

THOMAS PETER ELLIS
WELSH TRIBAL LAW
AND CUSTOM
IN THE MIDDLE AGES

IN 2 VOLUMES

VOLUME II

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PART V
THE LAW OF
CIVIL OBLIGATIONS

I

THE FORMALITIES OF BARGAINING

1. *Introductory.*

§ 1. The Welsh Law of bargaining, using the word bargaining in a wide sense to cover all transactions of a civil nature whereby one person entered into an undertaking with another, can be considered in two aspects, the one dealing with the form in which bargains were entered into, or to use the Welsh term, the 'bond of bargain' forming the nexus between the parties to it, the other dealing with the nature of the bargain entered into.¹

§ 2. The characteristic of all early law relative to bargain is that the formalities attendant upon the bargain, not the subject-matter of the agreement, form the contract, and without the observance of the formalities there is nothing to enforce.

The conception that an agreement without the prescribed formalities was enforceable was a later development.

Hence we find the Welsh Laws, like other early laws, deal mainly with the formalities and the legal consequences ensuing on the observance or non-observance of those formalities rather than with the agreement itself.

We have in the Codes matter dealing with the subject of agreements, e.g. the sale of goods, loans, and the like, but we have a larger volume of law dealing with the procedure to be observed on entering into a transaction.

The Welsh Laws recognized three principal modes of agreement, 'briduw', 'amod', and 'machni'.

2. '*Briduw.*'

§ 1. Not much is said in the laws about 'briduw'.

The word is said to mean 'the dignity or honour of God', but the origin of the phrase seems to be a popular mistranslation of an oath beginning with 'Pro Deo'.

¹ IX. 304 ; XIV. 658.

§ 2. Any agreement could be entered into by 'briduw', but, inasmuch as it was a 'mutual bond', it would seem that there must be reciprocal promises.

The fact that there must be reciprocal promises in 'briduw', 'amod', and 'machni', seems to prove conclusively that there could be no unilateral obligation entered into.

§ 3. An agreement by 'briduw' was entered into by the parties to the agreement grasping each other's hand, and, while holding the hand of the other, each party swore 'briduw', or 'Pro Deo', to carry out the promise made by him.

The swearing with clasped hands made the agreement binding.

It will be observed that, unlike the transactions by 'amod' or 'machni', no third person was involved or made responsible to enforce the agreement. Hence it is said that an agreement by 'briduw' was to be enforced by the King and Church, because God, whose name had been invoked in the oath, was the surety.

The grasping of hands was essential to the agreement, and if one person, in the course of the transaction, placed his hand on the shoulder or other part of the body of the other, instead of grasping hands, it was an insult which had to be compensated for with honour-price.

§ 4. Any person over seven, being *compos mentis*, could enter into 'briduw', even a married woman.

An agreement by 'briduw' was enforced by suit and distress.

Early English custom had the same mode of entering into bargains, and reference to it is made in Ælfred's Laws, c. 33, under the name of 'God-borh'.¹

3. 'Amod.'

§ 1. 'Amod', or as it is rendered 'contract', plays a large part in the Welsh Laws, though inferior in frequency to 'machni'.

Like 'briduw', it was a mutual bond, and so there could be no 'amod' where there was a unilateral agreement.

¹ V. C. 128, 132; VI. 108; XIV. 658.

§ 2. The ordinary method of entering into 'amod' is fully described in the Venedotian Code. The two parties met, grasped hands, and stated what their promises were one to the other in the presence of special witnesses who were called 'amodwyr' or 'contract-men'.

An agreement entered into by grasping hands only, without the presence of 'amodwyr', was not an 'amod', and a denial of such an agreement was established by the sole oath of the alleged promisor.

Mere negotiations did not make an 'amod', nor did the proposal and acceptance unless and until it were entered into by the grasping of hands in the presence of 'amodwyr'.

The object of having 'amodwyr' present was twofold, viz. to furnish evidence of the agreement entered into and to provide for its enforcement when proved.

'Amod' could be enforced by the 'amodwyr' without suit, or after suit; they, and not the executive arm of the King and the authority of the Church, being charged with the enforcement of the 'amod' when established.

§ 3. Quite a number of people were incompetent to enter into 'amod'.

An idiot, a drunken man, a man sick unto death, a youth under fourteen, professed religious men or canonists under vows, women under the dominating rod of their husbands, and the Sovereign were all incapable of 'amod'.

'Amod' was a personal obligation limited to the persons entering into it, and no person could, by 'amod', contract so as to bind a third person; hence an 'amod' by a son did not bind the father, and the father could make no 'amod' to bind his son after his death.

In the law of the land we saw that, except for certain lawful needs, no ancestral land could be alienated so as to affect the son's rights therein. One passage in the Dimetian Code, which says that an 'amod', involving the passing of an inheritance for consideration or, with the will of the owner, without consideration, secured the inheritance, might seem to throw doubt on this; but the passage simply means that a title to land acquired by 'amod' was as good a title as one of inheritance. It

does not mean that a man could disinherit his son by 'amod'.

§ 4. An 'amod' to be binding must be entered into freely; coercion and fraud annulled it.

Fraud or coercion in fact not only annulled an 'amod', but coercion had the effect of freeing the person acting under it from all liability, criminal and civil, and both fraud and coercion entitled the person who, under the influence thereof, had been induced to deliver property, to recover the same; if it were land at any time, if it were other property at any time within the period of limitation.

The performance of an 'amod' was also excused if sickness, poverty, or military service prevented the obligor from carrying out his undertaking.

Otherwise the sanctity of contracts was supreme, and is best expressed in the adage that an 'amod' was like a vow, which, if once broken, must be renewed and kept afresh.

§ 5. An important limitation on the power to contract existed in the provision that no contract to supply corn could be enforced after the expiry of the next succeeding calends of winter. The object was to prevent 'forward contracts' affecting ungrown crops, and to forbid speculation in the necessities of life.

'It is not right', says the Code of Gwynedd, 'to claim corn from one year unto another.'

§ 6. Contracts were enforced by actions for specific performance through 'amodwyr'.

A person breaking his part of the 'amod' lost all rights under it, but the other side could at any time claim its enforcement and performance.

§ 7. Perhaps the most remarkable feature about 'amod' in Wales was the absolute freedom there was for freemen to contract.

We are accustomed to the fact that society developed from status to contract; but what is remarkable in the Welsh Laws is that, while society rested on status, it was permissible for every freeman to contract outside law.

This power is not referred to once or twice only, but the expressions that 'contract always overrides law' and that

'a contract contrary to law must be kept' are frequent both in the Codes and the commentaries.

The only limitation on this power to contract outside the law was where the contract entailed harm or injury to a third person, e.g. a contract involving the killing of a person or the doing of an atrocious act.

It is not that it was permissible to contract for the performance of an illegal act: that is not what is meant.

The rights and liabilities of people were regulated by law or custom, and what is meant is that, if a contract conferred rights or imposed liabilities on a person contrary to those provided by the law, the rights or liabilities conferred or imposed by the contract were to be given effect to in preference to those secured by law or custom.

The exact scope of this freedom to contract outside law can be illustrated by reference to its application to particular instances.

In the law of marriage we saw that 'amobyrr' was paid to the lord by the woman's father or kinsmen giving her in marriage. But, by virtue of the power of free contract, the giver might contract with the woman herself or a third person that she or he would pay the 'amobyrr', and in that case liability to pay it passed to the other party to the contract.

Again we have seen that the law provided for the right to readjust partitions of 'tref y tad', but, if there were an agreement at the time of partition that there should be no readjustment, the contract overrode the law.¹

4. 'Machni.'

§ 1. The third formality by which agreements were entered into in Wales, and by far the most important of all, was 'machni' or suretyship.

The Welsh Laws are full of provisions regarding suretyship, which seem at first sight extremely complex.

One commentator complains that suretyship is one of the three complexities of law, because it is so hard to remember and reduce to rule, while another plaintively

¹ V. C. 96-8, 134-6, 202, 330; D. C. 448, 450, 542, 612; G. C. 788; IV. 30; V. 80, 90; VIII. 198; X. 330, 366, 388; XI. 404-8, 410, 424; XIV. 636, 640, 658.

remarks 'that if the most practised and greatest in the law were to study it from his youth to his old age, some point would crop up at the end, of which he had never before heard'.

Not only did the complexity of the law strike the commentators, but they were equally astonished that any one should, in view of the risks involved, be foolish enough to become surety for another in a bargain.

In the Book of Cynog there occurs the following aphorism :

'Be not quick handed among a multitude and take up no mischief not originating with thee, and take not the debt of another upon thee without anything being due from thee.'

The philosophy of backing another man's bills can be carried no farther than in the words of this old-time legalist, but the fatherly advice of Cynog to his sons, and the astonishment of other commentators, overlooked the fact that it was difficult to avoid being a surety if asked.

The Venedotian Code insists strongly on the social duty, and says that no one should refuse to be a surety if he were a person who ought to stand.¹

§ 2. The complexity of the law of 'machni' is more apparent than real, and it is made so by confusing it with the law of 'gorfodogaeth', the law analogous to the Roman 'actio sacramenti', and the law of distress.

These are all allied to the law of 'machni', but it will conduce to a better understanding if we deal with them separately and in their proper places.

There were three kinds of suretyship in the Welsh Law : suretyship to abide law, suretyship on behalf of a person charged with crime, and suretyship in a bargain. The first is dealt with under Procedure, the second under the Law of Crimes and Torts, and at present we are concerned only with the last mentioned.

§ 3. 'Machni' was, like 'briduw' and 'amod', mutual, that is to say, there was a reciprocal undertaking by two parties to an agreement. The formality was applicable to all agreements, and especially to sales of goods, gifts, exchanges, and the like.

¹ V. C. 128 ; VIII. 184, 206 ; X. 334 ; XIV. 660.

We have noticed in 'briduw' and in 'amod' that it was necessary for the parties to grasp hands, and to repeat the substance of the agreement. Exactly the same requirements were needed in 'machni'.

When two parties entered into an agreement by 'machni', each of them provided the other with a surety for the performance of his part of the undertaking, e.g. in a transaction for the sale of an animal the vendor gave the vendee a surety who guaranteed the vendor's title to the animal and the animal's soundness—the 'dilysrwd' and 'teithi' of the subject-matter—and the vendee gave the vendor surety guaranteeing the payment of the price at the time fixed in the bargain for payment.

In a transaction by way of suretyship, the surety and the man who gave him as surety, who is universally spoken of as the debtor (*cynnogyn*), grasped hands, the surety and the man to whom he was given as surety, the 'hawlwr' or creditor also grasped hands, and the debtor and creditor also did the same ; the substance of the agreement being repeated at each grasping of hands.

There was no 'tradio' or handing of property over, except in certain transactions, but the grasping of hands was absolutely essential ; it sealed the bargain and made it irrevocable, and, just as in 'briduw', the placing of a hand on the shoulder of another party, instead of in his hand, was an insult to be compensated for by the payment of honour-price.¹

§ 3. If there were no mutual grasping of hands there was no complete agreement between those who had not grasped hands, and any promise made without it was of no effect.

If, however, any two parties to a bond of 'machni' grasped hands and others did not, there was an effective bond between those who had done so, but none between those who had not. A transaction, in which some of those engaged did grasp hands and others did not, was described as a delusive (*gwaradog*) or slip (*pallog*) suretyship, the latter

¹ V. C. 132 ; D. C. 428, 598 ; VI. 108 ; VIII. 176 ; IX. 240-304 ; XIV. 658.

phrase being derived from the metaphor of a knot which did not hold.

The Dimetian Code is so concise and explicit on the subject that what it says is worth reproducing in full :

‘ If there be one hand wanting in mutually plighting, it is called a slip surety ; the nature of a slip surety is that one end is bound, and the other loose, and on this account if the creditor accept the faith of the debtor for paying the debt, and the faith of the surety for compelling the debtor to pay the debt, then each of them must be responsible by his agreement to the creditor ; if he take but the faith of one of them, then only one of them is responsible to him ; if the surety give his faith to the creditor to insure to him his debt he must be responsible to him for the whole debt since he takes not the faith of the debtor.’

The Venedotian Code and the Xth Book give the delusive sureties in the familiar form of Triads. In the former there is obviously a slight corruption of the text, as it includes in the delusive suretyships the case where no one had grasped hands with another. That was not a delusive suretyship, but no suretyship at all.

The three delusive suretyships were the following :

(i) If the vendee bought and demanded a surety from the vendor for title and soundness, and the vendor proffered a surety without taking him by the hand ; then, if the vendee took the surety’s hand, there was no agreement whatsoever between the vendor and vendee, or between the surety and vendor.

There was, however, a bond between the surety and vendee ; and, if either title or soundness failed, the vendee could recover from the surety ; but neither he nor the surety could make any demand upon the vendor.

(ii) Likewise if the vendor’s surety grasped the vendor’s hand only, and not that of the purchaser, the vendor and vendee grasping hands, the only enforceable bond was that between the vendor and vendee.

(iii) If one person entered into a bargain on behalf of another and himself stood surety for that other, the bargain was not binding on the person on whose behalf it was made. The laws did not recognize the act of an agent, unless that act were ratified by the formal procedure. The agent, however, having grasped hands with the other party, was responsible to him, and that party to the agent.

Of course these instances do not exhaust the delusive suretyships which might arise. The same rule applied if

the vendee’s surety omitted the grasping of hands, and the grasping of hands by the two sureties without the parties doing the same was of no avail to bind the parties.¹

§ 4. The delusive sureties are also mentioned elsewhere in the Anomalous Laws, but they must not be confused with what are called the useless or futile (*ofer*) suretyships, referred to in the Venedotian Code.

A delusive suretyship was one where promises were made which could not be enforced, because the full ceremony of grasping hands had not been observed ; useless or futile suretyships were bonds, which either had been entered into with full ceremony and were useless because the sureties were in law incapable of being sureties, or in which one side had given a surety and the other had not, and that other resiled from the bargain before being bound. The surety given by the vendor in that case was useless, because the vendee did not wish to avail himself of it, having resiled from the bargain, and he was useless to the vendor as he had not guaranteed anything to the vendor.

