously, this is essentially one of those cases which, no evidence being available except the defendant's, calls for the ordeal; and the most appropriate is the form of ordeal which already among the most advanced tribes[2] was beginning to spread, namely, the oath. Briefly, for these reasons this clause appears in the Hittite Code. If the ox has perished in any way, the bailee must, as a general rule, supply another; but if his defence is, that it perished "by the hand of God" (shall we say, "the act of God"?) he must say it on oath, and if he does, is acquitted. The case where the ox has been stolen by a third party is left open; after all, cattle ought to be looked after; and these thefts of cattle are the very plague! Nor are we told what is to happen where the bailee alleges that the beast has died, but its carcase shows foul play. This early legislation is rough and incomplete; it implies much, and does not consist of hard and fast rules.

Let us now consider the Hebrew Code.[3] At the end of it (among the latest of the clauses of the original Code, and among the priestly additions) is a group of provisions which we have called the commercial group, and which relate to bailments. They are the only clauses of the Code proper concerning contract or procedure or the ordeal. The first (Exod. xxii, 7–8) deals with a case of the deposit of money or goods. If the

[1] Note that this clause necessarily implies that in ordinary cases evidence in the Hittite Courts was unsworn.

[2] i.e., especially among tribes corresponding to the Early Codes.

[3] For translation see Chapter XII.

goods are stolen from the bailee's house, the thief, if found, shall pay double. If no thief is found, the question whether the bailee himself "has laid his hand on the other's property" shall be decided by ordeal, undergone by the bailee. He shall come "before God"; so the ordeal, presumably, involves an oath. This rule, like that of the Hittite Code, deals with the problem as one of a tort—a charge of theft against the bailee, not a claim in contract. Then (omitting an ecclesiastical interpolation) verses 10 to 13 relate to deposit of cattle (instead of goods or money). If the beast "dies or is torn or driven away, no man seeing it," the bailee takes "the oath of Jehovah" that "he has not laid his hand on the property of the other"; and "the owner shall accept it."[1] But if the animal is stolen from him, he shall make it good.[2] If it is torn, he is free if he proves it by producing the carcass (apparently without taking the oath, for here is satisfactory independent "witness"). The following two clauses (vv. 14, 15) relate not to deposit but a loan by the owner, and here enters the conception of contractual liability. If the loan is gratuitous, and the thing is hurt or dies, the owner not being with it, the borrower is absolutely liable. Not so, if the owner was with the thing,[3] or the loan was for reward (that is, a hiring), and it is hurt or dies. When we reach the period of the ecclesiastical interpolation (v.9), we find the procedure has developed much, and the oath is used in a further case. The plaintiff is claiming that goods in the defendant's possession are his property, and the defendant is alleging that he has bought them. We are not told whether there are any other witnesses. This difficult dispute is solved by the ordeal. If the defendant is condemned, he pays double;

[1] These are pregnant words, to which we shall later return.
[2] A germ of contractual liability—he should have looked after it.
[3] e.g., driving his own animals.

if the plaintiff is condemned, he makes the same payment, presumably as damages for what the English law calls "malicious prosecution."

So far we have been considering complete Codes.[1] The Assyrian fragments that survive do not contain any of the commercial provisions of the law.[2] In the earlier fragments there are no ordeals and no procedure: in the Women's Code, however, are to be found a few normal provisions relating to the ordeal. It is plain from the Code that in ordinary cases evidence was unsworn; and in all cases where the use of the ordeal is mentioned, it is to decide a question on which no evidence is available except that of the party who undergoes the ordeal. The references to ordeals are as follows. One clause (§ 25) provides that where a man, charged with harbouring another man's wife in his house, alleges that he was unaware of the presence of a married woman in his house, that question is to be determined by the river ordeal. Clause 17 provides that where a man accuses a woman to her husband of adultery, "if there are no witnesses," the matter shall be determined by the river ordeal. In another clause (§ 5) where a man alleges that another man's wife has stolen property from his house, he must swear "Surely I did not cause her to take anything; and there has been a theft in my house." The point of the denial on oath that he has laid a trap lies presumably in the consequences, for, if guilty, the woman may be handed over to the plaintiff to be mutilated. At the end of clause 26 (a corrupt text) there is some obscure reference to ordeals.[3] Whatever the precise meaning may be, it is apparently a case where,

[1] We shall return later to the fragments of the Twelve Tables.

[2] See, for some aspects of the commercial practice of Assyria, Chapter XXXIII.

[3] The brothers of a deceased man are claiming his property. The deceased's wife was living in the house of her father, and certain goods in the house are alleged to have been given by the deceased to his wife. The text seems to provide that judgment shall be "according to the decision of the gods". "They shall not be subjected to the sacred river or the oath."

owing to a death, the plaintiffs have no witnesses as to the matter in issue. In all probability this provision represents a late addition to the clause, by an ecclesiastical scribe. Such an authorship is even plainer in § 48, one of the later clauses of the collection. A has been told by B, that B has seen someone committing witchcraft (a criminal offence punishable by death); yet B has not reported the offence to the king. A reports B; and B denies he saw the offence, or that he said he saw it. A must state on oath before the Ox God (son of Shamash, god of law), "May I be cursed if he did not say it." Thereby A is cleared from liability for making a false charge. As for B, the defendant, he is first cross-examined vigorously by the king ("the king, as he shall be able, shall interrogate him and see what is behind him"). Thereafter a religious personage, the Ashipu, is called in, and administers to him the oath, ending with the following fearsome warning: "Be sure, that from the oath that thou hast sworn to the king and his son, they do not release thee. According to the oath that thou hast sworn to the king and his son, thou hast sworn."[1] There are no other provisions as to ordeals or procedure in the Assyrian remains.

In the few Sumerian fragments no ordeal is mentioned except perhaps in one mutilated passage.[2]

The Code of Hummurabi, to which we must now turn, shows a considerable development in the law. Of 250 or so clauses of the Code, which survive out of the total of some 282 clauses, 15 contain provisions relating to ordeals. These are the only clauses which relate to

[1] Apparently, therefore, as in Exod. xxii. 9, the oath is used to determine the contest of evidence between two persons. The defendant has no witness but himself as to whether he saw witchcraft committed.

[2] Clay, No. 28, § 7, which perhaps applies the ordeal to the decision of a question as to the defendant's knowledge. He is apparently charged with taking the complainant's daughter without her parent's consent, and his defence is he did not know of any father or mother; but the translation is very doubtful.

procedure.[1] Of these 15 clauses, two impose the ordeal by the "river god," one for witchcraft, and one for adultery. Both are capital offences, and both are obviously offences as to which, by the nature of the case, no evidence is usually available but that of the accused.[2] The other 13 impose ordeals by oath; and of these 13, 9 are cases of bailments, dealing with the same subject-matter as the clauses of the Hittite and Hebrew Codes which have already been discussed.

Only one of all these 15 clauses (§ 9) contains a provision for the evidence of witnesses on oath. This refers to the same case as that dealt with in the latest addition to the Hebrew Code, namely, where A claims property in the possession of B; B calls witnesses to prove he purchased it, and A calls witnesses to prove his ownership.

All the other 14 clauses are instances of true trial by ordeal. Of these, 7 relate to cases where the defendant alone knows the answer to the question at issue, and he undergoes the ordeal. In 5 cases, the issue is as to the amount of the claim, and no one but the parties (usually only the plaintiff) knows the answer. The onus is here on the plaintiff, and the plaintiff takes the oath.[3] The other two clauses (§§ 106, 107) are curious. An issue is to be tried before "God and witnesses"; and the explanation seems to be as follows. Clauses 104 and 105, which appear to be recent enactments, provide that where a merchant entrusts to an agent goods to traffic with on his behalf, he shall obtain from the agent a

[1] Except for some six clauses, which provide merely that, for the decision of the question at issue, one of the parties "shall be put to account". The words "before God" are not added. They do not call for special discussion. Most of them relate to cases where the evidence of independent witnesses is not available.

[2] See *ante*, p. 353, note (3); A.C., § 17; Num. v, 11 f.

[3] § 23, amount of loss by brigandage, in a claim against the inhabitants of the district; § 240, amount of loss, in a claim arising out of a collision between ships; § 281, price paid abroad by the defendant for the plaintiff's slave; § 120 and § 126, amount of property deposited by the plaintiff with the defendant.

sealed (i.e. witnessed)[1] tablet specifying their value. Similarly when the agent pays back money to the merchant he must get a sealed tablet by way of receipt. Otherwise[2] he will not be credited with the payment. Before these enactments were passed, it was probably provided by law (in the original form of §§ 106 and 107, as in similar clauses of the Code) that a dispute between the parties as to the amount owing by either should be proved "before God." Now, to meet the new law (§§ 104, 105) after the words "before God" in §§ 106 and 107 have been added the words "and witnesses." The ordeal by oath remains applicable, and in addition the persons who witnessed the tablets (if any) will also be called.

Summing up the position disclosed in the Code of Hammurabi, we see that procedure is still very little noticed, and evidence is still unsworn as a general rule. The use of the ordeal is, in almost all cases, still confined to circumstances where the evidence of one party alone is available. In one or two cases, however, it is extended to the decision of questions within the knowledge of both parties, where there is no independent evidence—questions as to the amount of a loss. It is also extended to one or two very difficult problems of evidence—that connected with "vouching to warranty" on a charge of theft. In short, the ordeal by oath is showing some sign of a tendency to spread.

The further history of the ordeal is well exemplified by the Gortynian legislation of the fifth century B.C., which, as has been said, stands on this side of the boundary separating the primitive from mature law. A substantial proportion of this legislation is taken up with provisions relating to procedure, and in them a number of technicalities appear. Writing is not in

[1] In Babylon all tablets of the slightest importance were witnessed.
[2] Certainly in the latter case; and impliedly in both cases.

general use at Gortyn, and is not made compulsory in any transaction covered by the Codes; but in several places notice is required to be given of certain facts in the presence of two or three witnesses, who must therefore be called, if there is a trial, to prove the notice.[1] Again, in several provisions a period of time is specified within which an act is required to be done, or forbidden to be done. Ordeals—which are exclusively ordeals by oath—appear to a much larger extent than in the Codes we have already examined. As has been seen, there is yet little notion of underlying principle, but great and growing experience in the technical needs and problems of litigation. Hence the legislator concerns himself in perfecting procedure—not for general purposes, but for each type of dispute. So in the new legislation enacted in the Gortyn Codes, the legislator describes in each paragraph how each of the questions at issue is to be tried. For example, the first paragraph of the First Gortyn Code refers to litigation as to whether a man is free or slave, and if slave to whom he belongs. A fine is imposed upon the party who takes him into custody pending the trial, and does not release him within three days of an order of the Court. "And with respect to the time (i.e. the question how long had elapsed after the order) the judge shall decide on his oath."[2] If the party denies that he took him into custody, the judge is to decide on oath, "unless a witness should declare." Again, if it is alleged on one side that the man is free, and on the other that he is a slave, "the stronger shall be they who declare him to be free." If each party claims the slave as his own, "if a witness declare it," the judge is to decide according to

[1] e.g., the 2nd Code, § 2, cited *ante*, p. 343.

[2] Orders are not drawn up in writing, and as the question at what date the order was made is within the special knowledge of the Judge, he decides it, on oath.

the witness. If they (i.e. the witnesses) declare for both or for neither, the judge shall decide on oath.

Summing up the Gortynian legislation, we easily discern three types of provisions as to procedure. In some cases, where the facts are such as to fall within the exclusive, or at least the special, knowledge of one party, the ordeal by oath is directed for him, and the judge is to decide accordingly. In some cases certain facts (for example, the giving of a notice, which is made essential to success in an action) are to be proved by, say, three witnesses. Here, according as the witnesses do or do not speak to the fact,[1] the judge is to decide the case. In most other cases in the Codes, the judge decides the question on oath "according to the circumstances of the case." The judge, that is to say, gives a sworn decision, but his judgment is unfettered by statute. One of the addenda at the end of the First Gortyn Code (§ 16) makes this position very clear. "A judge, whatever it has been written (i.e. enacted above) that he should judge according to the declarations of witnesses or as denied on oath, shall so judge as has been written; and in respect of other matters he shall decide on oath in reference to the circumstances of the case." Except as otherwise provided by statute, the judge remains unfettered, trying cases according to the unsworn testimony of witnesses, and the arguments adduced before him. He however gives his decisions on oath.

In one clause of this legislation, we meet for the first time the "sacramentales" of the Leges Barbarorum. This provision is reserved for one case, a case both of seriousness and difficulty. A defendant is charged with committing adultery with the plaintiff's daughter, sister or wife, in the plaintiff's house, and the defence is that

[1] In a few places it is provided, that the witnesses who allege a certain fact shall have the right to swear, rather than those who allege the contrary. In other passages it is provided that those who allege a certain fact shall have prior right of credence.

the defendant was "tricked" by the plaintiff. In that case it is provided that "he that took him shall swear, . . . himself with four others," or a lesser number varying according to the status of the woman, "each imprecating upon himself, . . . that he took him in adultery and beguiled him not."[1] The reason for compurgators is undoubtedly this, that (to use an expression of the Hebrew Code) the other party is not satisfied to "accept" the single oath. In short, there are three developments in the law of procedure. Firstly, it is becoming technical, and contains different provisions for the purpose of trying different types of disputes. Secondly, the ordeal by oath is continuing to spread from cases where the party alone has knowledge of the facts to cases where he has only special knowledge of the facts, or where the question of fact is difficult and independent evidence is difficult to obtain. Thirdly, this spread of the oath would tend to create dissatisfaction, and an attempt is made to cure opposition and defeat perjury by providing that the party must find a number of witnesses who will also swear.

Except in mediæval Europe, however, the use of the oath did not probably spread further.[2] In Rome (as in most places) it probably did not spread even so far. Since the jurists took no part in the actual trial of issues, we are told little of the procedural law, even in classical times. In the Twelve Tables there is no fragment relating to ordeals; but we are told that this collection contained a provision giving a depositor a claim for double the value of the thing deposited, and such a rule is so reminiscent of the Hebrew and Babylonian Codes,[3] that we can easily imagine that the oath was at that time used for disputes between bailor and bailee similar to

[1] 1st Code, § 2.

[2] As to the Code of Manu, see *ante*, p. 129, and see Manu, Chapter VIII, 190.

[3] Especially in C.H. it is usual, in regard to bailments, that the party failing in the ordeal by oath pays double.

those provided for in the Codes. The ordeal by oath survived in the classical period, and though the extent of its application is not certain, it plainly shows its origin. The oath remained only in the form of the ordeal by oath. The plaintiff might in certain cases offer an oath (of different forms) to the defendant, and if the latter took it, the action was lost; if he refused it, he was condemned. He might, however, offer it back, in which case the same alternative lay before the plaintiff.[1] Generally speaking, the oath appears to have related to matters within the sole or special knowledge of the party to whom it was offered. In Athens, where, in the classical period, the law in this respect was much the same, the oath became so discredited that it survived only as a vain and dangerous trick of the advocate. In Europe, however, in different circumstances, its use, as we shall see, spread further.

[1] See Prof. Buckland, *A Text Book of Roman Law* (1932), p. 633.

CHAPTER XXXI

PROCEDURE IN THE DARK AGES

In the previous chapter the history of procedure and the ordeal was traced through the ancient Codes of the near East, and it remains to trace that history through the Leges Barbarorum and the Anglo-Saxon laws. The examination of these collections is of especial interest and importance, for it shows to what extent mistaken notions of the character of primitive procedure have stood in the way of the correct solution of some historical questions of legal interest.

The most celebrated of the Leges Barbarorum is the Salic Law. Its fame arises only partially from the fact that it was considered (until the recent discovery of a fragment of a Code of Euric the Visigoth) to be the oldest of the Leges Barbarorum. A second reason for its fame is that it was the Code of the people—the Salic Franks—who established the Frankish Empire; and it is largely true to say that the history of the Frankish Empire is the history of the Leges Barbarorum. But these considerations alone would not explain the fame of the Lex Salica, nor the mass of the literature to which it has given rise. Its chief interest to legal theorists was quite different: those who, following Maine, looked for the elusive evidence of the technicalities and formalism with which early law was said to abound, seized with avidity upon the Lex Salica. Here, at last, were the strange, the meticulous ceremonies for which they sought. In the Lex Salica, in the words of Pollock and

Maitland's *History of English Law*,[1] "a few precious chapters, every word of which has been a cause of learned strife, lift the curtain for a moment and allow us to watch the Frank as he litigates. We see more clearly here than elsewhere the formalism, the sacramental symbolism of ancient legal procedure. We have no more instructive document; and let us remember that by virtue of the Norman Conquest, the Lex Salica is one of the ancestors of English law." Here, therefore, is a problem of importance, for the solution of which, as of all historico-legal problems, recourse should be had to the texts themselves.

The best text of the Salic Law dates from the second half of the eight century A.D. It purports to be a Code of law enacted by Clovis about the year A.D. 500. The text is corrupt, disfigured, mutilated and confused, and it comes to us from the close of the Dark Age of A.D. 600–750, with an unknown history behind it. The first chapter ("De Mannire") consists of two rules which merely impose fines for failure to appear in Court after a summons. The rest of the chapter consists of a kind of short commentary, merely three simple rules as to service. These clauses are so different in matter from what follows, that plainly they have been taken from elsewhere and put at the head of the Code: and indeed it is generally thought that the first two clauses have been taken from a Merovingian capitulary, and placed here with this short commentary.

Subject to what we have said as to this first chapter, the first thirty-six chapters—more than half this Code—are of a kind with which we are indeed familiar in early legislation. The language is such as we have always met with elsewhere, terse, couched in conditional sen-

[1] 2nd Edition, vol. I, p. 7. The learned authors in their "Sketch of Early English Legal History" which fills Book I, drew on certain contemporary histories as their authorities.

tences in the third person, statutory in form. The sanctions are, in practically every case, monetary.[1] There is no word of procedure. First (Chapters I–XII) comes a long group of chapters dealing with theft in an orderly manner; and then follows a haphazard collection of legislation on different topics. But the subject-matter is throughout civil injuries of various kinds known to early Codes, chiefly theft, homicide, wounding, assault, rape and adultery, with the addition of one or two criminal rules.

Chapter XXXVII, entitled "De vestigio minando," is the first chapter which has a subject-matter connected with procedure. It relates in fairly simple terms to the "spurfolg" (spoor law), defining the limits of the right of the owner of a beast to retake his property when, following its traces, he finds it in the hands of a third person, who claims to have acquired it by barter or purchase.

When we reach Chapter XL, we have to deal with matter of a strange and unfamilar kind, which we meet again and again in the rest of the Code, and which merits somewhat closer attention.

