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ANGLO-SAXON PERIOD OF ENGLISH LAW

II

When we turn to consider the subject-matters over which the Anglo-Saxon courts, which we have been describing, exercised jurisdiction, we find the usual archaic features. The only substantive rules of law that are at all fully set forth have to do with offences and wrongs, mostly of a violent kind, and with theft, mostly cattle-stealing. Theft, especially of cattle and horses, appears to have been by far the commonest and most troublesome of offences; but the common law of theft is wholly post-Norman. Except as involved in the law of theft, the law of property is almost entirely left in the region of unwritten custom and local usage. The law of contract is rudimentary, so rudimentary as to be barely distinguished from the law of property; it may be described as an insignificant appurtenance to the law of property. There is no evidence of any regular process of enforcing contracts; but no doubt promises of any special importance were commonly made by oath, with the purpose and result of putting them under the sanction of the church. A mixture of secular and ecclesiastical sanctions was rendered all the easier by the bishop constantly being, as we have seen, the chief judicial officer of the shire. Preservation of the peace and punishment of offenders were dealt with in England, as elsewhere, partly under the customary jurisdiction of the local courts, partly by the special authority of the king. The expression "the King's peace," even now used in every indictment, comes to us from the Saxons. The origin of it is to be traced to the notion that a stranger who broke the peace of a house must make atonement to the head of that house. But in the Anglo-Saxon period the king's peace was not for all men or all places. In England probably as late as the Norman Conquest each household had its individual "peace." The peace of the king was one thing, the peace of the lord of the manor, the peace of the churches, the peace of the sheriff, the peace of the homestead, were all quite other things:

2 Ibid., p. 58.
3 R. Storry Deans, Students' Legal History (2d ed.) pp. 6-7.
a multitude of jurisdictions imposed peace in a multitude of areas in a multitude of ways. But in no area was "peace" a verbal contrast with war: rather it conveyed the idea, dimly mirrored it may be, in the minds of men, of wholeness and soundness within the area whatever its size might be. But breach of the kings' peace was a much graver matter than an ordinary breach of public order. It made the wrongdoer the king's enemy. After the Norman Conquest the king's peace became the normal and general safeguard of public order. Slowly the idea of a "general peace" embracing the "peace" of the various customary jurisdictions was evolved, and the king's peace in the course of time coincided with this general peace. All jurisdictions, including that of the churches, were gradually absorbed by the king's peace, which became, in the process of centuries, the peace first of England, then of all the Isles, and with the onward expansion of the race, of all the king's dominions over-sea. The movement of absorption, long since practically concluded in England—though there manorial courts still possess a "peace" that is not the king's—may be observed in active operation to-day in the Empire of India.4

The first extension of the Pax Regis beyond the royal residence was by a proclamation that the king's peace should be observed in all the land during the week of the coronation, at Christmas, Easter, and Whitsuntide in every year. The next step was that the king could proclaim his peace in any particular locality. Offences against the king personally, e. g., treason, were breaches of his peace.5

The violation of the king's peace was the original offence from which the jurisdiction of the sovereign in criminal matters arose; and not only was it the practice that the king's justices should try breaches of his peace, but also that the king should be a party to the plea. It finally became the practice to allege every criminal wrong as being contra pacem domini regis; but there is good reason to suppose that felonies were at first the only crimes contra pacem, or, conversely, that crimes contra pacem were originally all felonies. The prosecution of violators of the peace by the sovereign sprang not so much from the Norman conception of the king as the foundation of justice, as from the Saxon idea of compensation to the sufferer for a wrong done.

4 Article in LONDON SPECTATOR (May 31, 1902).
5 R. Storry Deans, op. cit., p. 7.
If you injured me you must pay the bót. If you injured the king by violating his peace, you must pay the fine due to him, and he, therefore, prosecuted.  