Yet a third useless surety is mentioned, viz. where a surety guaranteed title, which he could not guarantee, the vendor having no title. In that case, if the real owner came and demanded possession, it must be restored to him. The surety was useless to preserve possession to the vendee as against the real owner, though of course the vendee could obtain an equivalent from the surety.²

§ 5. We have said that among the ‘ofer’ sureties were persons incapable of being sureties.

Incapacity might arise from two causes, the one want of will, the other want of competency.

The Welsh Laws never recognized any agreement entered into other than with full and free consent, or as it puts it, ‘ absence of compulsion, free giving or suffering removal of property without impediment, threat, or question’. Consequently, if any one induced another to become surety either through fraud, coercion, or fear, the suretyship was of no avail.

¹ V. C. 132 ; D. C. 428 ; VI. 108 ; VIII. 176 ; X. 342.

² V. C. 126 ; XIV. 658, 702.

There were many people incompetent to give or be sureties; the question of competency being determined with reference to the time at which the transaction was entered into. So a person who was competent to be or to give a surety was not relieved from liability if, after becoming or giving, he were rendered incompetent.

Of the persons lacking competency, the most important was a woman. A woman was competent to give or receive a surety, if she were competent to enter into a bargain. As the law puts it, 'a person who is competent to inquire into title, is competent to provide a guarantee of title'. But, with one exception, no woman was competent to be a surety. The one exception was the case of a 'lady paramount' in Dinefwr, who could guarantee a bargain entered into by some one under her.

Where, however, a woman provided a surety she was not competent to produce a compurgating jury of women to deny it; her compugators must be men, and we must also not lose sight of the fact that a married woman could not ordinarily make a bargain, except through her husband.¹

§ 6. The ordinary rule was that a surety had to be of the same status as the person for whom he gave surety, hence it was that the King could neither give nor be a surety.

But in addition to the King there were others incompetent. A foreigner, a monk, a friar, a hermit, a scholar, a clerk, a man in debt, a person not free to attend court without permission of his superior, a son under the dominion and authority of his father, a drunken man, a leper, an insane person, and a blind man were all incompetent, except that in Dinefwr a friar or a scholar could be a surety if his abbot or master allowed him to be so.²

§ 7. There was certain property also for which suretyship for title was unnecessary; such property carried its own guarantee. In this category were money, girdles, knives, arms, all property brought by a woman on her marriage, property given by a lord to his man, testamentary bequests,

¹ V. C. 98, 102, 126-8; D. C. 432; IV. 24, 30; VI. 110; VIII. 208; XI. 404; XIV. 588, 658.

² V. C. 122-8; D. C. 432; IV. 2, 30; VI. 110; XI. 404.

property received by a doctor from his patient, property received by a woman from her husband as 'wynebwerth', or property taken as spoil of war.

§ 8. No suretyship was valid if given for the payment of a reward for the commission of a tort or crime. Any person who stood surety for such payment was an accessory and punishable as such. So, too, the promisor; while the person who committed a crime and sued for the reward promised was at once punishable for the crime committed.

A bargain conducted in open market was also in South Wales not a subject for suretyship. To such bargains the rule of 'caveat emptor' applied, but it is significant that that rule is found nowhere except in that part of South Wales which came early under Norman influence.

Persons bargaining in open market were of the privilege of the mart, and so a stranger and a Cymro were on the same footing in a mart. Free trade in open mart was recognized early, and persons incompetent to give or be sureties were at full liberty to trade in market unrestricted.¹

§ 9. The next question is whether a person could stand surety for himself.

The ordinary formality of suretyship was, as we have seen, for each party to proffer sureties to the other, but we find some references to a 'debtor-surety', in some of which it would appear at first sight that the possibility of a man standing surety for himself was contemplated. Is this the correct meaning or not?

The references to the triple grasp, and the powers given to compel a debtor to pay, seem to preclude any such possibility, but the phrase needs examination.

In the Dimetian Code, p. 430, we have the following passage as translated by Mr. Aneurin Owen:

'Whoever shall buy property of another, and shall be himself surety ("ac afo mach ehunan") for the worth of the property, and die before payment of the debt, and leave the property in the custody of friends, the claimant is entitled to payment for that property because the dead who became debtor-surety to him ("a fu vach kynogyn idau") was owner of that property: he ought to swear . . . to having sold

¹ D. C. 606; G. C. 680; V. 56; VI. 120.

that property and to that person's being debtor-surety (*vach kynogyn*) to him for the worth of that property.'

This passage, as given, clearly contemplates a debtor being himself surety, but we have to note that it does not appear in all the MSS., that in some the word 'ehunan' is absent (which would make that part run, 'and there shall be surety for the worth of the property'), and that in some the words 'vach kynogyn' do not appear, either the word 'vach' or 'kynogyn' standing alone. Still, even if we take full cognizance of these variations, the fact remains that the transcript appears, standing alone, to be a fair collation from the MSS.

In another part of the Dimetian Code, pp. 396-8, a 'mach cynnogyn' is said to be 'a person who becomes surety for one unable to abide law on account of poverty, and in that case the inability of the party compels the surety to be a debtor'. In yet another part of the same Code, p. 428, we are told that unless there be a triple grasping the surety is a slip surety, 'except where a person comes as a debtor-surety on behalf of himself or of another whom he does not produce as surety'.

The Venedotian Code, p. 122, is, however, clear. 'A man is not to take a debtor as surety . . . no individual can be both surety and debtor (*vach kynogyn*).'

These appear to be the only references to the 'vach kynogyn', and there is no possibility of reconciling them.

It is, however, certain that in North Wales no debtor could stand surety for himself; and what seems to have happened was that, where a debtor became impoverished and unable to pay his debts, his surety, who had then to take on all liability without hope of recovery, was called a 'debtor-surety'. This phrase became applied, as Norman influences spread allowing a man to give his own security, to a man who pledged his own property as security or 'wadium' direct.

We know as a matter of fact that in early Teutonic Law it was possible for a man to be his own surety by giving his own 'wadium' or pledge at the time of the bargain, and it would seem as if in South Wales this variation was accepted.

It is safe, it seems, to assume that the original formality required the surety to be a person other than the debtor, and it was only as barter increased—as it did more rapidly in South Wales, where towns grew up earlier than in the north—rendering the formality cumbersome on occasion, that the practice of a man being his own surety was introduced.

§ 10. We have now to consider whether a surety's liability died with himself or not. Apparently it did not.

The laws provide that the liability of a surety was transmitted to his son, provided always that the son derived property from the father. It did not descend if the son did not inherit property from his father. The same rule applied if a surety became civilly dead, say by becoming a monk and taking his property to the Church. In the latter case the Church had to assume the surety's responsibility.

If there were no son, then the lord, who took the deceased's property by escheat, was responsible to carry out the surety's undertaking.

The Dimetian Code provides a procedure for the case where a surety died before the debt was paid to establish the fact that the deceased was a surety. The creditor swore with six others on the surety's grave, and thereafter the lord enforced the suretyship.¹

§ 11. We have now to turn to the duties of a surety.

A surety given to a vendee guaranteed title and soundness, and, if title and soundness failed, he was responsible to enforce recoupment by the vendor to the extent which the law provided or else make the recoupment himself.

A surety given to a vendor guaranteed payment of the price at a fixed time, and, if the price were not then paid, he was bound to force the vendee to pay or pay himself, when called upon to do so by the creditor.

The method of enforcing payment is described in detail in the part dealing with the Law of Distress.

It is this which distinguishes transactions through sureties from transactions through 'amodwyr'. They were alike in the fact that it was a duty common to both to force the

¹ V. C. 124-6; D. C. 430; G. C. 788; IV. 32; VIII. 208.

debtor to pay; they were different in that 'amodwyr' were not liable to make good the deficiency of the debtor, whereas the surety was. The contract-man's duty ended when he had done his best to enforce payment, the surety's did not until he had paid the uttermost farthing himself where the debtor did not pay.

The surety had, however, one chance of postponing the evil day of having to pay himself.

If he were satisfied that the debtor was unable to pay at the time fixed, he could ask him to free him from his suretyship by providing another surety to the creditor guaranteeing payment at some future date. If the creditor accepted that novation, well and good; the old surety was discharged; if the creditor would not, the surety remained liable.

The absolute liability of the surety to pay was subject to certain limitations in special circumstances.

The failure of the surety to compel the debtor to pay might be due to various causes. If it were due to the surety's own unwillingness to put the law of distress into motion, there was no excuse for him; but it might be due either to the debtor being poverty-stricken or to the debtor being outside the jurisdiction of the lord where the liability was incurred and to his having no property in that jurisdiction. In both of these cases the surety was said to be a surety for a nullity (*diddim*).

If the non-payment by the debtor was due to poverty, the authorities differ as to the effect.

The laws required a surety to compel a debtor to pay, even if he reduced the latter to insolvency, and the test of insolvency was whether the debtor was reduced to his last garment or not. The Dimetian Code says that the surety was bound to pay the whole of the balance due after the debtor had been reduced to this state of insolvency, but one passage in the Anomalous Laws says that in that case the surety was only responsible for half the balance. This limitation occurs nowhere else, and, in spite of its mention, it must be taken that the true rule was that a surety must make good all deficiencies caused by the debtor's poverty.

If the debtor had left the lord's jurisdiction, leaving no property therein, the same authority says that the surety was only bound to pay half the debt.

The Dimetian Code has much more elaborate provisions, and these provisions seem to represent the real law.

In determining the surety's liability in such a case, the first question was whether the debtor had left the jurisdiction before the due date for payment, that is before the date on which the creditor could have demanded payment, or after. If he had left before, then the surety was bound to pay half the debt immediately; for the other half he remained surety for a year and a day, at the expiration of which time, if the debtor had not paid, the surety must pay.

If the debtor left after due date, then the question arose as to whether the creditor had made demand or not. He was entitled to make demand on due date, and unless he did so and his demand were refused, he could not come down on the surety.

Now the law provided that if the creditor did not make demand on due date or within nine days of due date, and the debtor thereafter left the jurisdiction, the failure to recover was due to the creditor's own laches, and the liability of the surety disappeared. 'The obligation of the surety', it is said, 'shall be deemed to have passed away in the path of oblivion.'

The Venedotian Code does not deal with this particular point, but it does deal with something very similar to it. It is said that, if the debtor were banished from the country, after incurring the debt and before payment, on account of a crime committed by him, the liability of the surety was limited to one half the debt, the creditor suffering the loss of the other half, each of them being entitled to recover from the debtor whenever he returned.

Somewhat analogous to the case of the debtor being absent from the country was the case where he died before due date.

Here again we have different provisions in the laws. The Anomalous Laws provide that, if the debtor died, the surety was responsible for half the debt only, and he was not

responsible for that half if the debtor had provided by will for its payment. The Dimetian Code in one passage deals with the case where the debtor was his own surety. It provides that the creditor was entitled to follow the debtor's property into whosoever's hand it had come, and exact payment therefrom, if he swore to the debt with six others over the grave of the deceased. This provision merely regulates the right of a creditor to recover from the deceased's property, but it does not refer to the liability of a surety where the debtor had died.

In another passage it provides that the surety should proceed by a like oath to exact payment from the three persons nearest in kin to the deceased.

The Venedotian Code states that, where a debtor died before payment, the surety was to compel the son of the debtor to pay, exactly as he would have compelled the debtor to pay, provided the son had ascended to property on his father's death. If there were no son, and the lord had taken the debtor's property, the lord became liable for the debt.

The surety could proceed against the lord, and, though that might savour of contempt of the lord's authority, it is specially provided that a surety enforcing payment by a lord was not to be subjected to any punishment.

It would appear from these provisions, therefore, that where the debtor died, the surety was to proceed against the deceased's property as he would have proceeded against the debtor, and we may conclude that if he could not recover therefrom he must make good the liability himself.

This conclusion is definitely supported by the Xth Book. We have to note here that no demand could be made by the creditor, either on the debtor or the surety, if they were out on military service, suffering from the effects of a violent attack, or being subjected to a prosecution for theft.

The due date was extended until those causes were removed. But subject to this, the creditor must make his demand, and he was not entitled to keep the surety in suspense. He could not grant time to the debtor for payment;

he must demand payment or get a new surety to cover any extended period. If he granted extension without the surety agreeing, the surety was freed from all liability.

It is simply necessary to add that a surety paying a debt due by a debtor was always entitled, whenever he could, to recover from the debtor, and that he was entitled, before being forced to pay himself, to a period of eight days within which to make arrangements for paying.¹

5. *Other modes of bargaining.*

§ 1. It must not be supposed that at the time the laws were redacted every agreement must of necessity be entered into by 'briduw', 'amod', or 'machni'.

§ 2. As we have seen in South Wales, it was possible for the debtor to cover his liability to the creditor by handing over to the creditor at the time of the bargain some property as a pledge, a 'wadium', or 'gwystl', which secured payment, and in such a case the 'gwystl' could be disposed of, on failure to pay on due date, just as a pledge seized under the law of distress might be.

§ 3. In addition, just as in Rome the 'jus civile' required no formalities in some transactions and allowed agreements 'consensu', so, too, in Welsh Law, any transaction other than sale or exchange could be effected by oral agreement; in which case, however, there was a risk that a debt claimed or agreement relied upon could be denied by the single oath of the alleged debtor.²

6. *Like provisions in other systems.*

§ 1. The Welsh Laws in regard to formalities in bargaining, so far as essentials were concerned, did not differ from other systems.

§ 2. The Roman Law of the XII Tables demanded the utterance of words in a solemn form before a transfer was effected or before there could be a binding 'nexus' or delivery of 'mancipium'.

The right to property transferred depended also on certain prescribed acts, e.g. 'traditio', those acts constituting the

¹ V. C. 108, 122-4; D. C. 398, 400, 426-8, 430-2; IV. 6; VIII. 182-6; X. 334, 392; XIV. 582. ² VII. 152; XI. 418.

conveyance. The ceremony conveyed the property, and was not merely evidence of the fact of a contract or agreement to convey. The principle, though not the method, is identical.