These chapters, from the fortieth to the end, which plainly appear, for many reasons,[2] to be later than what precedes, can be described as belonging to two different classes. The first class consists of clauses which are of the same form as those that precede, and in all or almost all cases go over the ground of the topics covered in the earlier clauses, but provide for some special or exceptional set of circumstances.[3] In other words they continue the pattern of the Code, being later legislation

[1] There are a few corporal sanctions for offences by slaves, as elsewhere.

[2] For example, in these chapters appears evidence of the increasing devolution of judicial functions on classes of officials. Their date is the eighth century A.D.

[3] One of these (59, De Alodis) is the famous chapter setting out the rules of succession. This must also be late. There is nothing comparable except in the Twelve Tables, the Pentateuch, and the 1st Gortyn Code, § 5. See *ante*, p. 245.

added from time to time, and never arranged according to subject-matter.

The second class[1] consists of strange material indeed. In substance these clauses are descriptions of allegorical ceremonies, and technical or elaborate procedure. In language, contrasted with the terseness of the other clauses, they are verbose in the extreme, but the latinity is better. Often no sanction is attached; often they are not statutory in form or substance[2] and do not prescribe the use of the formalities they describe, but may merely introduce them by the words "Observare convenit"[3] ("the custom is") or use the word "debet" or "debent"[4] (they *ought* to do so and so). If ancient procedure were of this character, it were indeed full of "formalism" and "sacramental symbolism." But are these clauses ancient and to what extent do they represent legal procedure actually in force?

There are cogent pieces of evidence available elsewhere as to the date and value of these clauses. There is another compilation among the Leges Barbarorum, known as "Lex Ripuariorum," the Laws of the Ripuarian Franks. As has been said, towards the close of the fifth century A.D. the Ripuarian Franks, closely akin to the Salic Franks, elected Clovis the Salic King as their ruler, and the dominions of the two groups of Franks thereupon became united, before Clovis issued the legislation with which he is credited. The earliest text of the Lex Ripuariorum is roughly contemporary with the earliest text of the Lex Salica, and it, too, represents a collection of rules of various dates. The middle of the three sections into which the Ripuarian Code easily

[1] Chapters 40, 44, 45, 46, 47, 50, 52, 53, 56, 58 and 60.

[2] Occasionally we find one common characteristic of false law, a provision that the king is to act in such and such a way, e.g., 56, 1, "tunc rex . . . extra sermonem suum ponat eum."

[3] See, e.g., 46, "De Adfathamire hoc convenit observare."

[4] For "debet" see, e.g., 53 (1), 56, 58.

divides itself—namely, that from clauses 32 to 56—is of especial interest to us, for it consists chiefly of clauses identical in substance and language with clauses of the Salic Law. Clause 32, De Manire, contains the same two provisions that stand at the head of the Salic Law, with a different commentary added. But the clauses 38 to 56 of the Ripuarian Code cast a strange light on those "procedural" clauses of the Salic Law, which we have mentioned. These clauses (38 to 56) of the Ripuarian Code consist of the second half of the Salic Law (Chapters XL–LX) almost verbatim, and in the same order, except that the "procedural" clauses of the Salic Code are omitted.[1] There is no possibility of accident here. Now it can hardly be doubted that the Ripuarian Code was built up from different collections of laws, some of Frankish origin. There are two alternative interpretations of what we have observed: one is that these "procedural" provisions were not in the Frankish collection from which the compilers of the Lex Salica and the Lex Ripuariorum both drew; and the other is that the compiler of the Lex Ripuariorum omitted them of set purpose. If the latter view is correct, this must have been because he had no great opinion of them.

The most celebrated of these "procedural" provisions is Chapter LVIII, "De Chrenecruda." In a long and elaborate chapter is detailed how a man, who has no means of fully satisfying a judgment, may[2] assign the liability to certain specified relatives, by throwing upon them earth taken from the four corners of the house. The ceremonial is ludicrous in its formalism. Several later MSS say it was then no longer in use; that it had

[1] Namely, those specified in footnote (1), p. 372, *ante*. The Lex Rip. also omits §§ 41 to 43 of the Salic Law, a short, late group all relating to homicide. On the other hand, it includes two "procedural" clauses of the Salic Law (§§ 46 and 52) without any of their formalities.

[2] The clause is not statutory in form, and continually uses the word "debet" (he, or they, ought to do so and so).

only been observed in pagan times[1]; and that it was abolished by an edict of Childebert in 596—that is about 200 years before our earliest MS. Obviously this chapter is not worthy of any serious attention; like thousands of so-called legal provisions of the Middle Ages, it is a mere description of a custom believed once to have been in force. Certainly in the form described it can never have been in force.

The Leiden Codex of the Salic Law says in the second chapter: "There is no oath among the Franks; when they composed the Lex, they were not Christians." Although Christianity was not responsible for trial by oath, this is an interesting observation in view of the evidence, examined in the last chapter, as to the use of ordeals in primitive law. Taking the best text of the Salic Law, we find provisions as to the use of the oath and ordeal that might well have been expected in the circumstances. In the whole of Chapters II to XXXVIII there is no mention of ordeal or oath, and trials are apparently by the unsworn evidence of witnesses. In Chapter XXXIX, 2, appears the first reference to the oath. It applies only where "there is no sure (or definite) proof,"[2] and the defendant swears with a fixed number of "swearers" (juratores)[3], or pays the appropriate monetary composition. Similar provisions (limited to cases of the absence of "sure proof") are to be found in Chapter XLII, 5. Chapters XLVI, XLIX (1,3), and LVI (1) show us witnesses giving evidence on oath. In Chapter LIII (a procedural clause) we read of a practice under which a man charged with an offence for which he must undergo the ordeal of the cauldron of hot water,[4] may "buy back his hand" by a payment and

[1] The Salic Franks adopted Christianity under Clovis, about the time of his legislation.

[2] "Si . . . probatio certa non fuit."

[3] Showing a lapse of a very considerable length of time from the earlier provisions.

[4] Presumably in the absence of sure proof. See also, for the ordeal by cauldron, c. 56.

take the oath instead. And in Chapter LVIII, "De Chrenecruda" (mentioned above), is a rule providing for an oath with a fixed number of oath helpers, to prove that the unsuccessful defendant has no means to satisfy the judgment. Hitherto we have confined ourselves to the earliest and best text of the Lex Salica. When we turn to the later manuscripts of the Lex, we find that rules providing for the taking of the oath have spread back into the earlier chapters.[1] This is not surprising; the scribe was bringing the Code up to date by incorporating contemporary law.

The rest of the Leges Barbarorum, though they cannot be examined here in full detail, constitute a great mass of material, which affords valuable scope for testing our conclusions as to the history of the ordeal. In the use, however, of this material a preliminary observation must be made. When we are dealing with a manuscript of, say, A.D. 800, purporting to be the Code of a King of, say A.D. 500, we must expect to find, if the Code contains a system of law still in force in A.D. 800, that it has been repeatedly altered and added to. This we invariably find in all ancient Codes, and the only apparent exceptions are the Code of Hammurabi and the Gortyn legislation, which are not real exceptions, for they survive on the very stone upon which they were published. The phenomenon should not surprise us. The scribe who peruses the Code of an earlier king, observing a discrepancy between that written law and the law of his own time, and not knowing that law unconsciously and invisibly changes, believes, of necessity, that the Code contains an error, and proceeds to correct it. Still more readily, on perceiving in the Code an omission of a law attributed to the same king, he proceeds to add it to the

[1] See Chapter 14 (2, 3) and 16 (4) in Cod. 2 (Hessels & Kern). The words used in these passages are the same as those appearing in the best text from c. 39 (2) onwards ("et probatio certa non fuit").

document. Often it is in fact a contemporary law which did not exist in the time of the old king; sometimes it is a law which has never had any existence at all. This is the whole substance of the pattern and process by which each of the Leges Barbarorum are plainly constructed. On the other hand, if we are concerned with a document of A.D. 800 purporting to be a Code of a king of, say, A.D. 500, which Code ceased to be in force shortly afterwards, either because the country was overcome by invaders, or for some other reason, the position is entirely different. We cannot of course expect, in this period, such intellectual integrity as will respect the Code: space for writing, for example, is valuable. The Code will be likely to contain laws which are quite wrongly thought to have once been in force; but the scribe is unlikely to incorporate law of his own time, and especially rules of contemporary procedure. Applying these considerations let us briefly examine the texts of the Leges Barbarorum.

We have what is thought to be a fragment of a Code of Euric the Visigoth (466–485). As we have seen, its quality is outstanding[1]; it is the law of a Teutonic people who had lived in the Roman Empire, and it is strongly influenced by Roman law. It is thought to have been in force till the reign of Leovigild (568–586). Let us treat it, then, as a sixth-century Code. Fortunately the extant fragment, small as it is, contains (*inter alia*) a quantity of legislation on the subject of bailments, and the clauses where oaths are mentioned relate to the familiar situations. In three cases,[2] as in the Eastern Codes, the oaths are taken by bailees of property which has been lost. In the other two cases,[3] an oath is taken by the defendant, within whose exclusive know-

[1] It appears to me to have been added to; see, e.g., § 292, which contains a reason for obedience.

[2] §§ 278, 279, 280.

[3] § 284 and, semble, § 276.

ledge the fact apparently is. There are no other references to the oath.

As to the legislation of Clovis the Salic Frank, ruler of a much less advanced people, at the most Chapters II to XXXVI can date from his time,[1] and these chapters contain no mention of oaths or ordeals in the earliest text (which is of the later eighth century).

Shortly after A.D. 500, Gundobald, the Burgundian, according to tradition, issued a Code of legislation to his subjects, and it was added to and remained in force as late as the ninth century. The Lex Burgundionum, therefore, which purports to be his legislation, cannot be accepted as being all of his time. On examination it appears plainly to consist of an orderly Code of law followed by a large, miscellaneous mass of legislation, which, as we are often informed in the text, is of later date. The Code proper is, like the Code of Euric, primitive law influenced by Roman law, but even this part contains many interpolations of a later date.[2] It is not safe therefore to treat the provisions of the Code as a whole as representing law of an earlier date than A.D.800, although there are many indications in the Code proper that in its original condition it provided for no ordeals except the oath, and that only in the absence of other evidence.[3]

Theodoric the Great (about 454 to 526), the Ostrogothic conqueror of Italy, apparently produced a Code of law. When, however, after his death, Justinian recovered Italy, Gothic rule came to an end in that country, and Gothic law ceased to be in force. The language of the Edictum Theodorici makes it certain

[1] It is exceedingly difficult to believe that very much of this dates from A.D. 500.

[2] e.g., the first chapter, which is of purely ecclesiastical origin.

[3] See 6 (3), (6), (9); 20 (2); and 39 (3). With 6 (3), compare C.H. 20. With 20 (2), compare Euric 284. With 39 (3), compare A.C., 25. Chapter 8 of the Lex Burg. (at any rate, sub-clauses 2 to 5) is probably very late.

that the Code has been much tampered with, and part of it consists undoubtedly of mature and not primitive law.[1] The compilation is probably the work of some Roman lawyer, writing in that period of enthusiastic study of the law, before the Lombard hosts invaded the country some fourteen years after Justinian's victory. But, judged by the test we are now applying, the Edictum is shown to be based on genuine material. The only clause providing for the oath refers to the loss of bailed property. As in the Code of Hammurabi, the bailee may escape liability by taking an oath that he was not a party to the loss; if he does not take the oath, the plaintiff may prove the amount of his loss by oath.[2]

About A.D. 643, Rothari the Lombard is said to have produced a Code. But the Edictus Rothari (of which the earliest texts are of about the end of the eleventh century) contains a system of law which was in force for centuries after the time of Rothari, and on examination plainly appears to have been brought up to date from time to time. We must deal with it, therefore, under the later date.

The so-called Pactus Alamannorum[3] consists of fragments of a collection of laws of the Alamanni which are thought to have had their origin in the first half of the seventh century, but they come to us in a document of the eight century, and must, therefore, be treated as being, in their present form, of the latter date.

On the threshold, then, of the Dark Age of A.D. 600 to 750, reviewing the legislative products of the culture

[1] Such a phrase as (§ 86) "actio furti" is impossible in primitive law; causes of action belong to a far later stage. See also § 87, "In fuga positus servus nec vendi nec donari potest"; and §§ 125, 132. The Code ends with an addition (§ 154) rendering it sacrilege to summon any person on the Lord's Day or Passover—obviously by an ecclesiastical hand. As to MSS, all that is known is that Pithæus, who produced the first edition in 1578, had one MS, and Molaeus another.

[2] Edictum Theodorici, § 119.

[3] M.G.H., Legum, Tom. 3, pp. 34 ff.

of the sixth century, we see that the simple procedure of primitive law by unsworn evidence, with the ordeal in default of evidence, still prevails. In the more primitive (i.e. Early) Code of Clovis there is nothing of ordeal or procedure; in the two Middle Codes (Theodoric and Euric) the only legislation referring to the oath is such as is found in the Hittite and Hebrew Codes (except for the latest addition to the latter); yet the peoples of these Codes had all embraced Christianity, and the Visigoths and Burgundians long before. Procedure is scarcely noticed anywhere, and there are no technicalities of procedure; but in a few places, in the two Codes influenced by Roman Law, provision is made that a transaction should be evidenced by "two or three witnesses"[1] or "five or seven witnesses."[2] It is, on the face of it, not a hard-and-fast rule—the law is not yet crystallised enough—and it may well have come through clerical hands from Deuteronomy xvii, 6, and xix, 15, the only provisions of the kind in the Pentateuch.

After the Dark Age appears, first, the second half of the Lex Salica, which has already been examined at length. The oath (except in Chapter LVIII) is taken "where there is no sure proof," but we now hear of the evidence of witnesses on oath, and of a specified number of "swearers" in certain cases, as well as of the ordeal by hot water.[3] There is, however, as yet no mention of the ordeal by battle. We also read, in one fragment of the Pactus Alamannorum, that, in two cases, the defendant, instead of paying the ordinary pecuniary sanction for the wrong in question, may swear with a specified number of others "that he did not commit the wrong." In the other two fragments of the Pactus, where swearers are more frequently referred to, it is

[1] Euric 307; see Lex Burg., 17, (4).
[2] Edictum Theodorici, 28; see Lex Burg., 43 (a later addition).
[3] Perhaps an old German ordeal, which preceded the use of the oath. Its scope was not apparently extended. It is also found in the Anglo-Saxon laws.

provided that the defendant "shall pay . . . or swear with (so many others)." With the Lex Salica and the Pactus Alamannorum we may compare the further developments in the compilations called the Lex Alamannorum and Lex Baiuvariorum, in both of which the ordeal by battle first appears, and, still later, the compilations made at the Court of Charlemagne about A.D. 800. These are descriptions of rules said to be in force in parts of his dominions, and are not legislation, though they sometimes adopt verbatim the provisions of other Codes. With these collections—chiefly the Lex Saxonum and Lex Frisionum—we can compare the Lex Ripuariorum of the same date and the additions to the Lex Burgundionum (which was still in force). Lastly, after the second Dark Age, which commences in the ninth century, comes the Edictus Rothari, which is contained in texts of 1100 and onwards, and represents legislation of about A.D. 643, brought continually up to date.

The analysis of all these documents, taken in this order, gives the following wholly consistent results :—

	Code.	*Portion.*	*Approximate date.*	*Oaths.*	*Hot water.*	*Battle.*
1	Salic (Clovis)	Ch. 2–36	500 (?)	No	No	No
2	Ostrogothic (Theodoric)	Whole	520 to 560	Bailment (one)	No	No
3	Visigothic (Euric)	Whole fragment	470 to 580	Bailments (three) Defendant in sole possession of the facts (two)	No	No
	DARK AGE		600 to 750			
4	Salic	Ch. 37–end	650 (?) to later eighth century	Evidence on oath by witnesses in some cases. In a few cases Defendant swears "where no sure proof", with or without a specified number of swearers	Yes	No
5	Pactus Alamannorum	The three fragments	650 (?) to later eighth century	In a number of cases, oaths of defendant and a specified number of swearers	No	No
6	Lex Alamannorum	Whole	725 to later eighth century	Broad use (limits not clear) of oaths of defendant and a number of swearers	No	Yes
7	Baiuvariorum	Whole	743 to later eighth century	Ditto	No	Yes

	Code.	*Portion.*	*Approximate date.*	*Oaths.*	*Hot water.*	*Battle.*
8	Frisionum	Whole	Beginning of ninth century	In civil wrongs generally, sworn by defendant where offence denied, with specified number of swearers fixed according to offence	Yes	Yes
9	Saxonum	Whole	Ditto	Ditto	No	Yes
10	Anglorum et Werinorum	Whole	Ditto	Ditto	No	Yes
11	Ripuariorum	Whole	Ditto	Ditto	No	Yes
12	Burgundionum (Gundobald)	Whole	500 (?) to early ninth century	Ditto[1]	No	Yes
	DARK AGE					
13	Lombard (Rothari)	Whole	643 to 1100	Ditto	No	Yes (with detailed rules)

[1] There is much evidence in the Lex Burgundionum that in its earliest form it provided for the oath only in the absence of other evidence, and that the oath was only taken by the defendant, see *ante*, p. 377.

The above table shows that in the eighth century and later, in the Frankish Empire, the ordeal and oath attained a scope never reached in the ancient Near East nor in ancient Greece or Rome, and it also shows the steps in this process of expansion.

The ordeal by oath always threatens, unless checked, to engulf the whole law. As used by primitive peoples, in default of evidence, it is unexceptionable; but it always has in it this seed of destruction, that a weak Court may take shelter from the odium of disbelieving a powerful party, or find a refuge from the task of deciding upon a conflict of evidence, by declaring the evidence insufficient and having resort to the oath. The first stage, represented in the latter half of the Salic Law, is to apply the oath when proof of the offence is not " certa." This is an extremely slight alteration, if any[1]; but here the judge sets sail on an unknown sea. Even if two witnesses should give evidence that they saw the defendant in the very act of committing the offence, yet if the defendant denies it and alleges that the witnesses are perjured conspirators, is there " certa probatio " or not? It is easy to see that, from reliance on precedent, if Courts are weak, the logical outcome will be a general practice of resorting to the oath wherever the defendant denies the offence, but in A.D. 750 such a result has not yet been arrived at.