For in Anglo-Saxon as well as in other Germanic laws, we find that the idea of wrong to a person or his kindred is still primary, and that of offence against the common weal secondary even in the gravest cases. Homicide appears in the Anglo-Saxon dooms as a matter for composition in the ordinary case of slaying in open quarrel. There are additional public penalties in aggravated cases, as when a man is slain in the king's presence, or otherwise in breach of the king's peace. But treason to one's lord, especially to the king, is a capital crime. A freeman's life has a regular value set upon it, called wergild, literally "man's price," or "man-payment," or wer simply; while for injuries to the person short of death there is an elaborate tariff; for an eye so much, for a broken arm so much, and so on.  

To explain the phraseology of the time:

Wer was the pecuniary value set on a man's life increasing with his rank. It was also the measure of the fines payable by him for his own offences; for as the life of an earl was more precious than that of many ceorls, so his offences were the more grave.

Wite is the usual word for a penal fine payable to the king for a breach of his peace.

Bót is a more general term, expressing compensation of any kind for a wrong done. By Alfred's law of treason that offence was made bótleds (bootless) i.e., incapable of being compounded for a money payment. In a special sense bót was used to mean the compensation to be paid to the injured party, as distinguished from the wite payable to the king.  

Composition must generally be accepted if offered; private war is lawful only when the adversary obstinately refuses to do right, in which case the power of the ealdorman and of the king at need, may be called in if the plaintiff is not strong enough of himself.

We can watch a system of true punishments—corporeal and capital punishments—growing at the expense of the old system of pecuniary mulcts, blood-feud, and outlawry; but on the eve of the Norman Conquest mere homicide can still be atoned for.

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6 R. Storry Deans, op. cit., p. 205.
7 Pollock and Maitland, op. cit., p. 47.
8 R. Storry Deans, op. cit., p. 9.
by the payment of the dead man's *wergild*; and if that be not paid, it is rather for the injured family than for the state to slay the slayer. In the twelfth century the old system perished of over-elaboration. The bill that a man-slayer ran up became in the days of feudalism too complex to be summed, too heavy to be paid; for the dead man's lord, the lord of the place where the blood was shed, and it may be many other lords, would claim fines and fortunes. He had to pay with his eyes, or with his life, a debt that he could not otherwise discharge.

In connection with the matter of the preservation of the peace it is right to mention the system which constituted what became known as "frankpledge." Every tithing, as it was called, contained ten freemen; every freeman must belong to a tithing; every ten freemen constituted a district tithing. The members of each tithing were responsible for each other's good behaviour; in this relation the tithing was called a *frith-borth*, or security for peace, and later on, a frankpledge, which seems to be a corruption of the term. The members of the *frith-borth* were bound to produce in the court of justice any one of their number who was summoned. They were a sort of perpetual bail for one another. If one of them was accused and failed to appear, they might purge themselves by oath of being accessory to his flight; if they could not do so, they were obliged to make good the penalty of the offence of which he was accused. It was not until the time of Canute that this institution was made obligatory on every freeman. The obligation was examined into in the Sheriff's Hundred Court. This examination, or seeing into frankpledges was called *visus franciplegii*, view of frankpledge. Besides the security of the frankpledges every man was bound to have a lord or patron in whose protection or *mund* he was. As the *frith-borth* secured his responsibility to justice, the protection of the *mund* was intended to secure justice for him. If he was slain or injured, the *mund* was said to be broken, and the culprit had to make a compensation to the lord, as well as to the relations of the injured person. The custom of the *mund* was one of the most efficient preparations for the reception of feudalism.

As to the law of property in Anglo-Saxon times, as already stated, it is customary and unwritten, and no definite statement