§ 2 The Irish Laws present a closer resemblance, but still there are marked differences.

The Irish Laws appear to treat all transactions as 'contracts' without reference to formalities as being the effective part of the contract. That is to say, agreement itself in Irish Law might form contract, no matter how the agreement was entered into. In this particular Irish Law, which in so many matters is primitive, arrived at a conception of contract, approaching modern ideas, long before most other systems did.

At the same time there are elaborate provisions relative to sureties, directed not so much to indicate how an agreement was entered into as to provide for the carrying out of agreements when made, and in many particulars the Irish Law corresponds to the Welsh Law.

What is very striking in the Welsh Laws is that bargaining was individual and not communal. Throughout the whole of the Welsh Laws, notwithstanding the importance attached to kin responsibilities and kin rights in land and in the matter of torts and crimes, there is not the slightest trace of any responsibility on account of relationship in the matter of bargaining, beyond that it was a social duty to stand surety for a kinsman. Bargaining was a matter for individuals, and, wherever any liability was imposed on persons other than those who were parties to a bargain, it was imposed, e.g. on 'amodwyr' and sureties, by virtue of a contractual relationship freely entered into by such persons.

In Ireland bargaining or contract was not entirely individual: the communal bond of the tribe is constantly in evidence. We get frequent references to the fact that contracts were made by the tribe or family acting as a body, and to the power of the tribe to repudiate contracts made by members of it.

The principle of Irish Law was that contracts were entered

into by individuals under the sanction or approval of the tribe or family. Sometimes such sanction or approval was assumed or deemed to have been given, because the contract was of such a nature that consent to it could not be refused: in other cases such sanction was a necessary preliminary to make it binding on the tribe, and, if not obtained, the contract could be impugned.

But if sanction were assumed or given, the liability to carry the contract out or to make good any loss occasioned by non-performance fell upon the tribe or family. For example, in the *Senchus Mór*, I. 183, it is said:

'The default of thy great-grandson, the default of thy great-great-grandson, the default of every relative as far as 17,

and on p. 195 there is a similar expression.

The most eloquent account, however, is in the *Senchus Mór*, p. 283. The passage is worth quoting in full as showing the rigidity and all-embracing sphere of the tribe:

'Every tribesman is able to keep his tribe land; he is not to sell it, nor alienate it, nor conceal it, nor give it to pay for crimes or contracts: he is able to impugn the contracts of his tribe, and to impugn every contract of his kinsmen for whose crimes and securities and contracts and fosterage liabilities and land deeds he is accountable. Every litter of pigs (i.e. a share in the young), every reward, every purchase, every sale, every covenant, every contract, every tenancy, every *giallna*-security, every service is properly due to the lawful tribesmen by consanguinity to whom fosterage is due, and crimes as well as profits and losses and the support of the common senior.'

But, notwithstanding this communal nature of contract in Irish Law, we find in the later tracts that contract had become an individual act, and limitations on the power to contract, similar to those in Welsh Law, had taken the place of the earlier power of the tribe to regulate contracts.

The *Corus Bescna*, IV. 5, allowed the making of contracts between two 'lan' persons, two 'saer' persons, and two sane adults. It prohibited contracts by sons under the domination of the father, 'fuidhir' tenants, monks, 'daerstock' tenants, fugitives, women, and idiots, but it has the comparatively advanced provision that contracts entered

into by such persons might be ratified by the persons under whose authority they were.

The Crith Gablach prohibited contracts by sons, bondmen, monks, and fugitives, and the Senchus Mór has similar prohibitions.¹

Though we have practically nothing relative to formalities, there are traces that the procedure of 'amod' and 'machni' existed. For example, we read of the evidence of a contract-binder being conclusive, of immediate distress upon a surety who evaded justice, of two classes of sureties, kinsmen sureties and hostage sureties. The former were such as were given when both parties resided in the same country, the latter (*giall*) such as were given when the debtor resided in another country, the hostage-surety given being resident in the creditor's country.²

We have also mention of the right of a surety to recover what he had paid from the debtor, of the duty of the creditor to proceed against the surety before suing the debtor, and many other indications of a comparable system.

As in Welsh Law much insistence is placed on the inviolability of contract. 'The world would be evilly situated if express contracts were not binding', say both the Senchus Mór and the Corus Bescna, and 'the binding of all to their good and bad contracts prevents lawlessness in the world', runs the Senchus Mór.³

We have also reference to the fact that a contract debt must be paid on the specified date, or, if no date were specified, on demand, and likewise we have references to the place of payment.⁴

The inviolability of contract in Irish Law was, however, contingent, as in Wales, upon the absence of fraud and the presence of full knowledge and consent, and the Corus Bescna, IV. 5, gives an account of the effect of incomplete knowledge or consent upon a contract comparable to the Welsh Law relative to failure of 'teithi' and 'dilysrwd'.⁵

The differences in the Irish Law, due to different lines

¹ Senchus Mór, I. 51, II. 283; Din Techtugad, V. 55.

² Senchus Mór, I. 139, 215-17; Bk. of Aicill, III. 513.

³ Senchus Mór, I. 51; Corus Bescna, IV. 3.

⁴ Senchus Mór, I. 147; Bk. of Aicill, III. 155.

of development, are great, but there are sufficient indications that the original principles were of a similar character.

§ 3. The early English Laws of contract are meagre. Those laws being of a fragmentary nature do not give us the same details as to formalities as do the Welsh ones.

That similar formalities existed there is, however, no doubt.

The existence of a formality like 'amod' is established by the Fragment on Oaths, c. 8; of a warranty for soundness of cattle and for payment of price by the same Fragment, cc. 7, 9, the Dooms of Ine, c. 56, Edward's Laws, c. 1, the Carta of William the Conqueror, c. 10, &c.; of a formality similar to 'briduw', or Godborh, as it is termed, by Ælfred's Laws, c. 33; but the principal characteristic of English law was the need of witnesses and guarantors or sureties to all transactions, mainly as a security against theft. This was over and over again insisted upon;¹ and it was the common characteristic of most Teutonic and Scandinavian Laws, e.g. the Lex Burgund., Tit. XCIX.

As to kinds of transactions the English Law has little to say, but we do know of sales and purchases, deposits (where the law is comparable to the Welsh Laws), &c.

§ 4. The provisions of the early Scots Law are also meagre, and practically the only law of civil obligations found therein relates to the provisions that all transactions, particularly of the sale of cattle, must be conducted in the presence of witnesses,² but the few provisions there are seem to indicate the same methods of contracting as prevailed in Wales.

§ 5. In the Germanic Laws there is little relative to contract. The Lex Baiuor., Tit. XVI, cc. 9-15, does give an elaborate account of the procedure to be adopted in contracts of sale, in which special emphasis is placed on the phraseology, a derivative apparently from Roman Law, but beyond that there is little in their Codes.

¹ See, e.g., Ethelred's Laws, cc. 3, 4; Hlothaire and Edric's Laws, c. 16; Dooms of Ine, c. 25; Ælfred and Guthrum's Peace, c. 4; Athelstan's Ordinance, c. 12; Edmund's Council of Culinton, c. 5; Edgar's Laws, c. 6; the Laws of Edward the Elder, c. 1; Cnut's Laws, c. 24; the Laws of the Confessor, c. 38; and the Laws of the Conqueror, c. 45.

² See, e.g., Assize of King William, c. 5.

II

THE SUBJECT-MATTER OF AGREEMENTS

THE common transactions mentioned in the Welsh Laws are 'cyfnewid' (sale and purchase or exchange), 'llog' (leasing or hiring), 'benffyg' and 'echwyn' (lending), 'adneu' (deposit), 'rhodd' (gift), and 'cymyn' (bequest), with which may be compared the Irish list in the *Corus Feine*—loan, lending, purchases, contracts, and pledges.

i. *Sale, purchase, and exchange.*

§ 1. Wales, being a pastoral and agricultural community, was concerned almost entirely with the sale and purchase of animals, but the rules applicable thereto are equally applicable to the sale and purchase of goods.

The Welsh Laws recognized no distinction between sale for a monetary price and exchange for other goods. Both are called 'cyfnewid'. The absence of differentiation is no matter for surprise, as the sale and purchase of goods was made at least as often by barter as by the giving and receiving of a price in money.

§ 2. A sale or exchange might be effected through surety, contract, or 'briduw', but the first named was the principal form in actual practice. No sale or exchange without one or other of these formalities was fully binding.¹

A sale was completed and property passed the moment the parties to the transaction sealed the bargain by the clasp of hands. Immediate delivery of the property or the payment of price was not a necessary ingredient of the contract, they were incidents to the contract which could be enforced.

§ 3. In every sale of goods or animals there was on the one hand a warranty of title to convey and a warranty of soundness (*dilysrwydd* and *teithi*), and on the other side a warranty to pay the price at the time fixed in the agreement,

¹ V. 76; VI. 124; VIII. 176; X. 304; XIV. 590-8, 658.

the warranty being usually covered by security. The *Corus Bescna* is identical in its provisions regarding soundness.

The guarantee of soundness had a few exceptions, which appear to show the beginnings of a rule of 'caveat emptor'.

They are so few as to deserve notice.

Reference has already been made to the traces of this rule in transactions conducted in open market. In addition the *Venedotian Code*, p. 268, exempted from liability the vendor of a horse suffering from internal disorders, if he swore to his ignorance thereof at the time of sale: the *Gwentian Code*, p. 706, laid down a general rule of 'caveat emptor' in regard thereto, while the *Dimetian Code*, p. 572, maintained that a guarantee of soundness included all internal disorders. The VIth Book, p. 98, provided a rule of 'caveat emptor' in all cases of animals with defective teeth, and these are the only instances in the laws where the doctrine was applied.

§ 4. We have to consider the effect of selling an article or animal whose title or soundness failed, and the effect of non-payment of the price agreed upon.

In no case was the contract voided; it had been irrevocably sealed by the grasping of hands.

In the case of non-payment of price at the fixed day the vendor proceeded to recover the price by putting into motion the law of distress (q. v.) either before or after suit. In every transaction of sale the price must be paid at once or upon a date fixed for payment in the agreement itself; if no time were fixed, the debtor could pay when he chose.

If the price were not paid at the time of agreement, the date for payment must be at least one day later.

Time for payment could be extended if the fixed date happened to fall on Easter Day, Whit Sunday, or Christmas Day, for a week, but, subject to that exception, payment had in law to be made on due date. The creditor could, subject to the freeing of the surety from liability if the latter did not consent, extend the period of payment for the debtor's benefit, but if the debtor insisted on payment on due date, the creditor must accept payment or find himself debarred for ever from claiming.

There was no bar to payment being made before, if there were no contract to the contrary, but a creditor who demanded payment before due date, lost the right to claim on the proper date: he had to wait until the expiry of the same number of days after due date, so, if he demanded payment a week before due date, he had to wait until a week after due date had expired before he could seek payment. In Irish Law a creditor suing prematurely was fined five 'seds'.

In case of failure of soundness the vendee also proceeded to put the law of distress into motion to recover damages, and the amount of damages he could claim was fixed in the laws themselves. Nothing was left to the idiosyncracies of judges in determining the quantity of damages. They had to decree the amount fixed by custom.

Such amount was a definite proportion of the legal worth of the animal or goods.

The general rule was that if an animal were clean, that is one whose milk could be used for human consumption, half the legal worth of the animal was the standard of damages; if it were unclean, one-third. In the Gwentian Code the universal rule was one-third the legal worth.

There were certain variations of too minute a character to be worth repeating.

The guarantee of soundness was not for all time, and we have already noted in the chapter on the Worth of Men and Things the time limitation.

In the case of failure of warranty of title the vendee was entitled to recover the full value which he had paid. The warranty for title endured for ever.

But it must be noted that this warranty was for title, and not for continued possession. There was, therefore, no insurance against the animal being stolen. Title was only guaranteed so long as the vendee retained the article in his own possession, and, if he parted with the property to another, the vendor's warranty did not enure to the benefit of the new vendee. If the new vendee found his title challenged, say by a charge of theft, he could protect himself by relying on the first vendee's warranty to him, and

the charge was then diverted to the first vendee, the property being placed in his hands. The first vendee could then protect himself by relying on the vendor's warranty to him. This was in theft cases called the law of the 'arwaesaf' (q. v.), but the principle was operative in all matters where warranty of title had to be supported.

If, however, the vendee lost the property, the warranty ended with the loss, but the benefit of it revived immediately the property found its way back to the vendee's hand.

We can see, therefore, why a vendee, purchasing property 'bona fide' from a vendor who had stolen it, could not retain the property against a claim for recovery by the true owner. His sole remedy, warranty having failed, was to recover damages from the vendor.¹

2. 'Llog.'

§ 1. The second transaction referred to in the Welsh Laws is 'llog', which Mr. Aneurin Owen has rendered in various places as 'interest', 'lending', and 'hiring'.²

Interest was prohibited in the time of these laws by the canonists, and 'llog' does not mean interest. Nor does it mean lending. 'Llog' was simply the leasing out of the property by the owner in return for a hiring fee, which the canonist doctrine allowed.

The word 'llog' is derived from the Latin 'locatio', and the transaction is identical with the 'locatio' of the Roman Law.

§ 2. Not much is said about 'llog' in the Codes.

The Venedotian Code, p. 180, refers to 'llog' of land in one place only, where it is said that the owner of land is free to lease (*lloget*) it for the space of a year without permission of the lord; while the IXth Book, p. 276, says that no one has a pre-emptive right in respect to a lease, particularly if of 'manured' land.

§ 3. 'Llog' could be effected by 'briduw', 'amod', or 'machni', but the transaction could be entered into by 'consensus' without formality.

¹ V. C. 116, 122-6, 130, 264, 266, 268, 270, 274, 276, 278; D. C. 564-8, 570-4; G. C. 706, 710-18; VI. 104, 120; VIII. 182, 186, 188, 208; X. 344; XIV. 702.

² IX. 240.