About the year 750, at the close of the Dark Age (600–750) we see in the Pactus Alamannorum and the Lex Salica that the law of the Frankish Empire has developed to the following point. The ordeal by oath has been extended not merely to cases where there is no evidence but the defendant's, but to other cases where there is " no sure proof," that is to say, where the Court

[1] It is difficult to know precisely how to translate " certa ". If we translate the phrase as " where there is no *definite* proof," there is no alteration at all from the primitive usage.

is experiencing difficulty; and here it is not merely the defendant who takes the oath, but witnesses.[1] Secondly, the right of the defendant to discharge himself by oath, where there is no sure proof against him, is being extended to certain difficult and serious charges, whether there are witnesses or not; but in order to combat perjury on his part, it is provided that he must find a specified number of witnesses who will swear with him.[2] This may seem harsh; but some case h been proved against him, and roughly speaking (as in primitive law generally) the onus is on him to prove his innocence. One by one, in the case of divers offences, a requisite number of witnesses is fixed; but in A.D. 750 it is not by any means every case which has its fixed quota, and from which he may discharge himself by oath. Furthermore, it is plain from the Codes that they are still real witnesses, and are expected to swear to the defendant's innocence, of their own knowledge. We were told so in the Gortyn Code[3]; we are told so, for example, in a fragment (perhaps the earliest) of the Pactus Alamannorum,[4] and we are told so even in the (later) Lex Ripuariorum,[5] and in one of the chapters of the Lex Burgundionum (of historic importance) which calls these swearers "testes" ("witnesses").[6] There was, of course, no rule excluding hearsay evidence, and the witness might base his belief on credible information; but in that respect he was in the same position as any other witness.

Between A.D. 750 and 800 a great change took place. Firstly, the defendant's privilege of clearing himself by

[1] As in the latest part of the Heb. C. (Exod. xxii, 9), and in a provision of the C.H. (§ 9).

[2] As in the 1st Gortyn Code, § 2.

[3] See *ante* p. 367.

[4] 3rd fragment (*M.G.H.*, Legum, tom. 3, p. 34 ff.), §§ 22 and 38: "X solidos solvat (componat) aut cum Y iuret ut pro malo hoc non fecisset."

[5] Tit. 5 (10) and elsewhere: "aut cum X iuret quod hoc non fecisset."

[6] Lex Burg., 45. See *post*, p. 386. See also Lex Fris., 10, "De Testibus."

oath was insensibly extended till it applied, not merely to a case where there was no sure proof, but to all cases where he denied the offence charged. At the same time most offences had now their own fixed number of swearers, who were needed by the defendant in order to clear him, and the number rose according to the gravity of the offence, till, for example, in the case of "murder" (i.e. secret killing) in the Lex Ripuariorum it amounted to 72 men![1]

The prevalence of perjury was such that the necessity for procuring a number of witnesses, who would give sworn evidence for the defendant, had been quite insufficient to ensure that the truth should prevail. The defendant could always produce the requisite number from his relatives. Before A.D. 750 the plaintiff had (at least in some cases) been given the right of choosing half the number (presumably from the defendant's group),[2] but perjury continued unabated. The Courts were weak, and the defendants found the requisite number of perjurors and were acquitted; with the result that plaintiffs began to take the law into their own hands, and resort to violence. The law made the best of a hopeless position by allowing the plaintiff, if dissatisfied with the oath (or rather oaths) offered to him, to challenge the defendant to fight. The man with justice on his side would win; and the law began to make rules governing the contest. This introduction of the ordeal by battle must have occurred about A.D. 775, and was no more than fifty years old when our text of

[1] Tit. 15. At this stage it is obvious that few seriously expected the sacramentales to swear truthfully to what they knew; for how could a defendant, charged with secret killing, find 72 men who knew that he had not killed at all?

[2] With the "medius electus" of the Lex Salica, Chapter 42 (5), cf. the "medicus electus" of the Pactus, fragment 1. Compare the practice of the Sinai Bedouin, where the ordeal by oath is only used in the absence of sufficient evidence; and where, among some tribes, in the more serious cases, the defendant must be supported by the oaths of others, and the plaintiff has the right to dictate the oath, and to choose the men of the defendant's family or tribe who will swear (*Bedouin Justice*, pp. 40, 41).

the Lex Burgundionum came into existence. In Chapter XLV (which does not pretend to be part of the original Code) the introduction of the ordeal by battle is wrongly attributed to a late enactment of Gundobald; but the reasons given for the introduction are obviously correct. The passage runs as follows: "Many, we find, are so depraved, that they do not hesitate to offer an oath upon things uncertain, and to commit perjury upon things unknown to them." For the future, if the party (i.e. usually the plaintiff) to whom an oath has been offered declines to accept it, and "believes, confident in the truth of his cause, that he can convict his adversary by force of arms, and the other party does not yield, licence to battle shall not be refused." And if a witness of the party who has offered the oath is defeated in the contest, every witness who offered to take the oath "shall be fined 300 solidi," "so that they may delight in truth rather than perjury." Those scholars who believe in the sacramental symbolism of primitive procedure, do not accept this origin of the ordeal by battle, and suppose this ordeal to have been a primeval institution.[1] But even if we were to disregard the evidence of the Lex Burgundionum—which (apart from the fragments of Euric's Code) stands in a class by itself and is infinitely the best legal production of the period—we should still know that this was the true origin of the ordeal. So, too, the Edictus Rothari, in sundry passages, permits the defendant to attempt to "satisfy" the plaintiff with an oath,[2] and allows the plaintiff to challenge to battle if he is not satisfied with the offer. Trial by battle, so far as I am aware, is not found outside mediæval Europe in any Code or any tribe. By A.D. 1100 the Edictus Rothari contains detailed rules for the procedure of the ordeal. It finally

[1] See *P. & M.*, vol. I, pp. 50, 51.
[2] See, e.g., Edictus Rothari, §§ 9, 143, 252, 366, 368, 381.

spread as far as Iceland,[1] but, as is well known, at the Norman Conquest it had not yet reached England.[2]

What were the chief reasons for this development of the ordeals by oath and battle? One was the weakness of the central executive authority and of the Courts. In an average people of the 3rd Agricultural Grade, even though executive power may be weak, the influence of public opinion in small local groups and the general desire for justice and respect for law are usually manifest. When the Franks established their monarchy on Roman territory, there was a period of legislation covering the sixth century; but the local chieftains and the clergy were consolidating their territorial position and steadily growing in wealth and independence. The years from Dagobert to the accession of Pippin in 751 showed a continuous decline in the power of the Merovingian throne; and, as has been seen, the later parts of the Lex Salica (say, A.D. 700 to 750) contain in great part not statutory law, but descriptions of customs. The reason was that the process of legislation had practically ceased, for the Frankish monarchy was losing its authority to legislate for its dominions. Furthermore, in the second half of the Salic Law, we see jurisdiction exercised by royal judges; but they had no power to carry out their own judgments—executive authority, such as it was, was vested in the King. Such of the clauses of the second half of the Salic Law as can be supposed to represent procedure actually in force, and so much as we learn of procedure in later Codes, betray the greatest reluctance of the Courts to give any judgment in the absence of the defendant (who, if he were present, might be induced to settle with his opponent) or to take any steps to enforce their orders

[1] See Burnt Njal, p. 28.

[2] It is important to add, that neither had the defendant in England the right to clear himself by oath in all cases. See *post* pp. 389f.

against a contumacious party. The practice of demanding security from the proposed plaintiff, the taking of pledges pending a trial, and the employment of the penalty of outlawry, grow steadily from the eighth century. Even Charlemagne produced but little legislation (probably, for the main part, of an administrative character) and his reign is a beam of light which throws up the surrounding darkness. It was in part the weakness of the secular Courts in the eighth century that caused them to take refuge behind the ordeal from the odium of deciding a disputed issue against a powerful litigant.

The decrease in the royal authority greatly assisted the rise in the power of the Church. The first Middle Codes of the Frankish Empire—the two ecclesiastical compilations of false law known as the Leges Alamannorum and Baiuvariorum—are also the first documents evidencing the general spread of the ordeal by oath and the appearance of the ordeal by battle.[1] In the Ecclesiastical Courts, as in those of the Hebrews long before,[2] and in those of Norman England at a later date, the priests had extended the ordeal by oath to a general method of trial,[3] and they also presided over the applications of the oath in the secular Courts. It was undoubtedly due in part to their influence that the oath at this point of time experienced the wide spread to which we have referred. This event had probably never occurred before or since, and it inevitably produced another unprecedented development, or rather reaction. The oath was grossly abused; the opposing party resorted to violence; and gradually the new institution of ordeal by battle gathered about itself its own rules.

[1] Similarly in the Lex Rip. of 800. Tit. 56 corresponds to c. 59 of the Lex Salica (the last of the clauses of the Lex Salica represented in Lex Rip.); Tit. 57 introduces the ordeal by battle (which is later than the Lex Salica); and Tit. 58 is an ecclesiastical production. [2] See *ante* p. 120.

[3] Perhaps through an over-wide interpretation of Exod. xxii, 9, 10.

The development of procedure in Anglo-Saxon England took place later than on the Continent, and the whole process never passed beyond the stage which was there reached about the year 750. The laws of Aethelberht contain no reference to procedure or ordeals. Next comes a later collection, attributed to Hlothhere and Eadric, in which are mentioned one or two technicalities of procedure (especially sureties). The ordeal by oath is now mentioned, but only applies to cases where there is no independent evidence,[1] except in the one case of the vouching of a warrantor[2]; and, in relation to the same circumstances, there is also mentioned the evidence of witnesses on oath. The ordeal by oath has therefore only as yet attained the scope it reached in the Lex Salica. The next collection, that of Wihtred, is an ecclesiastical production. The strange character of this document and the rest of the Anglo-Saxon laws has already been pointed out; they cannot be accepted as true law of any age, though they reflect their ecclesiastical authors' notions[3] of what procedure should be or used to be. Yet even in the laws of Ine we read of the punishment of a man found guilty "either in the ordeal or by being caught in the act of committing an offence"[4]; and a provision in the laws of Aethelstan speaks of an offence by a person "whosoever it may be, whether taken in the act or not taken in the act, if it is known for a certainty, that is, if he shall not deny it, or be found guilty in the ordeal, or if his guilt becomes known in any other way."[5] We must not, therefore, assume, in regard to the law of Saxon

[1] With Hl. and E., §§ 2 and 4, compare C.H., § 20. See also § 5. Here, as in the Salic Law and the Pactus, is a commencement of the fixing of a quota of witnesses, and a provision as to choosing part of the number. In §10 the defendant can clear himself by oath, if the plaintiff consents.

[2] § 16; cf. Heb. Code (Exod. xxii, 9); C.H., § 9.

[3] Chiefly after the Norman Conquest.

[4] Ine, § 37. Compare Ine, § 18.

[5] IV Aethelstan, § 6.

England, that there was ever a time when the defendant was, in all circumstances, allowed to clear himself by ordeal, however plain the case against him; and we know that the ordeal by battle was not found in England before the Conquest.

On a groundwork of chaos and weakness, conflict of local jurisdictions and local laws, redeemed only by the vigour of the Norman monarchy, English law has built itself up. So far as procedure is concerned, the essential feature of the story is the introduction by the Crown of new machinery, to which the old ordeals did not apply; and the rapid extension of the jurisdiction of the King's Court. The story unfolds itself in the full light of history, and it lies beyond our purview; but a long time elapsed till the end of the thirteenth century, when forms of action came into being, and English procedure began to attain that wholly technical and stereotyped character, which is associated in our minds with the procedure of primitive law.

CHAPTER XXXII

CONTRACT AMONG THE TRIBES

THAT portion of Maine's *Ancient Law*[1] in which he considers the early history of contract, is among the most unsatisfactory chapters of the book. He endeavours to explain that history by supposing a primitive law which delights in "perplexed ceremonies,"[2] "grotesque gestures" and "symbolical acts."[3] "That which the law arms with its sanctions," he says, "is not a promise, but a promise accompanied with a solemn ceremonial."[4] He appreciates the importance, in this connection, of the study of the Roman law of contract; and indeed it is from his conjectures as to the history of the Roman Law that he derives his conception of the character of the primitive law of contract. In so far as those conjectures were founded on Roman texts, they were unwarranted; for Gaius' Institutes, late as they are, rarely err in the statements of history to which that great teacher commits himself. There are, indeed, few institutions of the Roman law which bear so clearly on their face the marks of their origin and history: once the dogma of a religious, formalistic and technical origin of rules of law is laid aside, and the rules of the mature Roman law of contract are taken upon their face value, it is possible to write quite a detailed chronological account of the early progress of this department of the Roman law—an account confirmed at every point by what we learn of the history of contract else-

[1] Chapters VIII and IX.
[2] P. 289. [3] P. 282. [4] P. 327.

where, both among the tribes and in ancient Babylon and Assyria. Let us begin then with the beginnings of contract among the tribes.

First, however, must be put aside the modern lawyer's notion of contract in the abstract. This is not the simple and natural fact it might seem to be, but is an artificial, technical and theoretical conception, arrived at by a process of abstraction from an increasing number of facts, and suitable for application to the myriad forms of modern human association. The law of contract starts with something much more simple and practical. In the primitive law we must speak not of contract but of transactions. The history of primitive contract is the history of primitive commerce.

Until we reach the highest grade among the tribes, we rarely find an institution or practice that can properly be described as trade.[1] The exchange of goods—to use a vague, generic term—is of course less frequent than among more advanced peoples; property consists chiefly of articles of food and articles of personal use and attire. In an earlier chapter[2] were described the social relations existing between the members of a community, where no organs had yet been specialised or crystallised out for the purpose of the trial of disputes. Following especially the account given by Dr. Malinowski of life in the Trobriand archipelago of Melanesia, mention was made of the greater importance of reciprocity as a force, impulse or principle actuating the conduct of persons towards one another; though that force is much assisted, and its nakedness is well clothed, by such motives as generosity, a desire for public approval, and the like. The system, so to call it, is chiefly made up of mutual acts and mutual transfers of goods, but in the

[1] The modern literature on the topic of primitive trade begins with the work of Karl Bücher. For bibliography, see Firth, *Primitive Economics of the New Zealand Maori* (1931), and Miss E. E. Hoyt, *Primitive Trade* (1926).

[2] Chapter XVIII.

present chapter we are especially concerned with the latter.[1] These are of the most varying kinds. At the one extreme are a few gifts plain and simple, for which no return is expected. Other transfers are gifts calling for some return; and at the other extreme are gifts to which the return must be of equal value,[2] so far as the means of the recipient allows; while the latter, to satisfy his amour propre or to win public approval, may often strive to make it larger. Among most of these tribes below the 3rd Agricultural Grade, transfers of this kind take the place of commerce proper.[3] While they are more than gifts, they are less than exchange in the sense of barter, for barter presupposes something of an objective standard of values, a preliminary stipulation as to the form which the return is to take, and an instantaneous return. None of these three conditions exists. Exchange is not frequent enough to create a scale of values; there is usually no bargaining; and the return may be long deferred—especially in the case of the transfer of the seasonal output of one producer (for example a fisherman) to a producer of a different class (as a gardener), who will return of his own output in its season. Similarly the exchange may be of an act for a gift, as where one man makes an article for another, and will receive in return some gift in kind.

The view of some authors that barter is only to be found where there has been contact with the civilisation of Arab or European, is as yet only conjecture. Barter appears among a few of the most primitive of all communities, where it is sometimes sharply separated from

[1] Including transfers of incorporeal rights, e.g., the exclusive right to perform a particular song or dance; cf. Argonauts, p. 186; Lowie, pp. 222 ff.; Spencer and Gillen, *Across Australia*, I, 224. The transfer may be between individuals, or groups of various kinds.

[2] And must sometimes be of a special type of property.

[3] For the best description of such a system and its relation to commerce, see Dr. Malinowski's *Argonauts of the Western Pacific* (1922). See also Firth, Chapter XII, pp. 386 ff.

the system of gift-exchange.[1] It may appear in more, for anthropological observers as a whole, preoccupied with more striking phenomena, tell us little of trade. However this may be, in the 3rd Agricultural Grade, and not before, barter is widespread. The system of relations just mentioned ceases to be all-sufficient in the domain of commerce, as in that of law. The greater quantity of property, the greater importance of property in the valuation of status, the greater frequency of exchange, accompany a growing definition of values and a substitution of barter for gift-exchange. In particular, as cattle constitute the most important form of exchangeable property, a definite scale of values is arrived at between different types of beast; and other lesser objects (such as the hoe) also come to bear a fixed ratio of value to the animals. These various units (but chiefly some common type of cattle) are also used to define the amount of the bride-price and the compensation payable for an injury.

The first commercial transaction that appears is one which, for want of a better term, may be called "ready (or instantaneous) barter." It consists (to be precise) of the delivery of a specific article by one party in exchange for the contemporaneous delivery of another specific article by the other party. This is not, of course, what modern English law would call an executory contract[2]—it is not a contract at all. To employ technical language, we might call it a bilateral conveyance. The transaction is completed *uno ictu*, and generally no obligations remain to be performed on either side.

[1] It appears, e.g., among the Andaman Islanders (Man, pp. 328, 389 f.; *Andamanese Objects*, p. 280); and in Melanesia (*Argonauts*, pp. 83, 96, 176, 189, 190, 362), where it has the separate name of Gimwali. As distinct from the great system of ceremonial exchange, called Kula, Gimwali has (1) no ceremonial, (2) no magic, (3) no permanent personal relationships and (4) in the Trobriand it is carried on exclusively with the despised industrial community. But there are some transitions and gradations between.

[2] That is to say, a contract under which obligations remain to be performed by one or both parties.

Neither party gives credit to the other; and no warranty of quality is implied, or found necessary or useful. Men trust to their intelligence and common knowledge, and disease or death in animals (or human beings) is not properly understood.

In regard to the system of gift-exchange it was said that in some cases the two transfers were more or less contemporaneous, in others a long interval might elapse. The latter type of transaction—but only among still more advanced tribes—is also turned into barter; and so there arises a second type of commercial transaction, which becomes of great importance. It may be called either "credit-barter" or "loan." In modern parlance "loan" may signify one of two things. It may mean, firstly, an arrangement under which the borrower agrees to return at a future date the identical article which was lent, together with a payment in cash if the transaction is commercial and not the mere accommodation of a friend.[1] This is a bailment. Secondly, it may mean a transaction under which the borrower is liable to return at a future date some article, other than that lent, of a specified value. This transaction almost invariably takes the form of a loan of money. Now the transaction among the tribes, of which we are speaking, is a loan of valuable property, usually cattle. It is a commercial transaction, for it will bring profit by way of labour, produce or increase to the borrower; and rarely even to a relative or friend is valuable profit-bearing property lent gratuitously. Furthermore, cattle also perform the function of cash. Hence it follows, that this transaction most commonly takes the form of the immediate delivery of a thing by the lender, who is to receive at a future time a different, specified thing of greater value. He lends, for example, a young kid, to be repaid by an

[1] Where the bailment is for reward, however, we in England do not call it a loan, but hire.

adult goat; a goat to be repaid by a young bull; or a young bull to be repaid by a heifer.[1] The remuneration of the lender is represented by the greater value of the thing he will receive in return. Occasionally we may find loans without reward, but they are of no importance and not of a commercial nature—loans, between friends, of goods of little value, especially food, in place of which similar goods are to be returned at a later date. This is the old gift-exchange remaining in force, with little alteration, in the sphere of purely social relations. So, too, the modern housewife in an emergency "borrows" from a neighbour a pint of milk to be repaid when the roundsman next calls.