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of it is to be found anywhere. Movable property seems for all practical purposes to be synonymous with cattle. Our documents leave us in complete ignorance of whatever rules existed. As to land, without conjecturing how the change took place, we may safely assume that, although traces still remain of common land tenure at the opening of Anglo-Saxon history, absolute ownership of land in severalty was established and becoming the rule. As to the private holding of land we must distinguish between bookland and folcland. As to bookland, or bookland, Anglo-Saxon charters or “books” are mostly grants of considerable portions of land made by kings to bishops and religious houses, or to lay nobles. Land so granted was called “bookland.” Lords of bookland might and sometimes did create smaller holdings of the same kind by making grants to dependents. But grants of bookland owe their existence, directly or indirectly, to royal favour, and throw no light, save incidentally, on the old customary rule of landholding. Folcland is a term which occurs only in a few documents, and then without any decisive explanation. But it appears to have been land held without written title under customary law. Probably its alienation was difficult. Some local customs found surviving long after the Conquest point to the conclusion that often the consent of the village as well as of the family was a necessary condition of a sale. Indeed it is not certain that folcland could be sold at all; nor do we know to what extent, if to any considerable extent, power to dispose of it by will had been introduced. Anglo-Saxon wills (or rather documents more like a modern will than a modern deed) exist, but they are the wills of great folk, such as were accustomed to witness the king’s charters, had their own wills witnessed or confirmed by bishops and kings, and held charters of their own; and it is by no means clear that the lands dealt with in these wills were held as ordinary folcland. In some cases we also hear of persistent attempts by the heirs to dispute even gifts to great churches.

In fact how far the liberty of alienation by will existed in Anglo-Saxon times is uncertain. It is the opinion of some

12 Pollock and Maitland, op. cit., p. 51.
15 22 Law Quart. Rev. p. 87.
authorities that complete disposition of land and goods was allowed, of others that limited rights of wife and children were recognized. However this may be, after the Conquest a distinction, the result of feudalism, to use a convenient, if inaccurate, term, arose between real and personal property.¹⁰

The division into bocland and folcland is not an exhaustive one. There were many allodial estates which had existed long before title deeds were invented; others that were conveyed by the gift of a horn or a clod of grass, or some other token, and of these especially were grants for religious endowments. For land could be conveyed without charter or writing, so long as “lawful men” of the hundred were present as witnesses. From this verbal conveyance, no doubt, is to be traced “livery of seisin,” which was a symbolical ceremony accompanied by words of gift in the presence of witnesses. The conveyer (afterwards called the feoffor) put into the hand of the conveyee (feoffee) a clod of earth or a twig, and said words to this effect: “I liver this to you in the name of seisin of Whiteacre” (describing it) “to have and to hold to you and your heirs forever” (or “heirs of the body,” or as the case may be). The name of livery of seisin, however, is Norman.¹⁷

There were, therefore, three kinds of estates, alodial, bocland, and folcland. The alodial proprietor held his land of no one, he was bound by no homage, he was free, he owned no lord or king over his estate; but he was subject to what was called the trinoda necessitas, the duty of contributing to the building of bridges and castles, and serving as a soldier in defence of the community, pontis et arcis aedificatio et expeditio. The tenants of folcland had, on the other hand, besides these duties, a liability to have strangers, messengers, horses, hawks, and hounds quartered on them by government; the duty of entertainment and sustaining the king and his officers and servants on their journeys, and of providing them with carriages and horses, and several others.¹⁸

Already, before the Conquest, by subinfeudation or by commendation, great portions of the land of the country were being held by a feudal tenure; and the alodial tenure which had once been universal, was becoming the privilege of a few great nobles.

¹⁸ Stubbs, op. cit., p. 7.
too strong to be unseated, or a local usage in a class of landowners too humble to be dangerous. For undoubtedly freeholders or socmen existed in Saxon times, but their socage right was one of absolute ownership of the land, and the Norman kings, as we shall see, retained only the name of socage, but altered the substance.

In the period immediately preceding the Conquest we find many of the tillers of the ground dependent on a lord to whom they owed rents and services substantially like those of which we have ample and detailed evidence in later documents. A large proportion of them were personally free men; and there is little doubt that, except in the Western Countries, common field agriculture was general if not universal. Land held of a superior was called *laen-land*. The *laen* or loan of land answered to the beneficium of the Conquest. It was a temporary loan or gift for one or more lives. Three lives is a very general term. The grantee might, or might not, be bound to perform services in return for the loan. He might be bound to pay rent; or the loan might be given in return for a lump sum.

*Bocland* preserved its name for a time in some cases after the Norman Conquest, but was finally merged in the feudal tenures in the course of the twelfth century. The relations of a grantee of bookland to those who held under him were doubtless tending for some considerable time before the Conquest to be practically very like those of a feudal superior; but the Anglo-Saxon law had not reached the point of expressing the fact in any formal way.

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