When property was hired out in 'llog', the lender did not part with the ownership thereof, but, during the currency of the period of 'llog', the owner, being out of possession, was not entitled to swear to it as his, nor was he entitled to inquire from the person to whom he had leased it what was being done with the property.

The transaction of 'llog' required that the identical property leased was to be restored on the expiration of the lease, and not property of a like nature. It had to be returned immediately the period expired, along with the hiring fee.

§ 4. While property leased on 'llog' was in the possession of the hirer, the latter had to take all reasonable care of it, and return it in the state in which he had received it, and, provided reasonable and lawful use alone was made of it, the hirer was not responsible for any damage to it.

Consequently, if a hired animal lost its life or was injured while with the hirer, he was not to pay compensation for it, unless he had used it in contravention of the agreement of hiring. If it were injured by unlawful use, the hirer paid for it, his own oath being sufficient if he denied having used it otherwise than he would have used his own. In every case the hiring fee must be paid.

§ 5. The use to which animals or goods leased on 'llog' could be put was expressed in the agreement, and use in excess of such terms was illegal, and must be compensated for. The standard illustration given in the Codes is the case where a man hired a horse to ride for a certain distance. If he rode it beyond he paid a surreption fine to the lord, and handed over half or a third of the extra profit he had derived from such user to the lessor.

We have exactly the same rule in the *Senchus Mór*, I. 169, 'Wherever there is use, there is payment for use; wherever there is wear, there is payment for excessive wear of a loan.'¹

3. 'Benffyg' and 'echwyn'.

§ 1. 'Benffyg' and 'echwyn' are different forms of loan.

The Roman Law divided loans of property into two, 'commodatum' and 'mutuum'. The Welsh Law had an

¹ V. C. 248, 266; D. C. 572; G. C. 744; VI. 100; IX. 240; XIV. 588, 590-8.

identical division into 'benffyg' and 'echwyn', and a similar, though not identical, division appears to exist in the Irish Law of 'arra' and 'anarra', the former corresponding to 'benffyg', the latter to 'echwyn'.

Mr. Owen translates the two words as 'loan' and 'borrowing', using the translations indiscriminately. The terms cannot be rendered exactly into English, and, in the presence of Latin equivalents, it is unnecessary to seek English ones.

§ 2. 'Benffyg' or 'commodatum' was a gratuitous loan for a period of an article or animal, at the expiration of which period the exact article or animal had to be restored.

'Echwyn' or 'mutuum' was a gratuitous loan, also for a period, at the expiration of which an equivalent for the article or animal loaned had to be restored.

Some things were incapable of being the subject of 'benffyg', e.g. seed-corn; the exact seed being used for sowing could not be restored, but an equivalent in kind could be, and a loan of seed-corn would accordingly be an 'echwyn'. So, too, nothing that was liable to waste could be the subject of 'benffyg'.

On the other hand, land could never be the subject of 'echwyn'; it must always be hired (*llog*), or if lent gratuitously, be lent as 'benffyg'.

§ 3. The ownership of anything given in 'benffyg' was not separated from the lender; he could not, however, swear to it as his during the period of 'benffyg', as it was out of his possession legally; but he could swear to it after the period had expired.

§ 4. There was a material difference as to liability for damage caused to 'benffyg' from that caused to 'llog'. In the latter case, as we have noted, provided the lessee took reasonable care of the property hired, he was not responsible for damages caused; but, in the case of 'benffyg', the borrower was responsible for all damage caused, and was liable to make compensation therefor. Even if the damage caused were not permanent, e.g. temporary disablement by accident, the borrower must give the lender an equivalent for use until complete recovery, and, failing

recovery, the substitute could be retained by the lender as his own.

§ 5. A 'benffyg' could be created by 'briduw', 'amod', or 'machni', though no formality was compulsory, but the Gwentian Code advises in such a case the taking of a pledge (*gwystl*) from the borrower, for otherwise his own oath denying the loan sufficed to prove there was no loan.

§ 6. In all cases of 'benffyg' the purpose for which it was made was stipulated in the agreement, and any use of it in excess entailed a surreption fine to the lord and a surrender of half the profit accruing from such use to the lender.

A person taking goods on 'benffyg', denying the loan, had to refund double the value when proved.

§ 7. Inasmuch as a 'benffyg' had to be restored in the state it was in when lent, no person could create a charge on such property, or as it is called 'return it with a surclaim on it'. The application of this doctrine to the case where a third person claimed the subject-matter as his, or in virtue of a charge on it in the hand of the person to whom it had been lent, is enlarged on in the Anomalous Laws.

It is provided that the borrower must take the property at once to the lender, and if the latter admitted the loan or the loan by him was proved, and that the third person's charge existed on it at the time of loan, the borrower could return it to the lender subject to the claim. If the lender denied the charge, the borrower could prove its existence at the time of loan.

If, however, the borrower admitted or it was proved that at the time of loan there was no charge on the property, then the lender could force the borrower to defend the claim of the third party, and decline to accept the property back until the claim were removed from it. Should the borrower discharge the third party's claim or give sureties to answer for it before reference to the lender, he created a charge on the property, and he could not call on the lender to recoup.

The rule of 'arwaesaf' applied to all 'benffyg', alleged to be stolen property in the hand of the lender, who had passed it on to a bona fide borrower.

If a borrower himself created a charge on the loan, he was compelled to restore to the lender property of an equivalent value free of charge.

§ 8. In 'echwyn', inasmuch as the identical property lent was not to be restored, the ownership in the article lent passed at once to the borrower. No question, therefore, arose as to excess use, and no stipulations restricting user were needed.

Likewise there could be no charge of theft where the 'echwyn' was retained beyond the stipulated period.

Like 'benffyg', an 'echwyn' could be effected by 'briduw', 'amod', or 'machni', or by pledge or 'consensu'.

§ 9. In both 'benffyg' and 'echwyn' a definite date for return of the article lent or its equivalent was fixed; but, if no date were mentioned, it could be demanded back the following day, and if demand were not then made, the period of currency was fixed as a year and a day.¹

4. 'Adneu' or Deposit.

§ 1. The transaction of 'adneu' is in the main identical with the 'depositum' of Roman Law.

It is briefly mentioned in the Codes, but with some detail in the Laws. The references to it in the Codes are sufficient to justify us in asserting that the transaction was known in very early times.

§ 2. A deposit both in Welsh and Roman Law was the entrusting of property to another for safe keeping. It could be made in Wales with or without 'briduw', 'amod', or 'machni'.

Ownership in the property was not transferred by the act of deposit, and the owner was entitled to recover the identical article deposited by him.

So long, however, as the property was in the hands of the bailee, the owner could not swear to it as his, as property must always be in hand before it could be sworn to; title and possession in early law being so closely allied as to be almost indistinguishable.

¹ Bk. of Aicill, 151, 153, 155; V. C. 248, 266-8; D. C. 572, 598; G. C. 708, 728; IV. 12; VI. 124; VII. 168, 170; IX. 302; X. 324, 378, 380; XIV. 588, 590-8, 658, 670.

There is an interesting discussion in the laws as to whether the owner of a deposit could prosecute for its theft while in the depositee's custody. He could not swear to theft, as he had to swear to its having been taken out of his hand, and the ultimate conclusion arrived at that he could prosecute is not arrived at on any logical ground.

§ 3. The prime duty of a depositee was to take such care of the article deposited as he would of his own property. Consequently, if the deposit were lost through negligence, the depositee had to make good its value.

There are numerous references to a depositee's liability where the property was stolen from him. If it alone were stolen, the depositee was primarily responsible to make good the loss: he was not responsible if goods of his own were also stolen and there were distinct traces of house-breaking; nor was he responsible if the deposit had been buried in the ground and had been dug up by the thief. In the latter case, apparently, the owner could come down on the lord to recoup him.

The responsibility of the depositee extended to a deposit burnt in his house.

§ 4. A deposit made in the precincts of a church was illegal and irrecoverable; and if the depositee became a receiver of stolen property and his house thereby became forfeit, the sentence of forfeiture did not extend to the deposit.

The owner could demand the return of his deposit at any time, and a denial of receipt by the depositee involved the latter, if the deposit were proved, in a penalty of double the value of the deposit.¹

§ 5. There are incidental references in the Anglo-Saxon Laws, which show that the same rules existed in the main in that law. There is a slight reference to the same system in the *Lex Baiuor.*, Tit. XV, providing that the bailee of animals was not responsible for damage caused by them, and further providing similar rules as to liability for burnt and stolen deposits.

¹ V. C. 244-8, 258; D. C. 484; IX. 238; XI. 420; XIV. 588, 590-8, 652, 672.

The Irish Law also had similar rules relative to the loss or destruction of deposits, the test always being whether there was or was not negligence in guarding.¹

The references are slight, but sufficient to show that the same law was of wide prevalence.

5. 'Rhodd' or gift.

§ 1. 'Rhodd' or gift is referred to in both the Codes and the commentaries.

A gift caused the immediate transfer of ownership in the property to the donee. A gift once made was irrevocable, and that rule applied to donations of land by a lord, which could not be revoked by his successor.

§ 2. Gift could be made by 'briduw', 'amod', or 'machni', but none of these formalities was essential. It could be effected by delivery into the donee's hand in the presence of witnesses, or by delivery under suretyship or indemnity by the donor against claim.

In every case removal by the donee was essential, but the requirements of removal were satisfied if the donee removed it for a short space and then returned it to the donor, apparently as a deposit.

In making a gift it was permissible for the donor to contract that any profit made by trading with it should accrue to himself, but, without such contract, he could claim nothing.

§ 3. The necessity for delivery of possession before the gift could be considered complete gave rise to an interesting comment on the case where the donor sent a gift by a messenger, and the messenger, having given no sureties to deliver it, misappropriated it.

The commentators say that the donor had parted with the property, and the donee had not received it, and so neither could recover from the messenger. If, however, goods were sent by messenger, say to market, there was no separation of the dominium over it from the owner, who could accordingly charge the messenger misappropriating with theft.²

¹ Ir. Laws, I. 279-81; IV. 191-7.

² V. C. 248; IV. 28; V. 54-6; XIV. 588, 590-8, 658.

6. 'Cymyn' or bequest.

§ 1. The Welsh Laws contain references to the power to will. The question of this power in early law presents a number of difficult points. Was there, in early law, any general recognition of the right to dispose of movables to take effect post mortem; if so, was it co-extensive with the right to dispose of property *inter vivos*; was a will revocable; and what formalities, if necessary, had to be observed in order to make a will valid?

On all these points the Welsh Laws throw no light, and, from the references in the laws, it is impossible to say whether the right of bequest was of tribal origin, or was derived from Roman Law, or from the later law of the canonists.

All we can say with certainty is that the power to will is mentioned in the Codes and Laws.

§ 2. Bequest is referred to in the XIVth Book, p. 702, as one of the modes of acquiring property, and in the IXth Book, p. 254, it is said that, in case of dispute between two persons as to which of them was entitled to a bequest, the statement of the parish priest through whom it was made was conclusive.

This latter appears to suggest, but it is only a suggestion, that bequests were death-bed gifts without delivery made in the presence of the priest.

§ 3. The Venedotian Code has three references to bequests, and the other Codes one each.¹

In the first mentioned it is said that a sick man could only bequeath a 'daered' (apparently in this case meaning donations for masses, funeral charges, and the like) to the Church, 'ebediw' to the lord, and his debts, meaning, it would seem, the assignation of definite property to meet the 'ebediw' and debts due. It is specially provided that a son may disregard any other bequest made by a sick man, but if he did so he was an 'uncourteous' son, and if he disregarded a 'legal bequest', relative to 'daered' and debts, he was to be excommunicated as a publican and pagan.

¹ V. C. 84, 254, 320; D. C. 452; G. C. 760.

The impress of the Church is very apparent in this provision; but it is difficult to say whether the reference to a bequest by a sick man meant that only bequests by sick men were legal or that all bequests were legal, subject to a limitation of power in the case of a man 'in extremis' making a bequest.

Death-bed gifts, it may be remarked, are in some systems of law, e.g. the Mohammedan Law, regarded with very considerable suspicion: on the other hand, other survivals indicate that wills derive their sanctity from the fact that they may be executed 'in contemplation of death'.

In another passage the Venedotian Code states that a thief under sentence of death might, if he were childless, bequeath his movables, but, if he had children, his power of bequest was limited to the making of provisions for 'daered' and debts. It is improbable that thieves had a wider power of will than ordinary individuals.

Elsewhere it says that no one could make a bequest of an ox, engaged in co-tillage, without consent of his co-tillers, the reason given being important, viz. that only that which is in possession could be bequeathed.

The Dimetian Code simply says that the title to a testamentary bequest was safe without 'machni', and the Gwentian Code prohibits any bequest of cattle, boilers, fuel-hatchets, or coulter to any one but the younger son, who would be heir thereto in case of intestacy, as they went with the homestead.

§ 4. In the Surveys we have some references to intestate succession, indicating thereby the right of bequest under custom.

No mention is made of it in Isdulas and Uwchduldas. Elsewhere the rule was if any person died intestate, having a wife, half the goods and chattels went to the lord, half to the wife, saving the corn, which went to the Raglot, and saving the rights of the Church, which were practically nil under Welsh Law. If deceased had no wife the whole went to the lord, saving the same rights. The felon's right to will is expressly recognized in the Survey of Denbigh.

In the Black Book of St. David's there are some occasional references.

In Ystrad Towy when a beadle died his movables went to the lord until his accounts were settled; in Meydryn, the movables of all intestates went to the lord, and likewise in Wolveran, where, however, we get the old rule that the lord should regrant land to the nearest heir in blood.

In Llanteufi there is an interesting note *re* the succession of childless widows to land. The lord seized all land where there was only a widow, but it is said that the old rule had been that the widow got a regrant till death or remarriage, and then the nearest heir was invested.

§ 5. These provisions help us but little, and it is apparent that the right of bequest was in a state of flux.

The fact appears to be that so far as land was concerned there was originally no power of bequest, and that the power to will movables arose under the influence of the Church.