In all these cases there is a present delivery of specific goods, as in the case of "ready" barter; but the corresponding delivery of other goods[2] in return is postponed to the future. These transactions are, from one point of view, best described as "credit-barter"; from another point of view they are also "loans." Perhaps the chief importance of credit-barter in the history of contract—and its importance becomes great—is that, unlike ready barter, it contains what we can easily recognise as one of our contracts. The obligation of one of the parties remains to be performed in the future, and if the lender of the goat does not receive, in the course of time, the stipulated young bull, he may require the assistance of a Court; and Courts are now always found.

It follows from what has been said, that while cattle constitute the chief wealth and chief standard of values, bailments can be of no real importance. Transactions under which an animal is delivered on the terms that the same animal, and no more, shall be returned, must

[1] For an example, see *Lango*, p. 69.

[2] Which might be described by an English lawyer as goods ascertained "by description".

be rare and not of a commercial character. Cattle are too valuable; as a general rule, in case of a loan, the lender would require to receive a more valuable animal in return. Hence bailments must necessarily be limited to two kinds. Firstly, there will be the gratuitous loan to friends of articles of personal use—especially articles of attire—lent for a special occasion or for a short period, and to be returned after use. The Ashanti, for example, have a special name for such a transaction.[1] Perhaps more important, however, is the second type of bailment, namely the deposit of cattle. A man delivers cattle to his friend with a request that he will keep them for him for a period. As the transaction is for the benefit of the owner, he can hardly ask for remuneration; and the friend may even expect a gift. When asked, or when the time arrives, he will return the same goats or cows with their natural increase (if any). These two bailments do not look much like contracts; true, the obligation of the bailee is postponed to the future, and the bailor may need the assistance of a Court to recover his property. Indeed already, perhaps, deposits are beginning to give rise to an amount of litigation out of proportion to their extreme paucity of numbers[2]; but the bailor's claim is simply to recover his own property. Even Gaius, writing in the classical period of Roman law, does not seem to regard "deposit" or "accommodation" as contracts; nor does modern law know quite where to put them. In the Late Middle Codes, among people who put out cattle to agistment on a large scale[3],

[1] "Bo mmokwa", which signifies the loan between friends of a gun or cloth or other article for some special occasion or day. No security is given or remuneration paid, but apparently, where a gun is lent, the lender usually expects a foreleg of any game shot (Rattray, *Ashanti Law and Constitution*, p. 371). The Romans called this transaction of gratuitous bailment-loan "commodatum" (accommodation).

[2] See a trial described, Routledge, pp. 204 ff.

[3] Among the tribes cattle are usually tended by the owners or their families. Where herdsmen are engaged they are sometimes remunerated by being per-

hire oxen for ploughing, and use banks and warehouses for the deposit of goods, bailments begin to wield a great influence upon the law, especially upon the history of the oath of purgation, and the emergence and development of the conception of negligence. In modern times they include many new forms, for example, varieties of pledge, and hybrids such as hire-purchase; but among the tribes they are few and unimportant, and are chiefly matters between friends.

Among the most advanced of the tribes of the 3rd Agricultural Grade, commerce is greatly affected by the introduction and spread of the use of currency. A commodity which is not perishable nor in everyday use, and is easily divisible, takes the place of cattle or other goods as a more convenient form in which to hoard wealth—for there is a growing disposition to hoard—and as a convenient medium of exchange. It may be gold dust passing by weight (so much more minute has become the estimation of values) or brass or copper rods passing by length, cowry shells by number, or even cloth. The expansion of this currency-commodity is gradual, and there is never enough of it among the tribes, any more than among modern civilised nations, to make it possible to conduct all exchanges through the medium of currency. Barter remains the chief transaction of commerce. The first effect of the use of currency is upon ready barter, which, though it does remain, begins to give place to cash sale. Instead of a transaction in which A gives certain goods to B, who at the same time gives in return a cow, B now gives A an amount of currency of the value of a cow. Except that currency is substituted for other goods on one side of the transaction, there is no difference between ready

mitted to keep the remainder of the milk and butter after delivering a stipulated quantity to their masters (see, e.g., Roscoe, *Twenty-Five Years in East Africa*, p. 217). Compare the practice in Babylon.

barter and cash sale. The transaction is still essentially not one of our contracts, but a mutual delivery.

The second effect of the introduction of currency is in the realm of loan or credit barter—the present delivery of goods on one side, and the delivery in return of other goods, equal or usually greater in value, at a future date. One species of such contract begins to spread with great rapidity, namely, that in which the subject-matter of the contract is currency on both sides. The loan of money, chiefly at interest[1] but sometimes gratuitously between close friends,[2] now becomes (together with ready barter, cash sale, and credit barter) one of the four important commercial transactions.[3]

The rest of the contracts that are found among the most advanced of the tribes must be briefly mentioned. Suretyship, which has been referred to in connection with procedure on the Gold Coast, seems also to be found in loans of money; but the person who appears to be a surety is in fact usually the principal debtor on whose credit the money is borrowed. It is to him that the money is advanced by the lender, and he promises to repay.[4] In addition to suretyship, mortgage and pledge are also found among these advanced peoples as incidents of loans of money. Pledge is found over a large area.[5] Children are commonly pledged by a father to work off a debt by their labour. They are entitled to reasonable treatment, for their status is not

[1] Rates of interest vary much, but are usually high.

[2] The latter transaction has the separate name "fame" in Ashanti (Rattray, *Ashanti Law and Constitution*, p. 371). Usually no time for repayment is specified in such a case.

[3] The same state of commerce is still indicated in the popular use of the word "loan" in England to-day. "Loan" is used as referring to a lending (other than a bailment) of goods for consumption; a lending of money to friends without reward; a lending of money for reward; or a purely gratuitous bailment. The word "loan" primarily stresses not the idea of a contract, but a delivery on certain terms.

[4] See Rattray, *Ashanti Law and Constitution*, p. 368.

[5] See, e.g., *The Peoples of Southern Nigeria*, P. A. Talbot (1926), vol. III, pp. 633, 635.

that of slaves, and it is not unusual to find that, as in the Hebrew Code and the Code of Hammurabi, the debt is regarded as extinguished after the lapse of a certain number of years.[1] Mortgage of land is found among the Ashanti and elsewhere.[2]

In exchanges of services for goods the transformation from gift-exchange to commerce comes later than in exchanges of goods for goods. What English law calls the hiring of services is found among advanced tribes but is not of importance. A man takes metal, for example, to a smith, who manufactures a spear for him in return for a gift in kind.[3] The hiring (or tenancy) of land, at a rent measured in cattle, is known to some tribes.[4]

Last, but not least, marriage must be mentioned. The contract to marry is not a commercial contract, and it is only in the 3rd Agricultural Grade, where the bride-price has become high, and there is a practice of paying it by instalments, that there can be a question of a breach.[5] The Codes provide that if the groom refuses to marry after an instalment has been paid, he forfeits the goods paid; and on the other hand if the bride's parents refuse, they restore two-fold.

To sum up, the only commercial transactions of importance, except among tribes who possess currency, are ready barter and credit barter, and among the few tribes who use currency, cash sale and loan of money are added. There is little else. Of these transactions,

[1] Six years among the Hebrews; three years in Babylon. See *ante*, p. 312.

[2] Rattray, *Ashanti*, p. 232. The land could for ever be redeemed. In some cases produce was taken as interest on the loan only, in other cases as liquidating the entire debt in a fixed period.

[3] Even in the H.C. (II, 43–6) and C.H. (§§ 257, 258, 261, 268–272) appear a number of clauses fixing in corn the remuneration of certain artisans. In the C.H. the fees of doctors vary according to the status of the patient.

[4] *Ante*, p. 275. See, e.g., *Akamba and other East African Tribes*, Hobley, p. 138 (referring to parts of Kikuyu).

[5] Even then it is commonly found that no particular sum is agreed on before marriage, though cohabitation does not usually take place till a certain quantity has been paid. See a number of instances in Seligman, *Pagan Tribes of the Nilotic Sudan* (1932).

ready barter and cash sale produce little litigation; and as for the others, there is nothing to call for a theory of contract, or even the abstract notion of a contract. None of the commercial transactions of the tribes are executory on both sides—even in the case of credit barter or loan of money the claim is by the man who has parted with his property and has received nothing in return. Probably among most tribes it would be regarded as wrong not to carry out a promise; but that is not the issue in these cases. What the Court decides is not whether the defendant has entered into a contract which he has broken, but whether he owes the goods or money claimed—for instance, whether he has borrowed money or goods and has not repaid. The claim, in the minds of the parties and of the Court, is in all cases merely a claim to an article owed, whether it be goods or currency. If the Court[1] gives judgment for payment of so many goats or so much money, and the defendant does not pay, in the law of the most advanced tribes the officer of the Court or the creditor will go and lead away a sufficient amount of the defendant's property, if he has any; or if he has none, and his relatives do not pay,[2] the creditor may take his person in execution till the debt be worked off. Apart from litigation the creditor may peaceably recoup himself from his debtor's goods, if he has the opportunity to do so.[3]

These commercial transactions are as simple and direct as any other branch of the primitive law. There are no "perplexed ceremonies," "grotesque gestures" or "symbolical acts." No more ceremony attaches to a sale in a bush market than in an English market, and infinitely less to a loan of money by an African than to one

[1] In a feudal community claims for small debts are heard by the local Courts.
[2] They usually do.
[3] See, e.g., Hobley, p. 81.

by a licensed English money-lender. There are no technical defences. As, however, writing is nowhere in use, it is not surprising to find, among the Ashanti,[1] a systematic practice of conducting any transaction of importance before witnesses—whether a sale, loan of money or mortgage of land. If it is a loan, the witnesses may one day be required to give evidence that the money was lent, and of the agreed terms of repayment. If it is a (cash) sale the witnesses are presumably required by the buyer for two possible eventualities. The seller might claim that the goods are his—supported perhaps by common knowledge that he is the owner; or a third person might lay claim to the goods, and allege that the buyer is a thief or receiver.[2]

Lastly, of religious sanctions as origins of the law of contract there is no evidence among the tribes. Among the Ashanti, however—where oaths are much in use—the borrower often swears an oath to repay, on the due date, the money lent. As in the Neo-Assyrian tablets, such an oath is unnecessary to give validity to the contract and adds nothing to its effect.

The foregoing account of the law of contract among advanced tribes may err on the side of exaggeration. The few data have been described at full length; much of them are confined to a very few highly advanced peoples; and of all tribes it is true to say that there is no law of contract but at the most only a law of debt.

[1] Who correspond to the stage of the Late Middle Codes.

[2] It is in accordance with the principle of reciprocity that the witnesses should be remunerated, in case of a loan, by a customary proportion of the money lent, and that in case of a sale, they should receive a fixed, proportional complement to the price. This was more or less invariable among the Ashanti (see Rattray, *Ashanti*, pp. 232, 234; *Ashanti Law and Constitution*, p. 368). The remuneration, like all legal expenses among advanced tribes, was high; about 2s. 6d. of every pound lent went to the witnesses).

CHAPTER XXXIII

CONTRACT IN BABYLON AND ASSYRIA

WHEN we turn from the tribes to pursue the history of contract in the Codes, it appears at first sight that the frequency with which commercial transactions are mentioned is in inverse proportion to their frequency and importance in fact. Barter is not mentioned, and sale hardly ever. Almost the only references to sale[1] relate to the vouching of warrantors when a person, who alleges he is a purchaser, is charged with theft by a third party who claims the goods; and the case is treated in the Codes as part of the law of theft. Bailments are almost everywhere increasing in numbers as the law develops. In view of what has been said, the explanation is not far to seek. The Codes are statutory legislation, not descriptions of transactions, and as sale is still essentially a cash transaction, fewer disputes and hence fewer problems arise in regard to it.[2]

The full story of contract is not therefore to be found in the Codes; but at the end of the period of primitive law, the clay tablets of the ancient Near East make it possible to paint a detailed picture of contemporary

[1] In the C.H., § 278, there is a statutory warranty of quality on the sale of a slave; see *post*, p. 412.

[2] The same reasoning explains the absence of rules of contract from such a collection as the Anglo-Saxon laws. *P. & M.* (I, 58) seek to explain that absence by supposing that promises of special importance were commonly made by oath, so as to put them under the sanction of the Church; adding that "there is great reason to believe that everywhere or almost everywhere a religious sanction of promises has preceded the secular one." If this were so, in such an ecclesiastical compilation as the Anglo-Saxon laws we should certainly have found rules prescribing the formalities by which such oaths should be taken. Apart from rules as to the vouching of warrantors, there are none.

commerce.[1] Yet the canvas used must be large indeed. In territory we are concerned not only with the successive empires of Babylonia and Assyria, but with large tracts lying under their influence from Elam to the Syrian coast. In point of time the canvas must be even larger; for there are at our disposal many thousands of these documents, drawn up by the peoples of the Near East in their daily affairs, and dating from before the middle of the third millenium up to the last century B.C.

The most impressive outward characteristic of these tablets is their comparative uniformity through the centuries and even the millenia. The contract tablets of Babylon are plainly constructed upon a common design or scheme, in which the various essentials that go to make up the agreement—the subject-matter, names of parties, contractual provisions, seals of witnesses, date—are set out in a fixed order; just as in a modern English agreement, the date, parties, recitals, contractual provisions and seals or signatures also appear in a settled order. This design is present in the Sumerian tablets at the earliest moment to which we can penetrate, and continues through the Semitic tradition until the Persians are masters of Babylon. Again the tablets, when compared with one another, separate themselves into various types, each evolved for use in a different kind of commercial transaction. In each type—as in modern conveyancing forms, except that those of the Near East are exceedingly terse and simple—are to be found brief, characteristic phrases, obviously of well-

[1] The following authorities have been chiefly drawn on in this chapter, especially the first named: San Nicolò, *Beiträge zur Rechtsgeschichte im Bereiche der keilschriftlichen Rechtsquellen* (1931); San Nicolò, *Die Schlussklauseln der altbabyl. Kauf-und Tauschverträge* (1922). Schorr, *Urkunden des altbabyl. Zivil- und Prozessrechts* (1913). San Nicolò, Ungnad, *Neubabylonische Rechts- und Verwaltungsurkunden* (1928 to 1930). Koschaker, *Rechtsvergleichende Studien zur Gesetzgebung Hammurapis* (1917). Koschaker, *Neue keilschriftliche Rechtsurkunden a.d. El-Amarna-Zeit* (1928). Meissner, *Beiträge zum altbabyl. Privatrecht* (1913). Cuq, *Etudes sur le droit babylonien*, etc. (1929). Johns, *Assyrian Deeds and Documents* (1898 to 1923).

understood meaning and effect, changing their form but slowly and rarely. In Babylon one or two such types do not change for nigh on 2000 years.

Yet to regard this uniformity as evidence of a supposed formalism of ancient law would be to take a view remote indeed from the truth. These forms grew naturally out of the economic circumstances to which they were applied; and they were retained till, in the slow changes of life and language, something new became requisite and was found. In the course of their history, the various types of contract which appear in the tablets were developed, and in Neo-Babylonian times new forms came into existence and lived side by side with the old. Further the extent of the uniformity to which we have referred varied much. On the one hand, in the sale tablets of Babylonia,[1] substantial changes were very few during 3000 years; but in the types of contract less fully represented among our tablets, especially those of the domain of family law, the changes were complete. Yet this comparative uniformity is the outstanding feature of the tablets, and impresses vividly upon the mind the truth that though civilisation may be broken down in a day, its construction is, especially in its early history, a slow and tentative process.

The tablets are of clay, imprinted, while still soft and damp, with a sharp instrument (commonly of reed) and afterwards dried in the sun or by fire. They were until Neo-Babylonian times drawn up on behalf of the parties by scribes (professional writers, not professional lawyers) who are often named among the other witnesses of the transaction. These scribes were usually, though not necessarily, members of the priestly order, and during a large part of this history writing was scarcely taught except in the temple schools. The fact that the tablets were drawn up by members of a profession, plying a

[1] In the history of the tablets of Assyria the constancy is less.

craft that was often hereditary, was no doubt partly responsible for the constancy of their form. After execution, they were usually kept by one of the parties[1] in vessels of clay or reed made for the purpose.

The general scheme of construction of the text of the Babylonian tablet—and the Assyrian differed little[2]—was as follows. First was named the subject-matter of the transaction—the house, cattle, slave, child, bride, and so on. Secondly were stated the names of the parties—the buyer and seller, for example, or adopter and adopted; and thirdly came the provisions of the transaction.[3] Fourthly the witnesses' seals (never their signatures) were affixed against their names; and the scribe was named, commonly as the last of the witnesses. Finally comes the date. The tablets appropriate to different types of transaction are characterised, as has been said, by their own familiar clauses. In addition to this scheme of construction, some tablets contain additional clauses following after the third head, namely

[1] Or, in the case of the Neo-Bablyonian duplicate tablets, by both parties. In some cases we are told that the scribe retained the tablet.

[2] For example, the following is a Neo-Assyrian specimen (Johns' *Assyrian Deeds and Documents*, No. 172). It records a (cash) sale of a slave, Nasir Ninip, by M.M. to R.A., and commences with the seal of the seller:

" Seal of M.M.
the saknu of the horses of the New Palace
legitimate owner of the person transferred.
Nasir-Ninip a weaver of embroidered cloth,
Slave of M.M.
has made a bargain R.A.,
the charioteer of the King, and from
M.M. for a mina and a half (of silver)
royal standard has taken. The price was complete
(and) given, this person was bought
(and) taken. There shall be no retreat or
lawsuit. (Whoever in) future
shall set up a plea, etc. [penalty clause]
[There follows a warranty against epilepsy for a certain period]
In the presence of (9 witnesses)
In the month of Ululu, 20th day, in the Eponymy of Y,
The saknu of Duri[i]."