From the very first the Church took a keen interest in the disposal of the movables of deceased persons, and was insistent that the proper destination of a dead man's goods was to purchase masses for his soul. It was out of this that the claim of the Church to exercise testamentary and intestate jurisdiction appears to have arisen.

However, the references we have show that some power to will was recognized in the tenth century, and that in all probability the Church was behind the conception.

Perhaps the fact that the Irish Law of wills seems to have grown up under ecclesiastical influences is sufficient to determine that among Celtic peoples, as among the Germanic tribes, the power of bequest was a comparatively recent innovation.

III

RESPONSIBILITY FOR ACTS OF ANIMALS

AN important part of early law is that which relates to the responsibility for the acts of animals.

The subject falls naturally under two heads, the law of cattle trespass, and the law of damage to persons caused by animals.

Nearly all early societies, it may be remarked, regarded animals in a sense as responsible creatures liable to the same penalties as men for acts done. This interesting chapter in early thought is dealt with by Sir James Frazer in vol. III, chapter VI, of his *Folk-Lore of the Old Testament*.

1. *Cattle-trespass.*

§ 1. As is natural in any society dependent on agriculture and pasture, the Welsh Laws lay down rules in regard to trespass by cattle on corn and grass lands. Many of these rules are too meticulous to be of interest, and their principal value lies in the fact that they illustrate the thoroughness with which the codifiers did their work.

Apart from these meticulous provisions the law, however, has interest. The rules lay down broad principles, and throw many sidelights on the economic structure of society.

§ 2. The first main principle of the law of cattle-trespass was that no person, however exalted his status might be, was exempt from liability to make good damages caused by his animals.

The second was that every man must look after his crops and fields and do that which lay in his power to protect them from trespass, and every person must see that his animals did not trespass on the lands of another.

The rules illustrate once more that the general rule of Welsh Law was that duties and rights were interdependent, and that a man who contributed to loss by his own negligence had no right to relief.

This is well put in the Venedotian Code, pp. 322-4 :

'Every man is to mind his corn, and every owner his animal. Every crop that a person shall harvest he is to look after and thereafter the cattle are free.'

§ 3. The duties imposed on a cultivator are very simple and clear. He was obliged to fence his fields, and to keep his fences in proper order from sowing time till the harvest was gathered in. He was obliged also to garner his crops by fixed dates and not to leave them on the fields ; and when he had garnered them he was bound to take reasonable precautions to protect them. Provided he did that he had definite rights against the owners of animals causing loss to him.

The chief crops referred to in the laws are corn—which meant wheat—barley and oats, orchard produce (especially apples), hay, cabbages, flax, and leeks.

Land was broadly divided (apart from wood and waste) into corn lands, hay meadows, and gardens.

It was the duty incumbent on every person to keep his garden land fenced all the year round, and the fences made had to be of sufficient durability to prevent the ordinary animal, while straying, from walking on to the land. It was recognized that no fencing would keep poultry off land, but the fences had to be of such a nature as to keep cattle off. Provided that were done the owner of a garden could recover compensation from the owner of cattle or poultry breaking through a fence or flying over it and causing damage. The fences round fields were not of so careful a nature. Fences, however, of a rough nature had to be placed round fields, and, if the field were a hay meadow, they had to be maintained in order from the 17th of March to the 1st of December.

After corn had been cut the latest day up to which it could be left in the fields was the 1st of December. By that time corn must be garnered and placed in stackyards. Round the stackyard there had to be a triple band of interwoven osiers or the like, with a door or gate allowing ingress.

The gateway must be of wattle, strengthened by a wooden plank in front and two on the back.

From the time the first sheaf was brought in till the 1st of December the gateway might be left open for the wind to blow through, perhaps for the purpose of preventing combustion, but on the 1st of December the gateway had to be closed, and, if it were not, no compensation for damage caused was allowed.

With this may be compared the provision in the Doms of Ine, c. 40 :

'A ceorl's close ought to be fenced summer and winter. If it be unfenced and his neighbour's cattle stray in through his own gap he shall have nothing from the cattle.'

If any one placed his stacks in the open fields without the regular stackyard fence he had no right to recover any compensation.

From the 1st of December until sowing time the ordinary fields were open for all cattle to graze upon at will. There was an exception made debarring the freedom of swine to come on meadow or arable land : they had to be confined to wood and waste land.¹

Subject to these precautions being taken the owner of land or crops was entitled to damages for trespass.

He had three remedies.

§ 4. The first applied where the damage caused could be made good by the restoration of a like quantity. For example, if a sheaf of corn were damaged, the owner of the animal had to replace it by a similar sheaf, the owner of the damaged sheaf retaining it as well.

If there were a dispute as to whether the damage were caused by uncaptured animals belonging to a particular person, the alleged owner of the trespassing animals could swear they were not his, and his oath was conclusive, but, if he were not prepared to swear, he was responsible. If the damage were caused to corn near a hamlet, the residents of the hamlet had each to swear the animals were not his, and then the whole damage was levied *pro rata* on every bullock in the hamlet, it being the duty of the hamlet to keep animals off neighbouring corn.

¹ V. C. 322, 324, 326, 328, 334 ; D. C. 578, 606 ; G. C. 720 ; V. 92 ; VIII. 198 ; IX. 268 ; X. 344 ; XIV. 594.

If there were any dispute as to the amount of damage, the oath of the owner of the crops was conclusive, but if it were a question of area, and the owner of the animals was prepared to surrender out of his land a similar area with a similar crop, then his oath was conclusive as to area.

If the actual damage could not be compensated for by the surrender of an equivalent, there was a fixed cash payment, which was always made for trespass on lands before the crops thereon began to mature.

There could be no recovery of compensation for damage to crops if the demand were made after the 1st of December following the time when the damage was caused, and damages to grass land could only be recovered by the next remedy.¹

§ 5. The second remedy was the right to seize animals trespassing, and holding the same until definitely regulated pound-fees were paid.

There was no system of local pounds: each person impounding impounded on his own premises, and the captor was not entitled to take his capture to another 'tref' than that in which the damage was caused.

Seizing or impounding animals on land, which had not been adequately protected, was prohibited, and any one doing so was fined for surreption and the cattle impounded were liberated.

Certain limitations were placed on the power to impound young animals. Calves, lambs, and kids could only be impounded from one mealtime to another, and at the expiration of that time they were set free without pound-fees. Foals following their dams were also not to be impounded.

Bulls, swine, stallions, boars, rams, and he-goats were also exempt from being impounded during certain seasons, but apparently their owners must compensate for loss.

Poultry could not be impounded when trespassing on corn, except for a fortnight after sowing and after the corn had begun to form in the ear.

¹ V. C. 322, 326, 328, 330; D. C. 554-8, 560; G. C. 740, 742, 744; XIV. 592-6, 602, 652.

Before an animal could be impounded it had to be completely on the land; so, if a horse merely stretched his head over a fence or only planted his two forelegs in the corn, he was not to be impounded. The sole right of the person whose crops were damaged in that manner was to recover the amount of the damage caused.

Strict rules are laid down as to how and when animals could be impounded, and for their treatment in pound.

Seizure had to be made while the animals were actually on the land trespassed upon. If they were pursued and made good their escape from such land, they could not be impounded.

If, in seizing an animal, the captor injured it, he had to make good the injury, but this did not involve payment for injuries caused accidentally. For example, if an animal, while being driven off land, fell and broke its leg, the captor paid no compensation.

Owners of land were permitted to use dogs to drive cattle up to the boundary of the land on which the trespass was being committed, and, within those limits, any injury, short of killing, caused by the dogs did not have to be compensated for. But if the dogs of a neighbour joined in the chase, and they caused injury, the owner of the dogs had to pay for injury occasioned. If dogs were used to drive animals after the boundary was passed a 'camlwrw' was paid to the King, and the trespassing animals went free.

There was no duty incumbent on the impounder to inform the owner of the animals impounded; the latter had to find out for himself where his animals had gone to. Seizure must be open, however, and animals impounded could not be concealed, and if an animal were concealed by the captor and it died he had to pay its legal worth. In impounding also the captor must drive the animals seized, and should, for instance, he ride a captured horse to the pound, he lost all right to recover damages.

The impounding had to be effective, and if an animal escaped from its pound the captor could recover nothing.

Domestic animals had to be tethered, wild animals to be put into an enclosure. Animals seized belonging to different

owners were not to be kept together, nor were animals of different species, lest they should fight and injure one another. Still if the animal of one man in pound killed or injured the animal of another, the owner of the animal, not the impounder, paid for the damage.

The captor of trespassing milch-cattle was entitled to milk the animals until released, but no one else was without his permission. He was at liberty, too, to arrange for feeding animals captured, and apparently to charge for their feed.

The fees payable for impounded animals are given in very great detail. They were not high, and never exceeded a penny per head. Beyond that there is nothing of interest in the scale of fees except that an animal trespassing at night paid double.

The owner of the impounded animal had the right to demand release immediately on the tender of fees and of security to compensate for damage caused. He could not demand release without doing that, and if he demanded return without offering payment or a pledge, the impounder was not responsible if the animal died in his custody. On the other hand, if he refused to release when the owner proffered a pledge, he paid for any damage caused to the cattle thereafter.

A person whose animal had been impounded had no other remedy whereby to recover his animals except by payment of the pound-fees, and, should he be so injudicious as to sue for theft or surreption, he lost all right to the impounded animal, and if there were any allegation that the impounding was illegally effected, the oath of the captor was conclusive.¹

In the Irish Law there is a very elaborate system of impounding for trespass. The law there forms in reality a part of the law of distress. It would be of little value to detail the Irish Law here. It suffices to note that in many details, e.g. the system of pounds, the prohibition on mixing different kinds of cattle in pounds, the increased

¹ V. C. 262, 322, 324, 326, 328, 330, 332, 334; D. C. 446, 558, 560; G. C. 708, 740, 744, 786; V. 44; VI. 114; IX. 240-2, 268; XIV. 594-6.

fees for trespass according to time, and the right to drive trespassing cattle off fields, they closely resemble the Welsh Laws.

They provide also for the payment of compensation, but, as usual, in the most meticulous fashion.¹

Other systems have not much to say about cattle-trespass. The provisions of the Lex Salica, Cod. I, Tit. IX, fairly represent the general Germanic Law, and are comparable to the Welsh ones.

All damage in meadows and enclosures had to be made good by the owner of the cattle. Impounding was permitted, but a person impounding had to inform the owner, and, if he did not, any cattle injured or dying had to be compensated for. Similar rules occur in the Lex Burgund., Tit. XXIII, XLIX, and CVI.

§ 6. The third remedy for cattle-trespass in Welsh Law was the right to kill the animal trespassing.

This right was confined to geese trespassing on corn or in a stackyard, and to pigs trespassing on woodlands.

Woodlands in Wales belonged either to the tribal bodies or the territorial lords, with certain rights therein pertaining to the freemen. Some woods were reserved, some unreserved. The herds of swine, which we find playing an important part in the economy of early Europe, were of importance in Wales also, and they were free to roam in the woods.

There was, however, a close season in reserved woods, extending from the end of September to the beginning or middle of January, during which swine were not allowed in the woods.

As their capture in woodlands was difficult, the owner of the woods was entitled to kill swine trespassing in the close season. The right to kill is definitely regulated.

A territorial lord could kill the tenth pig, and every pig over ten, while an ordinary 'uchelwr' could kill every tenth pig. Why the law of tithes should have been applied it is difficult to conjecture. It was out of this system that the later law of pannage developed.²

¹ Ir. Laws, I. 157, 161, 183, 269, 305, 325; V. 137, 141; also the Breatha Comaith issa Aridso.

² V. C. 328; D. C. 554, 560, 606; G. C. 742, 792; IX. 268; XIV. 596.

§ 7. Certain animals causing damage were exempt from liability for damages. Bees, birds, other than domestic fowls, and wild animals which had been tamed, were so exempt: they were considered as outside the control of the possessor.

§ 8. Connected with the law of trespass on land is the law of trespass in herds and precincts, the law of 'nets'.

Briefly stated that law provided that every person had precincts in which trespass by animals must be paid for. The King's 'nets' were his demesne, his stud, and the flocks of his 'maerdref'; the nets of a freeman his pasture land, his herds of cattle and swine; the nets of a 'taeog', his herds of cattle and swine and his house; and the law was that in addition to the right to seize and impound, the owner of animals trespassing in the nets paid a fee of fourpence.

It was one of the privileges of Arfon that there were no royal nets in that countryside.¹

2. *Injuries by animals.*

§ 1. The same rule applicable to cattle-trespass, viz. that every person was responsible for damage caused by domesticated animals of his, applied to injuries and other damage caused.

Likewise the rule applied that no one was responsible for the acts of wild animals, even if kept as tame ones.

Payment was enforced by the ordinary law of distress.

§ 2. Damages by animals were not to be compensated for if the animal acted in self-defence. They had the same right as human beings: 'Not only have men', it is said, 'the liberty to withstand violence, but irrational animals also have the right.' So if one animal attacked another in the usual place of resort of the latter, that latter was entitled to defend his right to be in that place. Damages by the aggressor had to be paid for, but the defending animal was free.²

§ 3. Injury caused by a rabid animal had not to be compensated for, nor injury caused by one vicious animal to another.

¹ V. C. 76, 106; D. C. 434-6; G. C. 776, 778.

² X. 308.

By 'vicious animal' was meant a male in pursuit of a female of its own kind. Consequently, if a stallion killed another there was a contest between 'vicious animals' beyond the reasonable control of the owners, but if a vicious animal killed one which was not vicious, full worth had to be paid.¹

§ 4. Injury by a mad dog was not paid for, but this did not imply that a person could not defend himself against a mad dog. On the contrary, if a person were attacked by a dog, mad or otherwise, he was entitled to defend himself. In the quaint phraseology of the law the person attacked could place his weapon between himself and the animal, and if the dog 'went upon the weapon so as to be killed', nothing was to be paid for it. The Anomalous Laws allow killing of a mad dog in self-defence without qualification.

Though injury by a mad dog was not to be compensated for by the owner, this only applied where the owner had no reasonable ground for suspecting his animal might be a danger.

If he had a dog, accustomed to bite, he must keep it within nine paces of his own house. It could be killed with impunity outside that limit, but within it any one killing the dog had to pay 2s., because the animal was within his own territory, to protect which it was his duty and instinct.

Even so, however, no one was to keep a dog accustomed to bite after it had bitten three people. The master was then compelled to kill it himself.

The owner of a dog was also liable to pay for all blood drawn by it at its legal worth, but if the dog were killed the amount was reduced by 16d.

The owner of a dog was not responsible for the act of the dog, if set on by strangers: the liability to pay was then transferred to the person setting the dog on.

These provisions, though at first sight trivial, are of value as indicating the principles on which liability for injuries caused was based. Those principles were responsibility

¹ IV. 4.

for that capable of control, subject to a right of self-defence.¹

§ 5. A further interesting provision as showing communal responsibility is the case where an animal was injured by another without it being known whose animal caused injury. If an animal were killed or injured by another in the same herd, the oath of the herdsman was conclusive as to which animal caused the injury, and the owner thereof paid; but if an animal were killed near a hamlet and not in the herd, the owner of the animal killed took relics with him to the hamlet, and put every resident to the oath that he was ignorant as to which animal had killed the other. If all swore ignorance, the value of the animal killed was paid by the whole hamlet, the value being assessed on every bullock in the hamlet.²

§ 6. We may add here the rules relative to injuries caused to animals. Every one injuring an animal, whether by an advertent or inadvertent act, paid compensation therefor, just as he would pay if he injured a human being.

He might, however, take over the animal and keep it until it was cured, returning the animal then, and in the meantime giving the owner another animal of the same quality for use. Should the animal die or be incapable of being restored, the animal given for use became the property of the person to whom it had been given.

Killing or injuring an animal in self-defence entailed no liability, if done in the reasonable exercise of defence of one's own life.

Inadvertent injury to a hired animal was not to be compensated for: it was part of the risk of 'llog'.

If injury were caused deliberately, there was frequently an addition of a 'camlwrw' to the compensation.³

§ 7. These provisions are not peculiar to the Welsh Laws. By Tit. VIII of the Roman Law of the XII Tables, compensation for all injuries or damages caused by four-footed animals had to be paid for, but the damage could be

liquidated by the surrender of the animal causing the damage.

In the Irish Laws the same general provisions are to be found. There the damages were reduced if the attacking animal were killed, but subject to that full compensation had to be paid.

Exemptions were accorded to bulls, rams, &c., in the rutting season, and to horses fighting among themselves; and identical rules in regard to injuries by dogs and the liability of the setter-on are given. Even in such a matter as that where injury was caused by an animal in a herd, and it was not known which particular animal was responsible, there was a parallel rule providing that the owners of the cattle might pay the damage jointly or cast lots among themselves to determine who was to pay.¹

In the early English Laws rules of a similar nature exist, particularly in Ælfred's Laws, cc. 23, 24. Injuries by animals to men had, as a general rule, to be compensated for and the offender delivered up; dog-bites were paid for at fixed rates, and if one animal killed another, the live animal was sold and the proceeds divided between the two owners.

Similar rules occur in the Germanic laws, but it suffices to give the references to a few: Lex Salica, Cod. I, XXXVI; Lex Alamman., Pactus III, cc. 17, 18; Lex Baiuor., Tit. XIV; Lex Burgund., Tit. XVIII; Lex Langobard. (Ed. Roth.), cc. 322 et seq.; Lex Saxon., II. 57; and Lex Ripuar., c. 46.

¹ Ir. Laws, III. 181-7, 193, 231, 269, 271, 359, 381, 415, 441, 529; V. 183; Heptads, VII.

¹ D. C. 496-8, 500; G. C. 730-2; XI. 414; XIV. 576.

² D. C. 562; G. C. 714, 744; XIV. 652.

³ V. C. 110-12, 264; D. C. 496; G. C. 744; VI. 100; X. 308, 382.

IV

MISCELLANEOUS PROVISIONS

A FEW miscellaneous provisions remain to notice.

I. *Payment of debts of deceased persons.*

§ 1. It was the rule of Welsh Law that there was no personal responsibility on the part of any person to pay the debts of his father or ancestor. It was also the rule, as we have seen, that, except for special necessities, no person in possession of 'tir gwelyauc' could charge that land for debt, so as to affect the property after his death; but, though that was the law, heirs, on succeeding to property, were responsible to pay the debts of the deceased predecessor. That liability was limited to the extent of the property received, so, if property descended to a number of heirs, each contributed *pro rata*.

The liability to pay debts was confined to persons succeeding by 'natural right', and no liability attached even then to pay for the unlawful acts of a predecessor in title.

'Alltuds', who had no 'natural right' of ascension to a predecessor, were not responsible for such debts.¹

§ 2. The Welsh rule is identical with the Germanic and Celtic rules prevailing elsewhere.

The Sachsenspiegel incorporates the Germanic rule in Art. VI:

'Qui haereditatem percipit debita solvit quantumcumque haereditas in mobilibus vel sese moventibus perdurabit.'

The same rule is found in the Leges Burgund., Tit. LI, the Lex Langobard. (Ed. Roth., c. 365), and the Lex Ripuar., c. 77.

Under Irish Law the rule was similar, the test of liability being whether the heir had inherited property (Senchus Mór, I. 227), and also under Scots Law (Leges Quatuor Burgorum, c. 89).

¹ V. C. 124; D. C. 432; V. 54; X. 392; XI. 396-8.

2. *Partition of Movable.*

§ 1. The rules for partition of landed property have already been considered: the rules for partition of other property are few, but simple and complete.

§ 2. No person could be compelled to maintain co-ownership against his will: the right to partition of movables was absolute, and, if refused by a co-sharer, the lord, on being appealed to, must divide.

Property might be physically capable or incapable of partition.

If capable of partition, and there were two co-sharers, it could be divided by one of two methods. The co-sharers jointly made a rough partition into two portions. Each co-sharer took one of these two portions and divided it into two again, then each co-sharer chose one part out of the portion so divided by the other. That mode of partition was called partition by agreement.

If that mode were not adopted, then the person who was lowest in status divided, or if status were equal, the youngest in age divided, and the other chose. If it could not be ascertained who had lowest status or who was youngest, division must be by agreement.

But if one party were averse from dividing, the one desiring partition divided, and the other party chose which portion he would take.

If there were more than two co-sharers, the person desiring partition divided the property into lots, and the person with the highest status chose his lot first, then the person next to him, and so on, the last lot being left for the divider. If status were equal, choice was made in order of seniority.

If the property were incapable of partition, e.g. a cow, the person seeking partition fixed its value, and the other party chose whether he would have the property, paying the divider's share, or would take half the valuation, leaving the property with the divider. The property remained joint until the valuation was paid.¹

¹ V. 88.

3. *Meaning of Property.*

§ 1. We have discussed under the land laws the Welsh conception of 'priodolder' rights, and in dealing with bees in the succeeding chapter the conception the Welsh had of acquisition of property in 'res nullius' is considered.

Very little is said in the laws beyond that as to what constituted 'property'.

Undoubtedly, the early legal mind could hardly distinguish between possession and property, and the whole of the law of procedure is coloured by that fact, but the beginnings of a distinction are apparent in the laws.

§ 2. In the Dimetian Code, 550-2, movables found on a man's land and belonging to an unauthorized squatter, could not be appropriated until three days or nights had elapsed; and, in what we may call the law of treasure trove, there are clear indications, though they be of a late period, of a differentiation arising. Under that law everything a 'priodawr' found *concealed* on his land belonged to him, except gold and silver, which belonged to the King, but articles found entangled in a weir could not be appropriated by the owner of the weir.

Wreckage before payment of port dues and flotsam belonged to the King, but if not claimed by him the finder could take it. If port dues had been paid, the King claimed nothing, and the owner of the vessel was entitled to all wreckage. The distinction is crudely expressed, but the beginnings of a distinction between possession and property are manifest.¹

§ 3. In the law of lost property the growing distinction is more manifest, though the rules are to be found principally in the commentaries.

Ownership in property lost by negligence was never parted from the owner, except in the case of a needle, a horseshoe, or a penny.

If two persons both lost property of a similar nature, and one of them found one of such lost properties, he retained it until the other went to law and established his own title to it.

¹ V. 46, 52-4, 72; VI. 102.

Animals could never be claimed by the finder. He had to apprise the lord of his find, and the latter proclaimed the discovery, and if they were not claimed, they were regarded as 'waste' of the lord's.

So too was the rule regarding valuable property found on the roadside, though one authority implies that the discoverer of lost property was entitled to keep it, for it states that if two persons, walking in single file, came across lost property, then, if the foremost of the two found it, he must share with the hindmost, but if the hindmost found it, the foremost, who had passed it by, had no claim.

Property lost through gambling was not regarded as lost property. Though frowned on, gambling was not illegal, and anything lost in gaming was irrevocably lost.

The XIVth Book is free from the complication that possession and property are almost identical, and determines that property in a thing is never lost, unless it be voluntarily parted with, but even then it is apt to confuse and identify the parting with possession and the parting with property. That is, it does not distinguish the parting with possession with intention to retain property therein from the parting with possession with intention of delivering ownership.

This distinction must be constantly borne in mind in the law of procedure, for, without it as the key, much of the law of procedure is unintelligible.¹

¹ V. 48, 72; VI. 116; VIII, 240; XIV. 588, 590-8.

V

THE GAME LAWS

§ 1. THE game laws partake of many characteristics, but in view of the light they throw upon certain early conceptions of property, they may be conveniently considered under the Law of Civil Obligations.

§ 2. In early Wales sport was not an exclusive royal or baronial privilege. Hunting and fishing were, as a rule, free to all freemen, and some animals could be hunted also by the unfree, notably the otter, wolf, fox, and roebuck.

The exclusive rights of the King were very limited. He was entitled to every male hawk and aerie in his dominions, and every one slaying a hawk paid its legal worth to the King, plus 3*od.* to the owner of the land on which it was killed.

We have here an inferential recognition of the freeman's right to hawks on his own property, and the Survey of Denbigh expressly reserves to freemen hawks found in their private woods.

Ravens, buzzards, and cranes were all royal birds, and beavers, martens, and ermines were royal animals, for the killing of which the legal worth was paid to the King, not as a 'fine' for a criminal offence, but as compensation for trespass.

In addition, the King had a few special hunting privileges. The times of hunting are mentioned in the Codes, and the King was entitled to enter on any land in the pursuit of game.

In a chase he was entitled to unleash his hounds thrice before the hounds of any one else were let go, and a hart set up by his hounds was inviolate. It was called the King's hart, and should, by chance, another hound overtake it the carcass belonged to the King, and must be retained by the finder for his disposal.

The only trace of anything in the nature of a fine is found in the unauthorized slaying of a King's hart.

§ 3. All free Welshmen were at liberty to hunt in their own tribal lands. Moreover, if a freeman were on a road and saw an animal of chase on another's land, or in the King's forest, he was entitled to shoot at it from the road. If his arrow struck the beast, he was at liberty to follow it wherever he chose. He could not, however, enter on another man's land until he had hit his quarry, and wherever he overtook it he gave one-quarter of it to the owner of the land. If he lost sight of it, and it died on the land of another, the owner of the land finding it got three-fourths if it were edible, 1*s.* if it were not.

Pursuit of an unhit animal was not reserved to the person who first unleashed his hounds. Any one was at liberty to let loose his hounds after any animal, but, if it were overtaken by any hound, the carcass belonged to the man who had first unslipped his dogs, provided that he continued in the chase until the animal were overtaken.¹

§ 4. The importance of these regulations lies in the views taken of property in that which was wild.

The Roman Law² held it was immaterial whether a man took wild beasts or birds on his own ground or that of another. 'Whatever of this kind you take is regarded as your property so long as it remains in your keeping, but when it has escaped and recovered its natural liberty, it ceases to be yours', and 'A wounded animal is not yours until you have captured it'.

The Roman Law took as its test of property in 'res nullius' the effective seizure and control of the hunted animal. It paid no regard to any claim by the owner of the land on which the animal was. The Norman Law, on which the whole of the subsequent English game laws was based, gave property in the chase, subject to the very wide royal privileges, to the owner of the land. Possession of land carried with it the right to everything on it.

There were two diametrically opposed principles in these

¹ V. C. 286-8 ; D. C. 496 ; G. C. 736-90 ; IV. 6, 8.

² Just. Lib. II, Tit. I. 12.

two laws. The Welsh Law occupied a sort of midway position between the two, being produced possibly by the clash of the two views.

Game was 'res nullius', and no one could trespass on another's land in its pursuit, but effective control commenced from the moment when a man marked it down as his own by wounding it, and he was then entitled to follow it up anywhere. The King, being 'owner of all land', could enter, without trespass, on any land.

§ 5. The killing of stags was prohibited, except by hunting, except when the stag was trespassing on corn.

Snaring and trapping appear to have been common practices. Any one could set a snare or trap on his own or waste land, but should a strange animal or passer-by fall into the trap, the snarer had to pay for the injury caused. He could avoid damages to a human being by placing a cross to indicate his snare, but that precaution did not avail against animals, even if trespassing.

Setting of snares on the land of another was forbidden under penalty of a fine paid to the owner of the land, who likewise walked off with the carcass caught. An animal caught in a snare, escaping therefrom, and falling into the snare of another, belonged to the setter of the first snare, if it carried the net with him.¹

Netting was permissible anywhere, and if any bird or animal became enmeshed in a net cast, and it broke the net, the owner of the animal was obliged to pay for it, unless the intruder were killed, in which case it was considered to have met with just retribution.

The principle applicable in these rules is the same as applied in the provision that wounding an animal gave the right to claim it.

Similar rules exist in the Lex Alam., Tit. LXXXV-VI, Lex Angl. et Werion., c. 61, Lex Rip., c. 70, and in the Book of Aicill, III. 273, 451-3.

§ 6. Fishing was unrestrictedly free to every one in Wales, in the sea or the river, for the sea and the river were incapable of appropriation, and fish were naturally 'res nullius'.