[3] Usually, in the earlier period, from the point of view of the transferee (i.e. buyer, adopter, bridegroom, etc.), e.g., " Such and such a house, Buyer from Seller has bought for the full purchase price ", or as the case may be.

the contractual provisions. Some of these will be examined later; none of them are necessary, and in the vast majority of cases there is nothing more than the terse minimum that has been described. But where these accessory clauses appear, they too tend towards a limited number of constant forms.

Yet though this constancy of form exists in the Mesopotamian tablets, they are not forms essential to validity. They are used because it is easier and better to adopt a well-tried and well-understood conveyancing form from others, than to invent for oneself. It is of supreme importance to notice that the existence of a tablet was never essential to give validity to the transaction it recorded, with the possible exception of one or two cases where statute-law had so enacted.[1] The tablet was merely intended to attest the transaction to which it referred, and this is made plain in every part of it.

Let us first consider that part of the Mesopotamian tablet which, when it appears in the English equivalent (the deed under seal) has come to give that document a special validity and operation of its own. The English deed is only sealed by a party or parties: the clay tablet bore the seals of the witnesses too. Practically all Mesopotamian legal documents of a private character were witnessed, even those where the amount involved was trifling; yet the number of witnesses varies enormously from tablet to tablet—there may be any number between 1 and, say, 25, and exceptionally tablets are found without mention of witnesses. It is abundantly plain that witnesses are not necessary to the validity of the transaction. The seals also were intended solely for the purpose of attesting the transaction and were never a legal requisite of form, and often in place of the seals of parties and witnesses are found impressions

[1] See C.H., §§ 104, 105, 122, 123. Compare C.H., § 7.

made by finger-nails or even by the pressure of the hem of a garment. Sometimes there is no seal either of party or witness. As to the parties, in most types of tablets the seal of one party only is generally found, namely, that seal that is likely to be of use in case a dispute should arise between the parties or with a third person. For example, in the case of a document in the nature of a conveyance or transfer, it is the transferor only who usually seals; in case of a promise, it is the promisor. The seals of both parties are commonly found only where either may be of use in case of dispute, as in tablets embodying transactions of barter, partnership or marriage.

Yet, although the contract tablet was not necessary to the validity of the transaction, this widespread use of writing for the attesting of transactions had of necessity certain legal results in Mesopotamia as elsewhere. If a transaction made orally is valid and enforceable, and the terms of a transaction in that form are the subject-matter of litigation, the question the Court has to consider is what the parties did and intended; and so it was in Babylon. But suppose it becomes common and usual to draw up such a contract in writing; and suppose a case comes before the Court in which the plaintiff sues on a contract which he says was made orally, but which the defendant denies altogether; though the contract, if made orally is valid and enforceable, the fact that there is no writing is a matter of strong comment on behalf of the defendant, and supports his story that no contract was entered into. This position had been reached even in the Old Babylonian period.[1] A second and even more important result of this widespread use of writing is that slowly the written tablet comes to perform the

[1] Cf. C.H., § 7, which provides that anyone buying property or receiving it on deposit from the son or slave of a freeman without witness or tablet has acted the thief and shall be put to death. See also §§ 104, 105, 122, 123.

function, not merely of witnessing an independent oral contract, but of embodying and being itself the contract. This change was never complete in Babylon, but from Old Babylonian to Neo-Babylonian times there are signs that the clay tablet was by slow degrees performing this latter function more and more.[1]

The abstract notion of a contract has made some progress, even in the earliest of the tablets, from the state of things seen in the previous chapter. Among the advanced tribes, there are, roughly speaking, two kinds of transactions. In one, such as ready barter or cash sale, the transaction is completed at the time it is made; in the other, such as loan of money, it is completed on one side at the time it is made, and not completed on the other. There are no transactions which are made binding by the mere fact of agreement without the transfer of property. That type of commercial transaction has not yet been reached; law compensates for loss, and until there are middlemen, and market prices that fluctuate from day to day, there will be no purely executory agreement to purchase and sell goods of a certain description at a certain price on a future date, nor can there be pecuniary loss by failure to perform such an agreement. But the transactions among the advanced tribes can be seen to have this in common, that they all involve the element of consent on both sides, even in the case of cash sale and ready barter. This abstract notion of a transaction as a thing done by the consent of two parties is present even in the Old Babylonian sale tablets. Here we meet, for example, the phrase *riksati-rakasu* "to bind a bond" (or "agreement"). It does not signify "to contract a binding obligation" but "to join in a transaction." It does not connote the modern notion of an agreement which creates binding obligations, so much

[1] See as to this, San Nicolò, *Beiträge*, pp. 162–171.

as a thing done by consent[1]—the transaction or the document attesting it, whether a cash sale or any other transaction. In the Neo-Babylonian tablets the notion of agreement becomes far more stressed, and we seem to hear several faint sounds of a theory of contract. One great group of Neo-Babylonian tablets are introduced, not by the subject-matter of the agreement, but by the name of a party and words showing consent: "A in the pleasure of his heart has given his house so-and-so to B for the full purchase price." One type of these Neo-Babylonian tablets is for the first time drawn up in the form of a dialogue between the parties: "A in the pleasure of his heart spoke to B as follows: Thy maiden daughter C give to me, that she may be my wife. Then B hearkened to him and gave him C, his maiden daughter, in marriage." With this form of contract should be compared that group of Neo-Babylonian tablets in which the verb "give" is used with various additions for the purposes of most types of transaction —"to give[2] for the full purchase price," "in marriage," "in exchange," etc. The formal words characteristic of each type of transaction, purchase, marriage, exchange, still remain; but the appreciation of the importance of the element of consent as pervading all these transactions is clearly present in the mind of the scribe. Thus the law of contract which had started, as we saw in the last chapter, with one or two transactions which it enforced, has largely increased the number, variety and frequency of these transactions, and has increasingly become aware of the important common element of consent underlying them all. But the law of contract has not yet become so technical that it deals with a

[1] Probably the early Roman "nexum" had the same meaning.

[2] Compare the English word "sell", which in its earliest meaning signifies "*to give* in various senses; especially to hand over voluntarily or in response to a request; to deliver up" (Murray's *New English Dictionary*, sub verb. "sell").

dispute before it on the basis of a theory of contract.

When we turn to consider the types of transactions comprised in the tablets, the continuity of development from the state of the law of contract among the tribes becomes even more clearly apparent. We saw in the previous chapter how the two great transactions of ready barter and credit barter (or loan of goods) had been influenced by the introduction and growing use of money. Ready barter was beginning to give way to ready-money sale, but credit barter remained. At the same time the loan of money was very rapidly spreading. In the tablets we take up the story from this point.

The transaction of ready barter is comparatively rarely to be found among the tablets, and we mention it only to pass it over. It certainly forms a separate type of tablet, but the widespread use of the Babylonian and Assyrian silver currency, and the development of credit, has largely substituted for it other types of transactions. The influence of ready barter, as a matter of history, appears from what follows.

The next transaction to be mentioned is the most common and important of all, namely, the Sale Tablet. It is of primary importance to note that the transaction it evidences is always, firstly, a ready-money sale, and secondly, a sale of a specific article. "The slave C, A has taken from B for the full purchase price." The most frequent subject-matter of the sale is land, cattle, and slaves, sacred offices[1] and the income attached thereto, and ships. Sale Tablets dealing with other property do appear, but they are comparatively rare, for the Babylonians did not usually evidence by writing sales of the less valuable types of property.

Sale is substantially still an instantaneous transaction, under which no obligation remains to be performed on

[1] Probably partly because the temples preserved their tablets for a longer period.

either side; but there has been some progress towards what the modern law calls a warranty. What we find in Mesopotamia is not a warranty in the sense of a right to claim damages for breach of contract, but a condition subsequent— a provision that in certain events the buyer gets his money back; and, further, the application of such a warranty in exceedingly limited. A general warranty of quality was unknown to the law of Mesopotamia throughout its history. In the Code of Hammurabi is a (probably recent) provision[1] that if a slave is sold, and within a month thereafter is found to be suffering from epilepsy, the buyer may return him and receive back the money he paid: but there is nothing more in the Code. As to a warranty of title, the Code of Hammurabi does contain provisions on this matter, but these rules are obviously treated as part of the law of theft.[2] Apart from such warranties implied by law the tablets contain certain express warranties, especially warranties against dispossession and eviction (which are frequent), and occasional warranties against epilepsy of a slave supervening within a certain period, or against the flight of a slave from the purchaser.[3]

But with this possible exception, sale is an instantaneous transaction. The Sale Tablet never provides that the price shall be payable at a future date, or that the goods shall be delivered in the future; and except that money takes the place of other goods on one side of the transaction, sale has all the characteristics of its predecessor, ready barter. Consequently whenever an agreement was made that, for example, the price should be payable at a later date, this transaction was not regarded as sale, but as two transactions, namely, sale

[1] C.H., § 278.

[2] C.H., § 9 f. See *ante* p. 24. Compare C.H., § 279, and see the Neo-Babylonian fragment of laws, § VI.

[3] For a detailed discussion of warranties in the tablets, see San Nicolò, *Beiträge*, pp. 206–210 and notes thereto.

plus a transaction of credit. The agreement was never reduced to writing in one tablet. A Sale Tablet was drawn up in the ordinary form, recording a cash sale, not mentioning that credit had been given for the price, and sometimes even containing an acknowledgment by the seller that he had received it; and a second, separate tablet was also drawn up purporting to embody a separate transaction. The latter took one of several forms. Usually it was a Loan Tablet[1] in ordinary form, and in this case it provided that the Seller had lent the Buyer such-and-such a sum (the amount of the price) which the Buyer agreed to repay on such-and-such a date.[2] Alternatively the credit-transaction was embodied in an Obligation Tablet (to be described later) stating that the Seller was credited with the sum of so much, debited against the Buyer, which sum the Buyer agreed to pay on a certain date. Occasionally the credit transaction might be drawn up in a third form, namely, a Deposit Tablet, recording the deposit of the amount of the price by the Seller with the Buyer.

Similarly, if the parties desired to provide that the price of the goods to be sold should be paid in advance and that the goods should not be delivered till later, the price was paid and a Sale Tablet was drawn up recording a ready-money sale. At the same time a separate tablet was sealed, either a Loan Tablet recording that " S (seller) has borrowed from B (buyer) such-and-such a sum, the price of such-and-such goods " till delivery; or an Obligation Tablet providing that B was credited against S with so much, the price of such-and-such goods, which S agreed to deliver at such-and-such a date.

These two types of tablet, which we have called the

[1] A type of tablet to be mentioned later.

[2] e.g., in the following form: " 1 mina of silver, as the purchase price of the slave Y, B (buyer) has borrowed from S (seller). On (such and such a date) he will repay it."

Loan Tablet and the Obligation Tablet, are together with the Sale Tablet the three most important and common of the tablets of the Near East. The loan of money, as among the most advanced of the tribes, has long been a very common transaction. The Loan Tablet expressly records a loan: "Such and such a sum of silver, which X has borrowed from Y. Such-and-such a sum he will repay on such a date." The Obligation Tablet is in some respects like our English account stated[1]; its substance is an acknowledgment of a debt as outstanding, and a promise by the debtor to pay on a certain date. "Such-and-such a sum of silver which Y has to his credit against X. On such-and-such a date he will pay," etc. This clay tablet takes the place of our paper book-keeping accounts, and no doubt had its origin in the growing volume of Babylonian mercantile transactions. The Code of Hammurabi, for example, devotes a number of clauses to disputes between merchants and agents as to the accounts between them. Since we saw among the advanced tribes a common practice for the lender to seize the borrower's goods if he could, without a trial, to recoup himself for an unpaid loan, it is not surprising that in Babylon a creditor was entitled, if he could, without a judgment, to levy execution for the amount owing on an Obligation Tablet; and in the Neo-Babylonian period other tablets also contain express words giving the right to levy execution without trial.

In the Babylonian sale, as in its predecessor ready barter, we have still the sale of a specific article. It is doubtful whether there is a single Sale Tablet in existence recording, to use the Roman term, a sale of fungibles—that is to say, a sale of such-and-such a quantity of corn,

[1] Except that it covers goods as well as money, and also includes a promise to pay or deliver on a certain date. It has no equivalent in the Greek papyri; but obviously bears resemblances to the Roman stipulatio and the Roman literal contract.

so many oxen, so many slaves, so much oil. The tablets refer, for example, to the sale of the slave X, the house such-and-such. This feature is derived, of course, from the character of sale as a cash transaction: the parties had in mind an article which was in front of them. The distinction may be put very roughly and inadequately by saying that the Sale Tablets do not include sales of produce; or, that they do not include, to use terms of modern English law, sales of goods by description, or sales of future or unascertained goods. Indeed the *ready* exchange of fungibles for goods or money is scarcely ever recorded in any type of tablet.[1] One reason is that only produce of little value was so exchanged—as in an ordinary retail sale in the market. But a large number of tablets do record the delivery of fungibles in return for the *future* payment of money or other fungibles, for example, the present delivery of so much oil, in return for the delivery, at a certain future date, of so much corn. A transaction of this kind was not regarded as a sale at all; for while it was embodied in a Loan or Obligation Tablet, there was no Sale Tablet recording the cash sale of the produce. This is, in fact, a separate type of transaction, namely, credit barter. It is not a sale: sale is derived from ready barter, whereas credit barter is a loan of goods to be repaid by other goods in the future. When the silver currency of Babylonia came into use, there could never be sufficient in circulation to finance all commercial transactions; especially the exchange of produce on a large scale continued to be carried on by means of credit, and, in fact, most of these transactions in the tablets refer to wholesale dealings in produce. An estate, which produced corn at one time of the year, required for its needs other produce at an earlier date; or a dealer, purchasing produce, would

[1] And where it is, it is not recorded in the form of a sale tablet, but as a sort of bilateral receipt. See, for instance, San Nicolò, *Beiträge*, p. 223.

not be able to pay till he had sold the goods. In modern times, too, almost every wholesale purchase is made possible by credit in some form or other. Few, if any, houses of repute pay on delivery for the goods they purchase; payment may be a month or three months after invoice, or by bill of exchange; or a purchaser may buy through his bank, which advances cash to the seller's agent in return for the bills of lading or other documents of title to the goods, which the bank holds as security against its customer. In Babylon the system of giving credit was simpler; goods were delivered, and the repayment, whether goods or cash, was postponed to the future. So, a transaction which we should describe as a sale of oil on credit, might be drawn up in the form of a Loan Tablet stating: "Such-and-such a measure of oil of the purchase price of 1 mina of silver B has borrowed from S. On such-and-such a date he will pay the silver." Where the price is paid in advance, the Loan Tablet may run, "1 mina of silver, as the price of so much oil (or for so much oil), S has borrowed from B. On such a date he will deliver the oil." If the credit "sale" is drawn up in the form of an Obligation Tablet, it may run as follows: "1 mina of silver the price of so much oil, S has to his credit against B. On such a date B will pay." Or, if the price is payable in advance, "1 mina of silver the price of so much oil, B has to his credit against S. On such a date he will deliver the oil."

In this way, well-recognised and well-separated types of written as well as oral contracts grew up, not under the influence of technical distinctions but under economic conditions constant and world-wide. In the Egyptian papyri, both demotic and Greek, uninfluenced as they were by Babylonian law, precisely the same features are to be observed. There are sales, chiefly of land, cattle, slaves and sacred offices, but none of fungibles; while,

for example, the exchange of money for wholesale produce, to be delivered in the future, is embodied in a class of documents drawn up in the form of loans.[1] In early Rome we shall see evidence of the same condition of things.

It has been said that in addition to the essential parts of the Mesopotamian clay tablets a number of accessory clauses appear from time to time. Among these there are sometimes references to religious sanctions, and they must be briefly examined for the purpose of removing any impression that they may in some way show a religious origin of contract. In the statutory law of the Near East there is of course no such evidence. These clauses are part of a large and varied group, found in sale and other tablets embodying (in modern phrase) transfers of property. As they occur only occasionally, and are not part of the essential framework of the tablets, but are accessories, they cannot pretend to throw light on the origin of the tablets. For the most part they are secular, and provide merely for payment of interest in case of delay, or for payment of agreed money compensation in case of breach or repudiation of the agreement by a party or third persons, or in case the transferee is dispossessed by a third party. These penalties are very large; they usually provide for payment of a sum equal to about ten times the value of the subject-matter of the contract; and there is every indication that they were put in as a matter of form and gave no remedy at law whatsoever. But in some of the contracts is contained a sworn renunciation by a party of any right to claim under the agreement, or to retreat therefrom; in some, there are curses against the party or third person who should contest the agreement; and sometimes

[1] See Pringsheim, Sav. Z. (1924), p. 429. See also Sav. Z. (1929), p. 48; San Nicolò, *Schlussklauseln*, pp. 25, 29; *Beiträge*, p. 227. The papyri contain no Obligation Tablets.

there are clauses providing for bloody corporal sanctions and the dedication of persons, animals or things to a god in case of any such repudiation or claim. These threats are found almost entirely in the Assyrian tablets; but so far from being an indication of a religious origin of contract, they, in fact, increase in fierceness and elaboration, and in the Neo-Assyrian tablets are at their worst. In short, the position is what we saw in the last chapter; religious sanctions are sometimes imposed by a party to a contract in an attempt to induce the other party to keep to its terms, but the validity of the contract derives from the law, which has evolved and enforces the secular provisions of the tablet.

Of the other transactions evidenced in the clay tablet, there is no space to say much. After Sale, Loan and Obligation Tablets, hire is the most common and comprises a large group of important types of contracts. The contents of the group vary from Old Babylonian to Neo-Babylonian times. Surprising as it might seem that agreements of service and agreements for the hire of chattels should be regarded as examples of one contract of hire, yet in language and in substance they were so regarded at all times in Babylon, just as they were in Rome, and in the Greek papyri, and are so regarded in the language of this country, where both agreements are commonly referred to as "hire." In the Neo-Babylonian period even the renting of houses comes within this group, and personal services, houses or chattels are all "given for rent," while the servants "let" themselves. Leases of land and of the profits of certain sacred and secular offices are at all times kept distinct from the hire of chattels and personal services, and so, too, are contracts for the execution of specified work. The latter are commonly drawn up in the form of Loan Tablets, in which the subject-matter of the loan is usually the materials which are to be worked upon

and have been received by the contractor; and contracts for personal services, where the remuneration is payable in advance, are often similarly framed.

Bailments, partnership, pledge, agency and the compromise of suits complete the list of the main Babylonian transactions.

CHAPTER XXXIV

CONTRACT IN EARLY ROME.