¹ V. C. 288; D. C. 552; G. C. 764; V. 52; VI. 102-4.

Attempts to appropriate and preserve waters seem to have been made in early times, for one of the privileges of Arfon protected the freedom to fish in the Seiont, Gwyrfa, and Llyfni. In South Wales, perhaps under Norman influences, partially preserved waters were recognized, for it is provided that a person fishing in such waters must give two-thirds of his catch to the owner of the water.

The absolute freedom to fish was not interfered with, so far as can be judged, by any prohibition in any of the Norman surveys of the fourteenth century, save in the First Extent of Merioneth.

Cymmer Abbey had, however, by grant of Llywelyn, special rights in the waters of the Mawddach estuary, a most exceptional case.

A peculiar provision in the Anomalous Laws gave fish, cast up by the sea, to the King under the general law of jetsam, until the tide had ebbed for the third time.

Fishing was conducted by weirs, hooks and lines, and nets. The nets in use were the salmon net, the grayling net, and the trout net. Bow-nets were also in use.¹

§ 7. Some light is thrown on the conception of property in that which was wild in the law regarding bees. Bees are often chosen as a means of illustration in many early laws, because of the importance of honey as a sweetening material before the introduction of sugar, and because of the importance of wax in the service of the Church.

The Roman Law regarded wild bees as 'res nullius', and no one had a right to wild bees on his own land until he had obtained physical possession of them by hiving. Any one coming on the land of another could secure possession of the bees by hiving them, but the owner of the land could prevent trespass on the land; nevertheless, once trespass was completed and the bees secured, he could not recover. In early English Law the bees belonged to the owner of the land, though the doctrine was never developed in that law. It was developed in the Norman Law in Jerusalem along those lines.

¹ V. C. 106, 302; D. C. 552, 584; G. C. 724; IV. 4; V. 52, 102; XIV. 576-608.

The Brehon Law is hopelessly involved, and nothing is more characteristic of the ancient Irish tendency to hair-splitting than the extraordinary tract *Bech Bretha*, which is entirely devoted to the law of bees.

In the Welsh Surveys bees and hives found on the lord's lands or in his woods went to the lord, whoever was the finder.

If found on the property of freemen they belonged to the finder; likewise in *Caimeirch* if on the property of a 'nativus', but in *Isaled* and *Uwchaled* only if found by him outside the woods, if within the woods they went to the lord. Common woods were for this purpose deemed to be the lord's.

§ 8. The differences in the provisions illustrate in a most striking manner the conflict of different conceptions.

The original Welsh principle was the same as that of Roman Law. A swarm of bees on a branch was a free hunt, 'for bees are always on the move and have no haunts', but the idea of the right of the owner of the land obtained recognition so far that the finder could claim only a penny or the wax, the owner of the land getting the swarm according to the *Venedotian Code*. In the *Dimetian Code* the owner of the land had the option of letting the finder take the swarm or purchasing it for 4*d.*, the price in *Gwent* being reduced to a penny and the wax.

A peculiar illustration of the growth of Norman ideas is found in the *Anomalous Laws*, which provides that if a swarm were in a tree on the boundary between two properties, the owners of the two lands were to strike the tree alternately with axes, and he got the swarm on whose land the tree fell.¹

The rules as to bees are of considerable value as illustrative of the conflict between the Roman conception of 'res nullius', which was apparently identical with the Celtic one, and the Norman conception of the land carrying with it everything that was on it, above it, or below it.

¹ V. C. 284-8; D. C. 502; G. C. 740; IV. 94; VI. 110.

VI

CO-TILLAGE

§ 1. THE Welsh Laws contain many regulations in regard to co-tillage. They are dealt with here, under the Law of Civil Obligations, because the view that is taken is that they form a branch of the law of contractual relations.

Prof. Lloyd, in his *History of Wales*, remarks that, save in the *Triads* (which he rightly rejects as evidence), there is nothing to suggest that a system of co-tillage existed in medieval Wales among the free tribesmen, and that the 'village community' existed only among the unfree.

It is correct that the laws do not say that the rules regarding co-tillage apply to free tribesmen; but it is equally true that they do not say that they are confined to the unfree.

The remark that the 'village community' existed only among the unfree is indubitably correct; but it can be said also that the village community, in the sense of being a communal body, existed only among a small section of the unfree, viz. those holding on 'trefgefery' tenure or in 'maerdrefs', which formed a small minority of the unfree vills.

No other writer maintains that the rules as to co-tillage apply to the unfree only, and, if the contention be correct, we would have to limit their operation to a minority of the unfree population.

§ 2. Apart from the *Triads*, however, there seem good grounds for believing that the regulations applied to freemen as well as to the unfree.

The first consideration is that these rules occupy a prominent place in the Codes, particularly in the *Venedotian Code*. It is difficult to believe that such prominence would be given to rules applicable only to a system of cultivation among the class which stood lowest in the point of status,

and who numbered but a small minority. One of the characteristics of the Codes is that they view most things from the point of view of the King and the freemen. They are codes of the customs of freemen, and the unfree are, at most, dealt with incidentally.

§ 3. Then, if these rules applied only to such unfree as had a communal village organization, they would seem to be superfluous. The laws lay it down explicitly that the regulation of cultivation in the 'maerdrefs' was in the hands of the 'land-maer', and in 'trefgefery' viles in the hands of the 'maer'. Those officers had full power to regulate the whole of the joint cultivation in those viles. What need could there be of rules, directed not to guide him but to guide cultivators undertaking joint tillage, when such tillage was entirely under his discretionary arrangements?

§ 4. The next consideration is more important. When we examine the rules, they appear to be not rules determining how a joint village community, unfree in nature, is to conduct its joint cultivation, but rules determining how a contract to join in cultivation between free contractors is to be given effect to.

Welsh society, prior to say A. D. 1300, knew nothing of manorial cultivation; it knew little of such a conception as a 'village community', and consequently little of joint ploughing as it prevailed in England. It did know a great deal about co-operation among freemen, and the rules of co-tillage appear to be customary rules determining how co-operation in agriculture was to be given effect to.

§ 5. If we recall what the economic situation was among the freemen and the 'treweloghe ailts', we shall be able to appreciate the purpose of these rules.

We have tried to point out above that, in the Welsh tribal system, there was a constant appropriation of plots to different units within the original clan, especially for agricultural purposes; in other words, separate occupation of separate plots by separate individuals or groups, that is the 'priolder' system, applicable to freemen and 'treweloghe ailts' alike.

Giraldus Cambrensis draws a vivid picture of the country-

side in his own day, and shows how the tribesmen occupied holdings and had their huts, not in a village, as the term is understood in England, but scattered about over the countryside.

Now it seems obvious that, if there were many of these separate holdings, it is more than probable that the occupiers would not keep plough-oxen requisite to plough each holding separately.

The Welsh plough-yoke contained four or eight oxen, and it is most unlikely that an individual or family, holding a small culturable area, would maintain eight or four oxen to be used solely for ploughing that small area. The *prima facie* probability is that holders of small plots would each have one or two oxen, and would, when the time for ploughing arrived, pool their oxen. We know that in England the extent of holdings was determined in terms of the number of oxen each holder had to supply for the lord's ploughing and the common cultivation.

The principle was the same, *viz.* that men maintained one or two oxen, or even a share in an ox, and at ploughing time pooled them, the latter compulsorily as a serf, the former by customary contract as a freeman.

§ 6. A system of co-tillage under contract, as distinct from common cultivation by a village community, appears to have prevailed in Ireland.

In the *Cain Aigellne*,¹ dealing with the law of husband and wife, it is said that either party may make a lawful contract, such as the 'alliance of tillage', with a lawful tribe when they have not the means themselves of doing 'the work of ploughing', the gloss adding that such contracts should, if possible, be made with fellow tribesmen.

In the same laws² a son was empowered to make a contract freely in some cases, such cases including 'an agreement for reciprocal ploughing when the father is not ploughing', which the gloss interprets as 'joining in co-ploughing with another person, when the son finds no place for ploughing with the father'.

Similar rules are found in the *Book of Aicill*, pp. 269, 271,

¹ *Senchus Mór*, II. 359.

² V. 285-9.

as in the Welsh Laws, relative to the care of oxen engaged in co-ploughing.

§ 7. Omitting references in the Triads to co-tillage, the references in the laws appear to be applicable to a system under which separate 'priodorion' combined to plough their lands by common effort.

The Venedotian Code, pp. 314 et seq., describes the method employed in making an arrangement of this sort, which is identical with that employed in ordinary contracts :

'Whoever shall engage in co-tillage with another, it is right for them to give surety for performance and mutually join hands, and that after they have done that, to keep it until the bond (*magl*) be completed ;'

'magl' implying apparently a contract-bond (*vide* Glossary).

It then proceeds to denote the order in which the plots, which each party to the contract desired to have ploughed, were to be ploughed ; first the ploughman's, then that of the owner of the plough-irons, then that of the owner of the ox yoked nearest the plough on the furrow side, then that of the owner of the corresponding sward-ox, then the driver's, then those of the owners of the other oxen, the ones nearest the plough giving their owners the right to precedence in ploughing, and, where yoked together, those on the furrow side having preference over those on the sward side. The last 'erw' to be ploughed was that of the owner of the plough, the 'cyfar' of the 'gwasanaeth' (*kasnat*), as it is called.

When the ploughing was finished the parties to the contract separated, unless there was a contract between them to the contrary.

These provisions seem to leave no room for doubt that the law is dealing with co-tillage under contract. The remaining rules point to the same conclusion.

It is provided that every party to the agreement should bring whatever was required of him to the ploughing, whether it be an ox or a ploughshare or what not, and entrust them to the ploughman and the driver, who were thereafter responsible for their safe-keeping and were enjoined to treat them as their own. If a person entered into an agreement and did not send his ox to the ploughing,

he lost all right in the co-tillage. Every one was obliged to come 'willingly and orderly', and should he delay and afterwards desire to come in, he had lost all right in the tillage.

If his ox, after coming to the ploughing, fell ill, whether from a wound, or fighting with another ox or any other cause, it was his duty to find another ox in its place. He was not allowed to sell the ox he had contributed to the joint ploughing until the 'magl' was complete, and, if he removed his ox from the joint work before his own land was ploughed, that land was not to be ploughed afterwards, and, if he removed it after his own land had been ploughed, it was incumbent upon him to find another ox.

In fact, while ploughing was going on, the owner of the ox lost all right of disposal of his own contribution ; his ox could not be pledged, it could not be bequeathed even, he had lost sole possession of his property for the time being, and was, therefore, incompetent to deal with it, for possession and ownership were co-extensive.

The contractual nature of the undertaking is further shown by the fact that a person engaged in co-tillage could not substitute another ox for the ox brought first, without common consent of the others engaged in the contract, provided it was able to work. He could not substitute a horse, or a mare, or a cow for an ox contracted to be supplied. If he did, and the ploughing went on with one of them yoked, the owner could claim no compensation for damage caused to the animal, nor could he get his own land ploughed under the contract in absence of an agreement.

No stranger could interfere with co-tillage while it was proceeding, no creditor could distrain on an ox engaged, but if a party to the contract used an ox he had stolen, the owner of the ox could remove it.

The contractual nature of the arrangement appears even more clearly from the provision that there was nothing to prevent any one entering into any number of agreements for co-tillage with different people, but the first claim on his services and oxen lay with the persons with whom he had made his first contract, and it was only when that contract had been completed that he could and must engage in the completion of the subsequent contracts.

The nature of the agreement further appears from two other provisions. If one party wanted rough bushy land of his own cultivated, and the other 'cleared ground' of his own, the latter might object to having to assist in more difficult work for his partner than what he was demanding himself. The law provided he must abide by the agreement, and plough whatever land the other party had, unless they had contracted otherwise.

So too, if one man had land a long way off, and another land near by—a state of affairs only consistent with separate holdings—and the latter objected to travelling a distance, the law stepped in to regulate the matter, and provided that in no circumstances were the oxen to be taken out of their own 'cymwd', and, within the 'cymwd', they were to be taken only so far as the weakest ox in the team could travel without fatigue and without rendering him unfit for work. The journey also was in no case to be so lengthy as to prevent the animal returning nightly to his ordinary stall.

§ 8. Minute instructions are given as to the duty and qualifications of the ploughman and driver.

No one could be a ploughman in co-tillage unless he could make a plough from the first nail to the last. Between them the ploughman and driver were responsible for the care of the animals and the plough, with the one exception that the owner of the plough-irons kept them in order.

The driver was expected to furnish bows for the yokes, also all rings and pegs needed for harnessing the team. He was also expected to yoke the cattle, and he was especially enjoined 'not to break their hearts' by overwork. The ploughman had to assist the driver in yoking, but in unyoking his duties were confined to unloosening the team nearest the ploughshare.

If in driving the driver injured any animal, he had to pay compensation unless he swore he had used it as he would have used his own. The ploughman was prohibited from beating or bruising his teams, and if he caused any bruise or injury he paid the owner compensation.

§ 9. The position of the oxen in the team was regulated by agreement, and no animal could be removed from the furrow side to the sward side without consent of the owner.

If by any chance the animal of any co-tiller died from over-ploughing, the owner was not compelled to furnish another, and he had an 'erw' cultivated for him, which was known as the 'erw' of the black ox.¹

Another regulation of interest is concerned with the quality of the ploughing. If any party thought his own 'erw' had not been ploughed properly, the ploughman's land was to be examined (hence the reason for ploughing his land first), and every one else's land was to be ploughed to the same depth and breadth.

When the ploughing was over, the oxen and implements were restored to their respective owners, who took them home. Co-tillage ended with the ploughing, and harrowing formed no part of the undertaking.