In previous chapters, where the course of history of different branches of the Roman law was considered, conclusions were arrived at, in each branch, entirely consistent with one another, but in some respects wholly inconsistent with orthodox belief. Those conclusions were arrived at by an examination, in the light of the universal history of primitive law, of the undoubted doctrines of the later law of Rome. Other considerations, too numerous to mention in this book, firmly corroborate those conclusions; and in the realm of contract the same process is even more fruitful and precise in its results.

The most distinctive of the institutions of the Roman law of contract is the mancipatio, or, as it was earlier called, mancipium. In the classical law it was not so much a contract as a form of transfer or conveyance, necessary to convey the full ownership in certain types of property, which were hence called "res mancipi" ("things passing by mancipation").[1] The mancipation is described by Gaius[2] as a "symbolic sale." "Five or more adult Roman citizens," he says, "are called together as witnesses, and also a sixth (of the same status) who holds a balance of copper and is called the libripens (balance holder). Then the mancipee (transferee) takes hold of the property and says: 'I say this slave is mine by quiritarian law,[3] and be he bought by me with this

[1] The ownership in these kinds of property could also be transferred by a collusive judgment of a Court (in jure cessio).

[2] Gai., I, 119.

[3] i.e. by the law of Rome.

copper and this copper balance.' Thereupon he strikes the balance with the copper,[1] and gives that copper to the mancipator (transferor) as if by way of price. In that way both slaves and free persons are mancipated, animals also which are res mancipi, a class which includes oxen, horses, mules and asses; and land, too, urban or rural, which is mancipi (and land in Italy is mancipi), is mancipated in the same way." Gaius ends by saying: "The copper and balance are employed because formerly only copper coins[2] were in use, consisting of the "as," and the double, half, and quarter "as," and there was no gold or silver coin in use (as can be seen from the Twelve Tables); and the value and efficacy of those (copper) coins depended not on their number, but on their weight."

When Gaius commits himself to a historical statement he is rarely wrong; and there can be no doubt of the accuracy of his explanation of the features of mancipation. It is easy to recognise it as a primitive sale, that is to say a ready-money sale of a specific article. The most valuable types of property among advanced tribes of the 3rd Agricultural Grade are, as has been seen, land, cattle and slaves; and in the clay tablets of Babylonia and Assyria, and the Greek and demotic papyri, the subject-matter of the sales is chiefly land, cattle and slaves.[3] Similarly the mancipation was applicable to land in Italy, cattle and slaves.

It can be seen at a glance that this ceremony was merely the natural, simple and in fact only method of conducting a sale of a valuable article before writing was in general use, and when money passed by weight. It was then a sale without formality of any kind. The sale of a valuable article would almost invariably take place before witnesses, as in Ashanti, Egypt, Babylon

[1] i.e. a bronze coin.
[2] "Nummis".
[3] Also temple offices and ships.

and elsewhere, but sales of articles of no particular value would of course take place without witnesses. Doubtless few would possess a libra,[1] and generally the parties would have to call in a person who owned one. It is easy to understand that, first, the practice to sell property of these classes in this way became invariable, and, becoming stereotyped before writing came into general use, was retained as the only recognised way of transferring the ownership of property of these classes. Primitive sale was, after all, more of a transfer than a contract; and sale was far the most common of all transactions. It is also easy to see how the number of five, as the quorum and usual number of witnesses, arose. In the Babylonian tablets,[2] as has been seen, the number of witnesses varies between one and twenty or more, but the average is approximately six; and in the Roman mancipation there are five witnesses and the libripens. Here again the course of the history of law is the substitution of the constant for the variable.

What, then, is the date at which this old cash sale became stereotyped in this form? It should not be difficult to answer, for many data are given us, of which the following are the most important.

First, as to the form of money: as Gaius observes, copper coins were already in use; the coins passed by weight not number; but no gold or silver coins were yet current. Next it is obvious that writing was not yet general when the transaction became stereotyped; for clearly writing perpetuates testimony far too well to have been discarded.[3] As to the subject-matter of the

[1] The libra was not a pair of scales, but a steel-yard, still in use in late Roman times. There was, however, no weight that shifted along the yard, but a fixed equipoise for weighing the commodity, in this case the "as" of copper. A libra would be of no use unless it was accurate.

[2] Where the witnesses appear to be almost always freemen—no doubt because they would be more readily believed.

[3] For an example taken from one of the systems of law where both writing and the weighing of money were in use, see Jeremiah xxxii, 6–14. Here can

transaction, we see that slaves were held by the Romans in considerable numbers, and that sales of slaves were quite common—for otherwise a practice of selling slaves in this or any other way could not have become fixed in the law. It is plain, similarly, that the sale of land was common; and as Italian land, and Italian land only, is res mancipi, the Roman and Latin colonies and dominions must have been scattered throughout Italy, but cannot have extended beyond its confines. Unlike, however, the sale contracts of Mesopotamia and Egypt, the mancipatio did not extend to ships; and therefore the Romans had not yet become a seafaring people. We can add that this method of sale, with weighing of the copper price, must have been employed over a considerable period in order to have remained in the law after these circumstances changed. Further we can infer that as, in later days, the five witnesses and the libripens (as well as the parties) were all Roman citizens, the mancipatio became fixed before any great influx of peregrins (free foreigners) into Rome. Finally, it should be added that the mancipation is mentioned in a clause which probably formed part of the "Twelve Tables," and is therefore anterior to the date of that collection.

Firstly, then, the facts known as to the history of Roman money tell us a good deal.[1] There can be no doubt that originally the cow was the highest unit of barter in ancient Italy, as among most advanced peoples of the 3rd Agricultural Grade; and that later, as among

be seen many features of the Old Babylonian clay tablets—the duplicate open and sealed copies to prevent falsification (cf. the Old Babylonian "case tablets"). the sealing, the witnesses, the clay vessel in which the deeds were preserved. The weighing was of the silver currency, as in Mesopotamia and among the Hittites. The Hebrews used papyrus in place of clay deeds.

[1] In the short account that follows of the history of the "as", there is, I believe, nothing inconsistent with the views of Ridgeway as expressed in his *Origin of Metallic Currency and Weight Standards* (Camb., 1892), and his article "Mensura" in Smith's *Dict. of Antiq.*; and article "Roman Money" in Sandys' *Companion to Latin Studies* (2nd Edition), p. 441 f.; see also, on the history of Roman money, Gnecchi, *Monete romane* (1907).

many other tribes,[1] copper (or bronze) rods or bars of a certain length came into use as a standard of values and exchange. The word "as" or "assis" (like "asser") signifies (*inter alia*) a rod or bar; and for long afterwards it was a unit of linear measure, namely 1 foot, the average length of the foot of a man. Hence it is clear that the "as" was a copper rod or bar a foot long. At first the bars (called by the later Romans "aes rude"[2]) were unstamped, but subsequently they were impressed with the figures of oxen, sheep and swine, showing that this currency had become adjusted in proportion to the value of cattle. According to Roman tradition (for what it is worth), "asses" were stamped before the establishment of the Republic (509 B.C.), but (again according to tradition) it was not till the passing of the Lex Aeternia Tarpeia in 455 B.C. and the Lex Julia et Papiria in 429 B.C. that the ratios of the "as" to the cow and sheep[3] were fixed, and that money penalties for injuries were made payable in "asses" instead of cows and sheep. We may assume therefore that 429 B.C. (if tradition is correct) represents the date from which copper bars took the place of cattle as currency.

The earliest unit of weight was the "libra"; but later the "as" became the unit of weight as well as of length, showing that the bars came to be weighed as well as measured. They were also divided into twelve "thumbs" ("unciae," ounces or inches); and indeed broken rectangular pieces of bars of bronze of quite late date have been found. It is clear, therefore, that in accordance with the course of events elsewhere, the standard of values was becoming more exactly defined, namely, by the weighing (and sub-division) of the bars. 338 B.C. is our first approximate date in the history of Roman money, for though stamped bars were issued as

[1] As, for example, in Nigeria to-day (= Late Middle Codes), and in ancient Greece, where the "obol" was a bar. [2] As opposed to "aes signatum".
[3] 100 "asses" to the cow, and 10 to the sheep.

late as the third century B.C., about 338 the first round "asses" were coined. There can be no doubt that this change was connected with the establishment of the practice of weighing the "as": when the "as" passed by weight it became an unnecessary inconvenience that it should retain the form of a bar. We cannot tell when the weighing of the "as" began; the change from measuring to weighing cannot have been instantaneous; but it is safe to say that while some had begun to weigh the "as" earlier, after 338 B.C. the "as" passed not by measure but by weight. It was also about 338 B.C., or a little before, that the "as" and its sub-divisions began a progressive loss of weight. In all probability it was, in part, this fall in weight of the "as" that caused the practice of weighing; and, indeed, it is likely that the coining of round "asses," the practice of weighing the "as," and the commencement of the fall in its weight, were roughly contemporaneous events, all caused by a new competition for wealth and a period of prolonged war. These circumstances continued for a considerable time. Of the coins that survive from 338 B.C. to the beginning of the First Punic War in 264 B.C. very few "asses" are of the full weight of 12 ounces, and they vary down to 3 ounces. In the First Punic War the weight of the "as" was reduced to (or, shall we say, fixed at?) 2 ounces, and in the Second Punic War, 1 ounce. Meanwhile silver coins began to be struck in 268 B.C., and gold coins in 206.

The story, therefore, told by the form of the mancipium and the known facts as to the history of Roman money, is that the practice of weighing the price with copper and balance upon a sale of valuable property became general at or before 338 B.C.—say 350 B.C. as an approximate date; that the practice continued at least till 264[1];

[1] This practice of money passing by weight is imprinted in the language of Rome, see, e.g., pendo, to "hang" (trans.), hence to "weigh", and so to "pay" (cf. expendo, pendeo).

and that it must have become stereotyped, at the latest, when the silver coinage began to be issued, in 268 B.C. On the other hand, that event can hardly have occurred much before 268, for the weighing of money must then have been of old standing in order to print the mancipium so indelibly into the fabric of the later Roman law.

Next, it was said that at the time when the mancipium became a fixed practice, writing cannot yet have been in general use. The first school was opened in Rome about 250 B.C.[1]; and the period from which inscriptions survive in any number begins about 240–230 B.C. The approximate date 225 B.C. may, then, from this point of view, be taken as the latest date at which the mancipium can have become fixed.

Again, slaves were held by the Romans in considerable numbers and regularly sold; which would seem to suggest a date not before 275 B.C., the end of the war with Pyrrhus, for from that war the Romans first acquired any considerable number of foreign captives. Further, the Roman and Latin colonies and dominions at the date in question extended throughout Italy; and we are therefore precluded from choosing a date before 275 B.C. Again, the Roman colonies did not yet extend beyond Italy; and since it was not till 241 B.C. that parts of Sicily were annexed and became the first Roman province, this is our latest date. As for ships, it is well known that it was the First Punic War that forced Rome to become a sea-power; and therefore, from this aspect, the mancipium must have become stereotyped before, say, 260 B.C. Lastly we shall not be far wrong in dating the commencement of the influx of free peregrins to Rome about 250 B.C.

Our conclusions, therefore, as to the date when the

[1] See Plutarch (Quæst. Rom., 59).

characteristics of mancipium ceased to vary may be tabulated as follows[1]:

Evidence.	*Earliest approx. date.*	*Latest approx. date.*
Coinage	(Not long before 268 B.C.)	268
Writing		225
Slaves	275	
Land	275	241
Ships		260
Peregrins		250

The date, therefore, lies between 275 and 268, and the year 270 B.C. may be taken as approximately correct. The close correspondence between these various independent tests is striking. We may regard that date from a different, less technical aspect, by saying that the practice of selling valuable property with copper and balance commenced not long before 338 B.C., that by 268 B.C. land in Italy, cattle and slaves were being regularly sold in this way, and that so fixed had the practice now become as the correct method of sale of property of these classes, that neither the issue of silver coinage from 268 onwards, not the building of ships from 260, nor the influx of free foreigners to Rome, nor the spread of her dominions beyond Italy, nor the use of writing, created any change either in the form of the transfer, or the kinds of property to which it was applied, or the status of the persons acting as parties or witnesses. We must not, however, commit the error of accentuating the technical character of the mancipium of 270 B.C. It does not follow from what has been said that it was never used for the sale of other property; indeed there is evidence that it occasionally was so used long afterwards. Nor does it follow that at this date cattle, slaves or Italian land were always mancipated on sale; nor that, if not mancipated, they were considered

[1] The quorum of witnesses may not have become fixed till later.

to remain the goods of the vendor. That point was probably not cleared up till long after. All that had occurred by 270 B.C. was that this method was now regarded as the correct method for the sale of land, cattle and slaves. There is a consideration that puts in a clear light the process of development that was occurring, and its gradual character. When the practice of the weighing of money first became general, about 350 B.C., all property, valuable or not, must have been sold with copper and balance[1]; but upon a sale of property of especial value, a number of witnesses would be called in. But in the stereotyped form of the mancipation, "res mancipi" were sold with copper, balance and witnesses, and other property without copper, balance or witnesses. What had occurred was simply this: when the silver coinage came into use mancipium (now becoming an old-fashioned ceremony) was retained unchanged as the correct form for the conveyance of goods of these specially valuable classes; but goods of little value continued, as before, to be sold quite informally, without witnesses, the price being paid in the currency of the time.

If we now turn to the so-called Twelve Tables, we find there a reference to the mancipium in the following curious sentence:[2] "Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto," "When (a man) makes a nexum or mancipium, as he orally declares, so shall be law." This is obviously a maxim of a school, put into the language of legislation. What is referred to by "nexum" we shall consider later. In regard to the mancipium, the change from the state of the law, as we imagined it to exist in 270 B.C., is profound. In our description of the mancipium after 338 B.C. we were

[1] Except that the more trivial objects might perhaps be paid for in kind.

[2] At any rate, this clause is generally thought to have formed part of that compilation which we call the Twelve Tables.

describing the method, then in use, of conducting the ordinary cash sale of primitive law, and in 270 B.C. we were still speaking of the method of conducting a cash sale, which was now constant in form on the sale of valuables. In Babylon, the cash sale of valuables was normally evidenced by writing, and the Sale Tablet had obviously taken a constant form before transactions became common under which the price was paid prior to or after the delivery of the goods; so that a separate tablet was drawn up, evidencing the arrangement to give credit. In Rome, as the cash sale was conducted orally, the credit agreement would be entered into orally at the same time. In 270 B.C. such agreements would be few and far between, and, in particular, there could hardly be any agreements to give credit for the price, for the price was always weighed out at the time of the mancipium. Moreover, in 270 B.C. the mancipium was not yet regarded as a technical prerequisite to the passing of property. But from that date onwards subsidiary oral agreements, of the kind found in the Old Babylonian tablets, must gradually have become common—especially warranties and agreements to give credit for the goods or the price; and at the same time—while indeed the whole law was beginning to develop technicalities—the mancipium, from being merely the correct way of evidencing a (cash) sale of valuables, became the only valid method of transferring such valuables, both in sale and in other new circumstances. Hence arose the question of the juristic position of the contemporaneous oral terms and conditions; and hence the maxim of the Twelve Tables, which declares that these terms and conditions, though oral[1] and informal, are binding. It is clear from the clause that these terms were not only common, but were of a most varied character—"as he

[1] There is, in this word "lingua", more than a suggestion that writing was now in general use, and was used for certain contracts.

orally declares, so shall be law"; and it is also clear that the mancipium was now, in substance, a formal conveyance essential to transfer the property in Italian land, cattle and slaves. It was an oral deed; and, like the terms and conditions which become binding by being incorporated in an English deed under seal, so in Roman law oral provisions announced at the time of the mancipium obtained validity thereby. It is obviously impossible to date this maxim before 200 B.C. The belief that it formed part of a Code of 450 B.C., when copper bars a foot in length had hardly, if at all, displaced cattle as currency—112 years before the issue of the first round coinage—that belief is untenable. As when we examined the provisions of the "Twelve Tables" on other topics of law, so here again we are forced to assign these clauses to a date no earlier than that when Sextus Aelius issued his Tripertita (about 190 B.C.).

In addition to cash sale, there must have been a second type of transaction in wide use at Rome, from a time quite soon after the introduction of copper bars as a medium of exchange—namely, the loan of money. From about 350 B.C. the money advanced was, of course, weighed out when the loan was made, and except where the loan was of trivial amount, a number of witnesses must have been called in, besides the owner of the balance. Apparently when the silver coinage and writing came into use, the system of copper, balance and witnesses was retained and employed where a substantial sum was lent, just as it had been retained upon a cash sale; but, unlike the cash sale, the loan of money by copper and balance had no opportunity of becoming fastened to a defined type of subject-matter. Hence, as writing became general, not only upon loans of trivial amounts but upon all loans of money, the copper and balance slowly fell into disuse during the succeeding centuries, and in the classical Roman law, as we shall

see, the loan of money was a formless transaction.

There is a good deal of evidence that when currency passed by weight, the loan of money was known as "nexum". Not that "nexum" means a "loan"—the word is precisely parallel to the Old Babylonian rikistu (riksati) and signifies a "joining" or "binding." Like rikistu, nexum was apparently used, firstly, to signify a "transaction" (an act done by consent); and also, secondly, to signify the "binding" relation arising from such a transaction.[1] Hence at Rome the word was especially applied to the two great and common types of transaction, namely, cash sale (otherwise called mancipium) and loan of money; and secondly (in regard only to loan of money), signified the state of "bondage" which a defaulting borrower was compelled to accept (for sale was, of course, a cash transaction). Just as, among the most advanced tribes, it is common to find that execution may be levied on the person or property of the defaulting borrower without judgment, if the creditor has the chance; so also at Rome there is evidence that, at any rate until the Lex Poetelia,[2] personal execution could be levied on the borrower of money without judgment.

There is abundant authority that as early as the early part of the first century B.C.[3] and as late as the classical law[4] the word "nexum" still signified one of two things, namely, either any transaction by copper and balance, or any such transaction other than the mancipium (which latter transaction had also this separate name). When we turn back to those words of the Twelve Tables: "When (a man) makes a nexum and

[1] cf. the classical "nexi solutio"; and Liv. 7, 19.

[2] Of perhaps the end of the fourth century B.C. This is Girard's view of the effect of that law.

[3] See Varro, L.L., 7, § 105, Müll., citing (Manilius and)Mutius; and Cic., Top. 5, 28.

[4] cf. the phrase "nexi solutio".

mancipium, as he orally declares, so shall be law," we must be right in concluding that by the words " nexum mancipiumque " are meant all transactions by copper and balance. By 190 B.C. the transfer by mancipium had begun to be used for the purpose of will-making,[1] as well as for other purposes, and if this maxim dates from that time then we can understand why it is taught in the schools. It is the principle on which are founded all those new conveyancing and contractual forms which include the copper and balance—namely, the principle that any oral statement accompanying is of binding effect in law.

These considerations as to the meaning and history of the term " nexum " help to make clearer the change that had occurred in the character of the mancipium. It had commenced its life as a cash sale of a valuable before witnesses, and the transaction had the object merely of *witnessing* the fact that the purchaser was receiving the property for a price (and had not, in the case of a cow or a slave, stolen it). The old form of words given by Gaius,[2] in which the receiver of the goods alone speaks, announcing that he is receiving the goods for the copper price, still shows this object quite clearly. The same origin of the mancipium is shown by its name, which signifies not a " sale," but a " taking " or " receiving." Furthermore, the word " emptum " used in the mancipium in the phrase " be it (or he) bought by me " signified originally " taken " or " received " not " bought."[3] In other words here is the same stage in the development of the notion of contract, which we witnessed in the Old Babylonian tablets, where

[1] See *ante* p. 256.

[2] *Ante* p. 420. The form of the mancipium in the testamentum per aes et libram (Gai., II, 104), also suggests that in its original form the mancipee alone spoke. He still speaks first, and the testator adds little. These forms probably date from the early second century.

[3] See Paul. ex Festo *v.* Emere, Bruns., p. 241.

the transaction is generally regarded from the point of view of the receiver (purchaser, adopter, etc.)—"He purchased, borrowed," etc.,[1]—and in the main the tablet merely *evidences* the transfer; but it already contains subsidiary contractual terms, and gradually comes to be regarded more and more as *being* the transaction and not merely *evidencing* it. Finally, in the history of the Babylonian tablets, there is a gradual spread of forms which regard the transactions from the other point of view[2]—e.g. "he gave for the purchase price, for hire," etc., and which come finally to cover the whole field of contract, accompanying the development of a theory of contract. In Rome, in the early part of the second century, the same process has begun in regard to the mancipium, which does not merely evidence a receipt on sale, but has become itself a conveyance, and the vendor and purchaser are orally imposing terms on which the property is handed over.

The history of the word "emptum" is of considerable interest; it is obviously an old word—perhaps older than the "mancipium," in which it was used—referring to (cash) sale. When, however, from 270 B.C., the two forms of sale became crystallised out, namely, on one hand, the sale of land, cattle and slaves, with the copper and balance, and, on the other hand, the entirely informal delivery-sale of other goods (as in a modern shop or market-place), "mancipium" became the specific name for the more elaborate transaction, and probably "emptum" for the other. From 270 B.C. onwards, as trade developed, credit sale must have become common, and ultimately more important than

[1] And in such a case the tablet bears the seal of the vendor, etc., and not of the purchaser. The Twelve Tables are Late Middle Codes, and would certainly, therefore, not evidence a later development than the Old Babylonian (Late Codes).

[2] In the Neo-Babylonian period, see *ante* p. 410. This corresponds to the date 150–130 B.C. at Rome.

cash sale; and this change had necessarily certain curious results. Firstly, the "mancipium," retaining its essential characteristics as an instantaneous transaction, became "mancipatio," a conveyance, and ceased to be a sale as cash sale of valuables became less and less important. On the other hand, as credit sale became common, "emptum" must have come to signify informal credit sales as well as cash sales. Still later, when mere agreements for sale,[1] unperformed on both sides, began to be useful and common, and (while the theory of contract was developing and the consensual element in contract was being more and more emphasised) became well-recognised, binding agreements, "emptum" in its more modern form of "emptio-venditio"[2] was the name applied to this new transaction. This stage was not finally reached before the middle of the second century B.C.,[3] and was not complete at the date of the Twelve Tables; and the origin of "emptio-venditio" as a cash sale is still apparent in a clause which formed part of that compilation.[4] This was to the effect that goods "sold and delivered"[5] did not become the property of the buyer unless he had paid the price, or the seller had taken security for the price or had given the buyer credit for the price. This provision vividly reflects the commercial usage of the Babylonian tablets, where, upon a credit sale, the seller seals a tablet of

[1] The English "sale" and "agreement to sell" both embody the same history, for "sale" signified originally a delivery. See *ante* p. 410, note 2; and cf. Sale of Goods Act, 1893, secs. 1, sub-ss. 1, 3 and 4, and 62, sub-s. 1; Indian Contract Act, 1872, s. 77.

[2] Purchase and sale; or, literally, "taking—giving for the price". "Taking" still comes first. With venditio (venum—ditio), compare the contemporary "traditio", and the "give" of the Neo-Babylonian tablets.

[3] And hence sale in Roman law bears its second century name, ending in "-tio".

[4] Just., *Inst.*, II, 1, 41. Cf. Pomp. Dig., 18, 1, 19.

[5] "Venditæ et traditæ." It is inconsistent with the accepted theory of the early history of Roman law that this provision should have appeared in the Twelve Tables, and the statement in the Institutes to this effect is not generally accepted by scholars.

cash sale and may even acknowledge receipt of the price, but takes from the buyer a separate loan- or obligation tablet in respect of it. Indeed this remained a rule of the Roman law even after the classical period, as also did the rule that the ownership of property did not pass by an agreement of sale not completed by delivery. To pass the property the agreement to sell must be followed by delivery, and, in the case of Italian land, cattle or slaves, the delivery must take the form of a " mancipatio."

In his classification of the types of contract known to the mature Roman Law of his day, Gaius[1] does not include mancipatio or nexum. Mancipatio was now a conveyance; and nexum, in so far as it referred, not to the mancipation, but to the loan of money by copper and balance, was obsolete. Obligations which arise by contract, he says, are of four kinds; the obligation is created either by delivery of a thing; by words; by writing; or by (simple) agreement. This is of course the language of analytical theory; he is not concerned with history, and does not necessarily mean, for example, that as a matter of history the first type of contract became binding because property was handed over. In a sense, however, this is true: roughly speaking, these four classes of transactions are set out in the historical order in which they became important, and during this history the consensual element in contract, owing to the changes in commercial intercourse, had become more and more magnified, so that the character of each of these classes of contract is somewhat different. The accuracy of this order was, no doubt, made possible by the continuity of the written legal tradition at Rome; for from the time of the Twelve Tables at the commencement of the second century B.C. the law was taught with

[1] Gai., III, 89 f.

vigour, and in the middle of that century there begins a line of jurists of distinction.

In the first class of obligations (the "real" contracts) Gaius might have included the mancipium and nexum, if he had been writing a historical treatise. There, too, property was handed over when the transaction was entered into. The only instance he gives, however, is that of "mutuum"—the loan of fungibles (i.e. roughly, produce or money) where the articles to be returned are not those that were lent, but others of the same kind. Gaius' notion of the origin of the word "mutuum"[1] is somewhat naive—but its true origin is very clear. No one would question that the adjective "mutuus" (whence the English "mutual") is derived from "muto" ("I exchange"). "Mutuum" belongs to that type of abstract expression (so common in Greek,[2] and apparently characteristic of early Latin of the third century B.C. before the ending "-tio" comes into general use), which is in form a neuter of the adjective. Mutuum means "a thing exchanged," and so, "exchange." It is simply the older Latin equivalent of "mutatio" or "permutatio," just as the contemporary expression "mancipium"[3] ("receipt" or cash sale) corresponds to the later "mancipatio," and probably "emptum" to "emptio-venditio." "Nexum," another contemporary expression, would in later Latin have become "nexio" or "nexus."[4]

"Mutuum" is that old, familiar transaction credit barter. In Babylon and Egypt we saw that, with the spreading use of money, ready barter had become very

[1] "Ex meo tuum fit"—referring to the fact that, unlike the case of the bailment, upon a mutuum the property in the goods lent passes to the borrower! Justinian follows Gaius. This explanation is reminiscent of Varro's derivation of nexum from "neque suum" (Varro, L.L. vii, 105).

[2] e.g., τὸ καλόν, beauty.

[3] As though from an adjective "mancipius".

[4] Commodatum and depositum are also third-century transactions; traditio is later.

uncommon in the tablets; and the chief types of tablets were those recording cash sale, loan of money, and the credit-exchange (called "loan") of fungibles for fungibles or fungibles for money.[1] In the classical Roman law, conversely, the loan of fungibles is called "exchange," but the transaction is the same, looked at, for certain reasons, from the opposite point of view. In Rome ready barter has disappeared from our ken, and we find the same three main types of transaction. The history of mutuum, or barter, was no doubt as follows. Before the introduction of copper money, the two main types of transactions were ready and credit barter.[2] From 429 B.C., or whenever the use of copper money became general, ready barter began to disappear in favour of cash sale; the loan of money (usually at interest) became rapidly common; but credit barter (now alone called mutuum) remained. After 350 B.C. cash sale began to split into the two transactions of mancipium (also called nexum) and the informal delivery-sale emptum; the loan of money at interest was generally by copper and balance (nexum), and the loan of goods for goods or goods for money remained in the form of credit barter or "mutuum." We are indeed told that in early times one could not recover interest on a mutuum. As, however, the practice of using the copper and balance on a loan of money slowly began to fall into disuse after 250 B.C., the term mutuum became extended to loans of money at interest, and interest was recoverable.

Let us now return to Gaius' classification of contracts. He does not include any bailments in his first class, but Justinian includes two,[3] commodatum ("convenience" or gratuitous loan of an article) and depositum

[1] In Babylon, alone, there is a fourth common tablet, the Obligation Tablet, representing further development. See *post* p. 443.

[2] Perhaps both called "mutuum".

[3] Apart from pignus.

(gratuitous deposit).[1] It is significant that in both cases no payment is received by the bailor. We have seen[2] that bailments are uncommon and unimportant in early society, and their place is largely taken by credit barter, for if the owner of property is to receive reward for lending it to another, his remuneration usually consists in the fact that he is to receive back not his own property and cash, but something different of a higher value. Hire for reward becomes important only at a later stage, represented in the developed system of Babylon; and in Gaius it appears in the fourth class of obligations.

Gaius' second class consists of obligations created by words—the verbal contracts, the chief of which is the "stipulatio." It is a unilateral contract—an enforceable oral promise. The stipulatio of the classical law is referred to as a formal contract, but a very minimum of form is required. Usually one party addresses to the other the words, "Do you promise . . .?" and the latter replies, "I promise." The factors that have shaped the form are manifest. The first is that, as in the mancipatio, it is the person who will benefit who speaks; he has called in his witness or witnesses, and repeating for their ears the substance of an agreement previously arrived at with the other party, asks: "Do you promise to do (or give) such and such?" Or, "Will you do (or give) such and such?" The latter (since the word "yes" is not common in Latin, and there is no equivalent for our "I do" or "I will") replies, "I promise," "I will do" or "I will give." In general the verb used by the promisor was, naturally, the same as that used by the promisee; but this was not necessary. A mere substantial correspondence was enough; Ulpian, indeed, tells us that "Quidni" ("Yes") is a perfectly good answer, though he says a

[1] Said to have been referred to in the Twelve Tables.
[2] *Ante* pp. 396–8.

mere nod is not enough.[1] Nor need a word signifying "promise" be used by either party. "Dabis? . . . Dabo," is found in Plautus,[2] that is to say, as early as literature takes us; and Gaius speaks to it, as he does to "Facies? Faciam."

Until recently, Muirhead's theory of the origin of the stipulatio held the field. According to him this contract had a religious origin, being once a promise taken upon oath.[3] The theory was based on two assumptions: the first, that the stipulatio was once invariably taken in the words "Spondes . . .? Spondeo"—a belief still general; and the second, that the word "spondeo" had a purely religious significance. There is no evidence to support either assumption, and indeed what evidence there is contradicts both. The notion that the word spondeo was once an essential part of the stipulatio is based on a passage of Gaius which does not support it,[4] and shows, at the most, that "spondeo" was an old or *the* old Roman word for "promise." As has already been said, no word signifying "promise" was necessary even in Plautus' time. Secondly spondeo, as a word meaning "promise," was probably also used at some time in a religious sense[5]: but a glance at a lexicon will show how very rare this use was.[6] Muirhead's theory

[1] Dig., 45, 1, 1, 2.

[2] Pseud., IV, 6, 16.

[3] And on this theory was largely based the belief, still held, in the religious origin of contract generally (see, e.g., *P. & M.*, vol. I, pp. 57, 58).

[4] Gai., III, 93. What he says is, that the stipulation can be taken by the use of any verb signifying "promise", in Latin or any other language; that a foreigner may take it in Latin if he understands the language, and a Roman in Greek if he understands the latter; but that the form "spondes? spondeo" is so essentially proper to the Roman, that it cannot be taken by a foreigner, and cannot even be properly translated into Greek, although the word is said to be of Greek origin.

[5] Just as "promitto".

[6] In Plautus' time "spondeo" was used for secular promises of many kinds, especially promises of marriage; and respondeo meant "answer". If, as is likely, the many uses of spondeo are derived from one, that meaning must be "to speak". For spondeo, meaning to "go surety", compare the English "to speak for" someone: for sponsus (betrothed) compare "bespoken"; and cf. respondere, "to speak back." If so, the change in meaning of "spondeo"

constitutes an attempt to make the history of the stipulatio accord with the belief in the religious and formalistic origin of law. Recently, it has given place to the theory of Mitteis[1] who, still believing that "spondeo" was originally an essential part of the stipulatio, sees its origin in the "suretyship" which is found in Rome in judicial proceedings;[2] as though, from signifying "to undertake liability for another" the word spondeo came to signify "to undertake liability for oneself." Law does not grow in this way; but this hypothesis is a little nearer to the true explanation.

Now, it is important to notice that the essential differences between the contracts of Babylon and those of early Rome were all due to one cause: while, even in Hammurabi's time, all Babylonian transactions of importance were evidenced by writing, the Romans, till late in the third century B.C., conducted all their commerce orally, and it was at this early stage that their law crystallised. The main types of transactions at Rome up to this date have been mentioned; but they do not include all the various kinds of agreements then in use. Firstly, there was suretyship in judicial proceedings, but this being a promise made to a Court, stands outside the general field of contract; nor was there the same necessity of procuring witnesses to evidence it; and it was probably of little importance or effect in the present connection. But what of the many oral terms and conditions, accessory to cash sales, loans of money and credit barter, which must have been agreed upon in

accompanied its development from a purely formless oral agreement to the classical stipulatio. The Greek σπένδω (σπονδή) apparently meant to "pour out".

[1] *Aus Röm- und Bürg. Recht.* 109.

[2] "Sponsio"—a word with quite a different connotation from that of stipulatio; namely, not the dictation of a promise by the promisee (stipulator), but a unilateral promise by the promisor. On the ground of language and meaning we ought, by analogy with other Roman legal terms, to place the sponsio in the first half of the second century B.C.

the commercial transactions of Rome, as trade rapidly increased from, say, 275 B.C. onwards? On cash sales, whether with copper and balance or without, there were agreements to give credit for the price or for the goods. Then, upon sales and credit barter, there were express warranties of quality made at the time; the vendor, for example, agreed to answer if the slave or cow died within a certain period. Then there was suretyship, especially in loan of money and credit barter. When the impecunious Balbus wished to borrow, he at first, perhaps, got his rich friend Marcus to borrow for him; and later Balbus borrowed, and Marcus orally agreed to pay if Balbus should default. There was also another kind of agreement, the agreement to marry, when the dowry was fixed. There were various other agreements, not yet common, which later became separated off as new independent types of transactions, such as hire. All these agreements were necessarily oral till 225 B.C. or thereabouts, and they were all of the greatest importance, of the very core of commercial life. Consequently, they were necessarily witnessed, in all except trivial instances.

Now, in regard to terms incidental to mancipium and nexum, there was no need to call in witnesses. Libripens and witnesses were present; the transaction had already evolved a common form of words, and the additional terms of which we are speaking were stated orally by vendor or purchaser, lender or borrower, as the case might be. And when we reach 190 B.C., we find that maxim of the Twelve Tables, which lays it down that all terms orally stated at a mancipium or nexum are binding.

But apart from terms agreed between the parties to a transaction with copper and balance, witnesses must be specially called in to evidence the agreement—to witness, on a credit exchange of produce for goods or money, the promise of one of the parties to deliver goods or

pay the price on a future day; on a sale of new kinds of valuables on credit, the purchaser's promise to pay the price, or, where delivery is outstanding instead of payment, the vendor's promise to deliver the goods; on a cash or credit sale of new valuables, or on a credit exchange, the warranties of quality; on a credit sale of new valuables or a credit exchange, the promise of the surety; or a promise to marry and the fixing of the dowry. Hence in brief, we get a new method of witnessing, or, in other words, a new type of transaction, which, though it never becomes wholly uniform, comes naturally (as has been said) to be expressed in the form of a question by the promisee summing up a prior discussion for the benefit of the witnesses: "Will you do so and so?" and an answer by the promisor, "I will." This comes to be called the "stipulatio" ("binding"),[1] and the promisee is the "stipulator" ("binder"). It is inevitable that the word "spondeo," the contemporary word for "promise," should very commonly be used in the stipulatio; and that "facies? faciam" and "dabis? dabo" should also be common. Later, more modern words for "promise" are also used. If the uses of the words "spondeo," "sponsus," "sponsio" and "sponsor" are noted in a lexicon, it is interesting to see that they fall precisely into the categories already mentioned. There is a general meaning of "to promise"; there is the special meaning of "to become a surety"; the special meaning of "to warrant" the present or future existence of a fact; and "to promise in marriage." There is a considerable amount of evidence in Latin literature as to the early use of the stipulation for these varied purposes.[2]

The period from 275 to 225 B.C., when the trade of

[1] A more modern synonym of "nexum". See *ante* p. 431.

[2] There are two further meanings of sponsio—the forensic wager in the later actio per sponsionem; and the international treaty—but these do not concern us.

Rome was rapidly developing, must have witnessed the creation of the stipulatio[1]; and the later spread of writing did not oust the "verbal contract." Not that the stipulatio was yet recognised as a separate type of contract. Such a classification is artificial, and the Twelve Tables make no reference to the stipulation, but it is likely that the jurists of the middle of the second century B.C. fixed its place in a system of Roman contract and partly delimited its form and scope.[2] Hence, for example, in the Classical Roman law, the parties to a stipulation must be present in the same place, otherwise the promise is wholly void.[3] In short, the history of the stipulation is the normal history of change from the informal to the formal agreement, from the variable to the uniform, from the dynamic to the static, from isolated facts to theory, from the form that witnesses to the form that constitutes an agreement.

Of Gaius' third class of obligations, namely the literal contract, little need be said. This is the product of the general spread of writing during the second century B.C. The codex of house and estate management kept by the Romans corresponds roughly to the Babylonian Obligation Tablet, that is, the tablet of Babylonian business accounts. This so-called literal contract, like the mancipium and the stipulatio, plainly commenced merely as a method of evidencing an oral transaction. Indeed, Gaius tells us that even in the classical law this was its operation, except where the codex recorded a novation[4]—that is, in effect, the substitution of a different written contract in place of what existed before.

[1] The fact that in Gaius' time the foreigner was not considered competent to use the word "spondeo" is some evidence that spondeo was the only word in use for "promise" till the influx of peregrins began (after B.C. 250). As the word "spondeo" remained in great use in the stipulatio for at least five hundred years, we can understand the force it acquired.

[2] The word "stipulatio" is a second-century expression to judge from its form; see *ante* p. 436.

[3] Dig., 45, 1, 1.

[4] Gai., III, 128 f.

Of Gaius' fourth class, too, the consensual contracts, sale, hire, partnership and agency, we need say little. These are further commercial transactions which, though they had probably appeared earlier,[1] took final shape in the middle of the second century B.C., in a period of intense and enthusiastic study of law and search for legal principle. By 150 B.C. the civil law had become technical and static, and the list of contracts had closed. Apart from a great detailed development of the agreements already mentioned, progress could only come from the Prætors. The latter were able to introduce few new contracts—not as a rule the kind of thing which we have called commercial transactions, but species of other legal agreements; and these were not actionable, but at the most, like the pactum de non petendo, or agreement not to sue, merely afforded a defence to an action. This chapter illustrates how, in each separate type of contract, the Roman law, starting from simple, natural and practical beginnings, slowly became technical and unchanging; and how the Roman law of contract, as a whole, too, underwent the same process of change. It also illustrates how, first, the history of Roman law has been misread in the light of false assumptions as to the religious and formalistic nature of early law everywhere; and then how the misreading of Roman history has been used to support these false conceptions of the origins of law. In truth, what is regarded as the unique record of the history of law through an unbroken millenium from the traditional date of the Twelve Tables to the time of Justinian, can, with but little exaggeration, be described as an account of the classical Roman law; what precedes it is, as a whole, and except as to a few facts, a series of misconceptions; and what follows is a blank until the

[1] Especially sale, which had changed its character. Mandatum, from the form of the word, seems to be a third-century transaction in origin. The C.H. (which knows of no agreement to sell) contains many provisions on the subject of agency.

restoration of the classical law by Justinian. The belief in the religious and formalistic origin of law is disproved by the facts of Roman, as of all other legal history. And how strange was that belief! If an imaginary intelligent layman had been entrusted with the task of writing a history of law, he might have been much nearer to the truth.

INDEX

ABYSSINIA (=Late Codes), 1, 181, 298, 332
ADULTERY AND SEDUCTION, 68, 112, 309, 323–7, 353, 361
  As a crime, 293–5, 326
AETHELBERHT, LAWS OF, 20, 62–70, 90, 293, 309, 356
  An Early Code, 179, 218, 296
AETHELRED, LAWS OF (Early Middle Codes), 297
AETHELSTAN, LAWS OF (Early Middle Codes), 288, 389
AGENCY, 25, 419, 444
AGRICULTURAL GRADES
  Defined, 176–8
AKAMBA (A3; E. Africa), 182, 205, 241–2, 295, 299, 316, 325
AKIKUYU (A3; E. Africa), 158, 182, 197, 241, 248, 309, 352
ALAMANNORUM, LEX, 18, 19, 59, 60, 67, 74, 380–1
  An Early Middle Code, 179, 218
ALAMANNORUM PACTUS, 59, 378–81
  An Early Code, 218
ALBANIA, NORTHERN, 210, 319
ALFRED, LAWS OF (Early Middle Code), 62, 78, 158, 294
AMERICA, NORTH (H.2), 196, 291, 296
ANDAMANS (H.1), 314, 394
ANGLORUM ET WERINORUM, LEX (Early Middle Code), 19, 60, 382
ANGLO-SAXON LAWS, 20, 62–70, 76–79, 152, 403
ANUAK (A3; Nilotic Sudan), 227
ARMENIAN LAW-BOOK
  A Central Code, 116, 217
ASHANTI (A3=Late Middle Codes; W. Africa), 181, 183, 216, 222, 227, 236, 243, 248, 259, 272, 316, 333, 336
  Contracts, 397, 399, 400
ASSAULT. SEE WOUNDING
ASSYRIA
  Legal history of, 10, 11, 22
  Contracts, 403–19
ASSYRIAN LAWS, 10, 11, 33–8, 56–7, 284, 294, 361–2
  Late Codes, 179, 218
  Marriage 34, 223–5, 232–4
  Inheritance, 246
  Property, 267
AUSTRALIAN TRIBES (H.1), 194, 205, 393

BABYLONIA
  Legal history of, 9–14, 306
  Neo-Babylonian Code, 12, 56, 412
  Contracts, 403–19
BAILMENTS, 110–12, 117–19, 129, 357–64, 367, 376, 378, 395–8, 437–8
BAIUVARIORUM, LEX, 18, 19, 59–60, 67–8, 74–5, 293, 380–1
  An Early Middle Code, 179, 218
BARTER
  Ready, 357–8, 393–402, 408, 411, 423
  Credit, 395–6, 399, 415–16, 436–7
BESTIALITY, 40, 112, 280, 291
BRIDE PRICE, 40, 68, 112, 204, 225–34, 243, 326
BURGUNDIONUM, LEX, 17, 58, 67, 158, 246, 309, 315, 326–7, 329, 377, 380, 382, 386
  A Central Code, 179, 218

CANUTE, LAWS OF, 152, 288, 289, 294, 297, 298
CHINA, 132
CHIEFTAINSHIP, 185–6, 333–9
CIVIL INJURIES, 192, 196 f., 202 f., 281, 301–30
CLAN
  Weakening of, 224, 246, 247
  Land held by, 270–1, 273, 276
CODES, 3, 5, 6, 27, 35, 137, 206, 209–18, 355–6
  Classified, 179, 214–18
  Contents of, 204, 214–18
CONCUBINES, 25, 104, 232–4, 324

CONSTITUTIONAL RULES, 185–91, 207, 271–3, 331–9
CONTRACT, 4, 306, 356–64, 367, 391–445
  Theory of, 409–11, 434
  Married women, 310
CONTRACT TABLETS, 6, 7, 8–14, 343, 403–19
  Form, 403–7
  Effect, 408–9
  Seals, 407–8
  Sale, 411–13
  Loan, 413–14
  Obligation, 413–14
  Deposit, 413
  Hire, 418
COPYRIGHT, 393
COURTS
  History of, 194–201, 351 ff.
  And arbitration, 196
  Litigation, 203–5
  Feudal Courts, 333–9
  Security, 198, 338, 388, 440
CRIMINAL LAW. See also separate 44, 65, 277–300, 305 offences]
  Definition, 277–9
  And religion, 151–60, 292
  Sacral offences, 196, 281, 289, 290, 291
  Procedure, 194–6, 200
  Offences against Crown, 295 ff.

DAMAGE TO PROPERTY, 41–2, 310, 330
DAMAGES, 302–3, 306
DEBT-SLAVES, 103–5, 106–7, 122, 311–12, 399–400
DEODAND, 107–8, 157–9
DEPOSIT, 25, 29, 110, 359–61, 363–4, 367, 397, 413
DIVORCE, 220, 229, 232
DRACO. SEE GREECE

ECCLESIASTICAL COURTS, 95–8, 118, 120–1, 138, 216, 293, 356, 388
  Separation from secular Courts, 97–8, 289, 290
  Inheritance, 244–5
ECONOMIC DEVELOPMENT
  Relation of law to, 173–84
  Tests, 176 ff.
  Tribes without Courts, 185–6
EDWARD, LAWS OF (Early Middle Code) 291
EDWARD AND GUTHRUM, LAWS OF (Early Middle Code), 289, 318
EGYPT, 12, 416–17

ENGLAND. See also the various Anglo-Saxon Laws.
  Eleventh century, 207, 244, 272, 289, 297
  Twelfth century, 231, 290, 298–300, 315
  Thirteenth century, 247, 267, 286, 287, 296, 298, 303, 305, 309–10, 319, 320–1, 323, 327, 339
  Relation to the ancient Codes, 179
EQUITY, 3, 206, 348–9
ESKIMO (H.2), 196, 295, 314
EURIC, CODE OF (VISIGOTHS), 16, 19, 57, 376, 381
EXECUTION FOR DEBT, 25, 103, 110, 141, 200, 224, 311–12, 401, 414

FALSE LAWS, 71–84, 372
FAMILY, 223–5, 326
  Property, 265, 273–6
  Liability of head for, 308–11
  Liability of, for head, 311–12
  Head as judge of, 313
FEUD, 302–3
FEUDALISM, 19–20, 25, 41, 72, 99, 183, 207, 272–4, 296, 331–6
FICTIONS, 3, 206, 346–8
FRANCORUM CHAMAVORUM, LEX (Early Middle Code), 19, 60
FRISIONUM LEX, 19, 60, 67–8, 293, 318, 319, 352, 380
  An Early Middle Code, 179, 218

GALLA (A3=Late Middle Codes; E. Africa), 183, 216, 316, 330, 352
GERMANS (A3), 227, 245, 300, 302, 315
GLANVILLE, 300, 339
GOLD COAST, 181, 198, 216, 309, 330, 333–4, 354
GORTYN CODES, 15, 54–5, 165, 267, 274, 294, 303, 309, 343
  Ordeals, 364–7
  Beginning of mature law, 179
GREEK LAW, 13, 15, 144–60, 210, 416–18
  Homer, 144–7, 149, 352, 200–1
  Draco's Code (Late Codes), 149 ff., 217
  Athens, 149 ff., 159, 267, 346, 368

HAMMURABI, CODE OF, 1, 10, 22–32, 55, 321, 343, 412
  Marriage, 222–3, 224, 231–4
  Inheritance, 231–4, 246–51
  Property, 267
  Civil law and crime, 284–7, 300
  Ordeals, 362–4
  A Late Code, 179, 218

HEBREW CODE (Ex. xxi. 2 to xxii. 17), 14, 87–8, 102–25, 154–7, 359–61
Translation, 103–12
Commentary, 113–22
A Late Middle Code, 179, 218
HEBREWS, LEGAL HISTORY OF, 85–125, 154–7, 160, 200, 346, 356
Inheritance, 242, 245–6, 250
Property, 268–9
HENRICI I, LEGES, 78, 155
HERESY, 112, 292
HIRE, 42, 112, 360, 400, 418–19, 444
HITTITE CODE, 11, 14, 39–45, 57, 159, 292, 294, 315–16, 357–9
A Central Code, 179, 218
HLOTHHERE AND EADRIC, LAWS OF, 20, 62–70, 389
An Early Code, 218
HOMICIDE, 39, 105, 114–15, 192, 200–1, 284, 305, 309, 310–20
Religion and, 144–60
E. Africa, 182–3
As criminal offence, 297–9
HUNTERS
Defined, 176

ICELAND, 147–8, 296, 302, 319
IDEAL RULES, 67, 73, 90
INCEST, 122, 138, 280, 290–1, 296.
INE, LAWS OF (Early Middle Code), 62, 77, 389
INHERITANCE, 138, 205, 235–59, 311
Wills, 248–59
IRELAND, ANCIENT LAWS OF, 20, 81–4
Early Middle Codes, 217

JAPAN, 132–3

KAFFIRS (A3=Early Codes ; S. Africa) 160, 183–4, 186, 195, 198, 204, 207, 227–31, 248, 272, 286, 290, 293, 295, 297–9, 309, 354
KAVIRONDO (A3 ; E. Africa)
Bantu, 182, 229, 317
Jaluo Nilotic, 241, 244, 293
KIKUYU. SEE AKIKUYU

LAND. And see FEUDALISM. 25, 36, 41, 99–101, 268–76
Communal property, 269–73
Family and individual property, 273–6
Village communities, 270, 275–6
Tenancy of, 400, 418
LANGO (A3 ; Uganda), 181, 197, 242, 290, 316–17, 325, 328, 329, 330, 352, 396
LAW
Early words for, 88–9, 144–6
Before Courts evolve, 187–93
Growth of earliest, 202–8, 340 f.
LEGAL PRINCIPLE, 30, 38, 45, 139, 344–6
LEGISLATION, 3, 26, 205–18
LEVIRATE, 129, 229, 243–4
LOAN. And see BAILMENTS. 112, 119, 357, 360, 396, 413
Of Money, 399, 413–14, 431

MAINE, SIR H. S., 1–4, 49, 50, 126, 196, 206, 275–6, 279, 346, 350, 370, 391
MANU, CODE OF, 14, 126–32, 275–6
End of Middle Codes, 217
MAORI (A2), 248
MARRIAGE. And see BRIDE-PRICE
History of, 220–34, 400
Matrilocal, 34, 221 f.
Patrilocal, 35, 221 f.
Before Courts evolve, 192
MARRIAGE PORTIONS, 104, 230–2
MASAI (A3 ; E. Africa), 180, 182, 242, 293, 352
MELANESIA (A2), 189–90, 196, 314, 393–4
MONEY, 140, 303, 398, 424
MORTGAGE, 101, 274, 399, 402, 419

NANDI (A3 ; E. Africa), 116, 242–3, 322, 324
NEGLIGENCE, 26, 119, 129, 307, 329, 358
NIGERIA, 181, 233, 242–3, 274–5, 312, 315, 324, 424
NYIKA. SEE WANYIKA

OATH. See also ORDEALS
Actions begun by, 336–9
In contracts, 402, 417–18
ORDEALS, 51, 72, 96, 117–19, 129, 350–90
By oath, 52, 111, 117–19, 129, 350–90
Oath helpers, 354, 367–8, 374–5, 380 ff.
By battle, 381–90
OUTLAWRY, 295–6

PARTNERSHIP, 408, 419, 444
PASTORAL GRADES
Defined, 177–8
PERJURY AND SLANDER, 24, 321, 330, 336–9

PRIMITIVE LAW
Definition of, 1
PROCEDURE, 3, 4, 141, 194–201, 333–9, 350–90
PROPERTY
Before Courts evolve, 192
History of, 260–76
Moveables, 263–7
Land, 268–76
Head of the family, 224–5, 266–8
Women, 266–7
Sons, 267–8

RAPE. And see ADULTERY. 293–5, 323–7
RELIGIOUS THEORY, 3, 49–169
Separation of law and religion among tribes, 163, 188
Religious sanctions among advanced tribes, 183, 216, 402, 417
Primitive religion and magic, 163–7
Modern law and religion, 161–9
RIPUARIAN CODE, 17, 19, 60, 318, 319, 372–3, 380–2, 385
An Early Middle Code, 179, 218
ROBBERY, 299, 310
ROME. And see TWELVE TABLES. 1, 15, 134–43, 225, 231, 293, 345
Inheritance, 246, 251–9
Contracts, 391, 420–45
Mancipium, 420–32
Barter, 423, 436–7
Sale, 420–35, 444
Bailments, 437–8
Stipulatio, 438–43
Literal contract, 443
Hire, 444
Justinian, 13, 17, 18, 21, 342
ROTHARI EDICTUS, 378, 382, 386

SALE, 29, 226, 357–8, 398, 411
Warranty on, 118, 360, 403, 412
Credit, 412–13
Rome, 420–35
SALIC LAW, 17, 19, 58, 59, 70, 158, 198, 244–5, 295–6, 304, 309, 318–19, 322, 356, 369–90
An Early Code, 179, 218
SANCTIONS, 277–330
Pecuniary and corporal, 152, 282 ff.
Defined, 303 f.
SANCTUARIES, 75, 105, 114–15, 150–7, 200–1, 319
SAXONUM, LEX, 19, 60, 380, 382
An Early Middle Code, 179
SCHOOL BOOKS, 82–4, 90–1, 127, 139–42, 344
SCOTLAND, ANCIENT LAWS OF, 79–81
Leges Inter Brettos et Scottos, an Early Code, 218
SCRIBES, 35, 43, 405–6
SHILLUK (A3; Nilotic Sudan), 227
SINAI BEDOUIN, 322, 324, 354–5
SLANDER. SEE PERJURY
SOURCES, 5–7
SUDAN, NILOTIC (A3), 181, 400
SUMERIAN LAWS, 9, 10, 23, 56, 116, 222, 321, 362
Marriage, 222–3
Belong to Late Codes, 179, 218
SURETYSHIP, 399, 440–3

TALIONIC PENALTIES, 30, 37, 107, 116, 122, 129, 140, 183, 284, 304–5, 321–2, 325, 332
TECHNICALITIES, 3, 336–9, 340–9, 364–7, 369–74, 390
THEFT. See also ROBBERY. 24, 34, 41, 109, 119, 310, 327–30
Spoor-law, 160, 371
As a crime, 299, 328
THEMIS, 3, 144–6
THEODORICI EDICTUM, 18, 377–8, 381
TORRES STRAIT ISLANDERS, 248, 275
TRADE, 217, 267, 392 ff.
And gift exchange, 393
TRESPASS, 183, 330, 338
"TRIBES, THE"
Meaning of the term in this book, 186
TWELVE TABLES. See also ROME. 134–43, 198, 225, 231, 289, 320, 367
A Late Middle Code, 179, 218
Inheritance, 251–8
Property, 267–8
Mancipium, 256, 420–4
Sale, 434
Deposit, 438
Legis Actio Sacramenti, 338

WABONI (A3=Central Codes; E. Africa), 182, 315
WADIGO (a Nyika tribe), 222, 238
WAGIRIAMA (a Nyika tribe), 241, 268, 316, 352
WALES, ANCIENT LAWS OF, 21, 81–4, 217
WANYIKA (A3=Central Codes; E. Africa), 182–3, 222, 238, 240, 274, 315–17
WATAVETA (A3=Central to Late Middle Codes; E. Africa), 182, 241, 317

WATEITA (A3=Central Codes; E. Africa), 182, 243, 275, 315–17
WIHTRED, LAWS OF (An Early Middle Code), 62, 76–7, 389
WILLELME, LEIS, 67, 78, 294, 297
WITCHCRAFT, 138, 195, 279, 280, 287–90, 353, 362
WITNESSES
To transactions, 181, 402, 406–7, 422 ff.
WOUNDING, 41, 43, 44, 66–8, 106, 129, 140, 309, 320–3
Tariff-lists, 67, 322
As a crime, 298–9
WRITING, 211, 215, 256, 342, 364–5, 422, 440, 443

ZULUS (A3=Late Middle Codes; S. Africa), 206, 335.