§ 10. Lastly, we must note the provision that disputes regarding co-tillage could be entertained by the Courts and disposed of summarily by the judge of the 'cymwd'; and, if a formal plaint were lodged, it went to the sessions and was disposed of there, not by summary procedure, but after invoking the whole procedure of the Courts.²

Moreover, the lord of the territory could enforce the keeping of a contract to co-till, and any one refusing to abide by an agreement, voluntarily entered into, was fined three kine, and the produce of the land belonging to himself, which was ploughed or to be ploughed, was handed over to the other parties.³

§ 11. Many of the provisions in the Welsh Laws as to co-tillage are no doubt meticulous, and in themselves not worthy of notice, but they assist us in obtaining an understanding of the circumstances to which they applied. On the one hand, they are obviously not confined to co-tillage by the unfree; on the other, they are inconsistent with an identification with the common tillage of the English manorial system.

Considered in detail, the rules appear to be concerned with the co-operation of individuals to secure for each one the cultivation of land occupied by him by means of contract.

¹ G. C. 726.

² XIV. 728.

³ G. C. 794; VI. 104.

PART VI
THE LAW OF CRIMES
AND TORTS

I

INTRODUCTORY

§ I. MODERN conceptions of crime presuppose the existence of two factors, a State whose laws or regulations are broken, and punishment inflicted by the State for a breach of those laws and regulations.

In archaic communities there was no State whose law could be infringed or which could inflict punishment for infringement.

That which we now call crime was, in such communities, an injury caused to an individual or a group of individuals bound together by a tie, generally of relationship real or assumed, and the remedy for an injury was for the individual or individuals injured to take revenge upon the person causing the injury.

The growing social consciousness of mankind, faced with the perpetuation of revenge upon revenge—the vendetta—attempted to meet the evil by instituting in the first place not punishment, but reparation. An injury, theft, murder, or what not, was not conceived of at first as a crime against the community which should be punished, but as a wrong or tort against a person or persons, to avoid vengeance for which the person injuring must pay compensation or reparation, according to a fixed scale sanctioned by custom.

The payment of compensation or reparation was enforced by public opinion. A person who did not submit to public opinion was ostracized, or, to use a modern term, outlawed, and the person injured was then entitled to fall back upon his original remedy and wreak vengeance without fear of reprisal.

Some communities, with which we are not now concerned, followed a slightly different line. They conceived of a wrong as a sin against a Divine Being, and substituted for the right of private vengeance the hope of divine punishment.

'Vengeance is mine, I will repay', and they removed, or attempted to remove, the operation of retribution from mundane authorities, and succeeded in confusing 'sin' and 'crime'.

This was only possible in a theocratic State, and everywhere it failed in its object.

It was only when a community obtained for itself an executive arm, the King, that tort developed into crime. The King at first enforced the reparation which was decreed by custom, taking a portion of the reparation as his due for enforcing it.

Gradually the conception arose that a tort to an individual might be a breach of the peace of the community or of the King, the executive arm of the community, and hence the conception of the King's peace, a breach of which was to be punished. Criminal Law was thus established.

§ 2. In English Law this conception obtained definite and final currency by the pronouncement in section 2 of the Conqueror's Law, though throughout the Saxon period there had been a steady growth, whereby the King's 'grith' or 'mund' had usurped the field hitherto held by 'tort'.

If we study the early history of any of the European peoples we shall find the King constantly and steadily extending the scope of his executive power, not for his personal aggrandizement so much as in the interests of maintaining peace in the community at the head of which he stood.

With the extension of his power, the protective organization of the tribe, clan, or kin gradually weakened, surviving only partly as the instrument which the King used to enforce his peace, and partly as the basis of a social or economic structure which the King did not interfere with.

§ 3. The growth from the period of vengeance, through the period of reparation, to the final period of punishment was nowhere marked by any violent alteration. The expansion was gradual and oftentimes uneven. So far as it is possible to say, with any degree of certainty, theft was the first matter which came to be regarded as a crime, that is as something for which reparation was not the sole appro-

priate remedy, but for which punishment must be awarded, and among the last torts to develop into crime was killing.

§ 4. The result is that in all early systems of law, into which the conception of crime has entered, we find surviving rules regulating the exercise of vengeance and fixing reparation, as well as rules establishing punishments. Sometimes vengeance is still regarded as the remedy for murder; sometimes the exercise of vengeance is regulated by limiting or fixing its extent, as in such rules as 'an eye for an eye, and a tooth for a tooth'; sometimes we find vengeance bought off by paying reparation; sometimes reparation is paid and punishment also awarded; and sometimes we find Criminal Law triumphant and punishment alone meted out.

§ 5. In the Welsh Law of 'crime' we come across all or most of these remedies existing side by side; and unless we bear in mind that the laws of Hywel Dda were codified in an age when new and old ideas jostled against each other, we will be unable to appreciate the historical value of those laws.

There is little or nothing in the whole of the Welsh Law of crime peculiarly indigenous to Wales: there is a counterpart for practically everything we find there in some or other system of more or less contemporary law, but here again the exceptional value of the old Welsh Laws lies in the fact that no other legal survivals give such a vivid, clear, and concise view of what the law was as do the so-called Codes of Hywel Dda.

II

THE LAW OF PUNISHMENT

§ 1. BEFORE considering the details of the law of torts or crime we have first to state what had been established as recognized forms of 'punishment' for crimes in Wales in the time of Hywel Dda, and what was the object or theory of punishment.

§ 2. The Welsh Laws make no attempt to urge that the object of punishment was reformation. The theory of punishment is a very simple one. It is summed up in the simple aphorism: 'The law says that whoever shall break its commandments is to be punished.'¹

That is to say, punishment was necessary for the maintenance of peace and order. To us that would seem to be almost a platitude, but when we consider how recent it is that that principle has been accepted, and how, in the matter of so-called political crime, it is whittled down under the influence of an hysterical humanitarianism, credit must be given to the old Welsh lawyers for their grasp of an essential first principle.

§ 3. In another matter the Welsh Laws show the same grip on first principles. It is beside the purpose here to describe the complexities and difficulties that exist in the English Law of to-day relative to conspiracy and overt acts. All this complicated learning is absent from the Welsh Laws: it is brushed aside by the simple provision that there can be no punishment for intention or thought without act.

The first test to be applied is always the act done. Not that intention was left out of consideration, when there was proof of an act having been done. It was left outside of consideration in the law of reparation to a very large extent; but what differentiated an act for which reparation was

¹ XI. 412.

due from one for which punishment must be awarded was the intention with which the act was done. There might be reparation due, but no punishment for 'error without deed'.¹

The classification as a crime of an act done was determined by the intention with which it was done. For example, when we deal with theft, we will see that the act of taking the property of another was theft, surreption (a lesser offence), or error (which was no offence at all), according to whether the act of taking was deliberate and dishonest, deliberate but not dishonest, or committed through mistake. Again, in the law of murder we shall see that where the act of killing was justified as having been done in self-defence or with the consent of the person killed, the criminality of the act was wiped out; and yet again in the law of accessories or abetment we shall find a scientific determination of the penalty according to the nature of the act of abetment.

The importance of intention is also apparent, as already indicated, in the differentiation between the making of reparation and punishment.

The law provides that every act causing injury or insult—subject to some few exceptions to be noted in due course—whether injury or insult were caused intentionally or not, was to be redressed; that is to say, the person injured in person or property was to be compensated by the payment of reparation. Over and above this, where there was intention—intention being established and measured by the circumstances in which the act was committed—there was a penalty or punishment payable to the King as representative of the peace of the community.

§ 4. The distinction between and the coexistence of reparation and punishment must never be lost sight of in Welsh Criminal Law. Not only was reparation almost always payable, but where penalties were attached to an act, those penalties were generally additional to and not in substitution for the reparation. There was a coexistence of injury to the individual or his kin with the breach of the

¹ IX. 270; XIV. 596, 648.

King's peace; there was not, as we find in modern law, a deprivation of the individual's right to compensation when the law punishes for a breach of its peace.

This coexistence of reparation and punishment for the same act colours the law of procedure. It explains why there could be both a civil action for theft, that is an action to recover stolen property, and a criminal action to secure the punishment of the thief.

§ 5. The importance of intention as determining the criminality of an act finds forcible expression in the law relative to persons incapable of crime.

Over and over again we find it asserted that certain people could not be punished for their acts; but, though they could not be punished, they or their kinsmen must make good the damage done by them. The act done must be repaired, but as the persons committing the act could not in law have an intention, they were not to be punished. Youths under seven and idiots were never to be punished. Persons intoxicated were also exempt; so too were persons committing an act under duress or compulsion; and, according to some authorities, those who were deaf and dumb, a rule also existing in Ælfred's Laws, c. 14.

Incomplete intention was also recognized in the rule that a youth between seven and fourteen could be punished only by a 'dirwy' or fine, the liability for which fell upon the father, who was responsible for controlling a son in the exercise of his intention.¹

§ 6. Among the kinds of punishment recognized in the Welsh Laws the death penalty naturally comes first. It was confined to deliberate homicide, certain acts of theft, treason, and, according to some authorities, arson.

The death penalty was always by hanging.

§ 7. The second recognized form of punishment seems to have become extinct by the time of the codification. We see from the laws that, for theft and offences tried under the law of theft, there was a time when certain criminals were either handed over in bondage to the person whom they had injured, or were sold by the King into bondage.

¹ V. C. 200-2; XIV. 648, 662.

We frequently come across the phrase 'saleable thief', but it is clear from the laws that the practice of selling a criminal into bondage no longer existed. The sentence was still preserved, but what happened was that a man sentenced to be a saleable thief was permitted to redeem himself by payment of his sale worth, that is £7, failing to pay which he was not sold, but banished.¹

§ 8. The two common punishments in Welsh Law were the 'dirwy' and the 'camlwrw', both of them fines. The former was fixed at twelve kine or £3, and was the appropriate penalty in cases of theft absent, violence and fighting, and the latter at three kine or 180 pence, the appropriate penalty for the major portion of other crimes.

The 'camlwrw' could be imposed for all offences, however minute, though we are told that, inasmuch as no complaint could be admitted where the subject-matter of the offence was less than one penny, 'camlwrw' could not be imposed for less than a penny.

It could be imposed for disobedience to the King's orders, and for a host of minor petty misdemeanours against the King's authority.

Just as in Roman Law penalties could be doubled and trebled, so a 'camlwrw' could be single, double, or treble, according to the nature of the offence, and we find also that a 'dirwy' might be doubled, but never trebled.²

§ 9. Mutilation as a punishment is mentioned, but it was confined to one or two cases only, and then only when the offender was a bondman previously convicted. It was not a punishment which could be inflicted on a freeman, nor upon a bondman for a first offence.

§ 10. Spoliation or forfeiture of movable property is also mentioned, principally in the Triads. Forfeiture of land was permissible only in cases of treason and murder by waylaying.

§ 11. The punishment of banishment is only once referred to as a substantive penalty, the occasion being where a man killed a kinsman.

¹ V. C. 252; D. C. 418; G. C. 702.

² V. C. 222; VI. 100, 120; XI. 408; XIV. 612-14.

It was a punishment commonly applied in default of 'dirwy' or of the redemption value of a saleable thief, but it was not pertinent for failure to pay 'camlwrw'.

A person banished was exiled from his countryside. A picturesque account is given in the Triads, an expansion of what is said elsewhere in the Venedotian Code.

The true law was that a man banished must leave the country the next day, and was given a day for each 'cymwd' he had to traverse.

Should he return, he could, according to some authorities, be rebanished once, but only once. On the second return, and, according to others, on the first return or on failure to remove himself in the time fixed for doing so, the exile, if found nine paces within the territory from which he had been banished, was to be executed, and neither sanctuary nor relics protected him. The only ground for exempting him from execution which he could claim was that he was returning along the high road to reconcile himself with the King.¹

§ 12. Somewhat similar to the punishment of exile was that of food-forbiddance. The penalty of food-forbiddance could be passed where there was a contempt of lawful summons, or where a person sentenced to a 'camlwrw' failed to pay it.

Food-forbiddance was simply an edict prohibiting every one from giving food or shelter to the person named; it did not entail exile, but was a legalized boycott effective until the offender submitted to law. Any one disobeying the edict became liable to a 'camlwrw' for supporting the offender.²

§ 13. Imprisonment for a term is nowhere mentioned in the Welsh Laws. We know there were means of restraining liberty in ancient Wales, for the porter of the palace was a jailor, and the smith of the Court made 'gyves'; but imprisonment for a term was not a penalty inflicted for any offence against the laws. Imprisonment was permitted to secure a man arrested for an offence for whose appearance security was not given, and as a punishment for disobedience

¹ V. C. 244; VIII. 196-8.

² V. 60; XI. 398; XIV. 612-14.

to a lord's legal order, but not for an offence known to the older laws.

In one passage of the XIVth Book we are told that imprisonment could be imposed for theft in hand; but the circumstances of the context make it clear that the word 'imprisonment' is either an error or a later substitution for the death penalty.¹

§ 14. The last punishment mentioned is the forfeiture of status. This was confined to treason and some cases of theft. It was additional to the substantive penalty.

§ 15. Mitigation of penalties was permitted. The King or lord had the prerogative of mercy, and could remit any penalty, or reduce the 'camlwrw' from 180 to 3 pence, but he could not transfer his right to recover the redemption price of a thief.²

The rules of the Welsh Laws as to punishment are, for the period, humane, and there is a well-balanced effort to apportion the penalty to the crime.

§ 16. The Irish Laws are, in many respects, comparable to the Welsh Laws in the matter of punishment.

Though Ireland had no regular courts, the idea of the King's or Chief's peace existed, and we find the conception of punishment for breach thereof in embryo.

Those laws lay emphasis on the distinction between an injury caused with intention and one caused inadvertently. On this point they go rather farther than the Welsh Laws in making intention punishable, when an act other than that intended was committed. 'An eric-fine', it is said, 'is due by a man when he went to do injury to a lawful man in his proper place, and the injury intended was not inflicted'; but a distinction is drawn in the law of Exemptions between injuries caused deliberately and those not so caused or done in lawful anger, the law permitting a reduction in the reparation payable in the latter case, though in every case some reparation must be made.

The Irish Laws are similar to the Welsh ones in regard to the persons capable of crime. There is the same rule relative to boys under seven and under fourteen: 'A boy

¹ XIV. 612-14, 622.

² X. 330.

ceases to be a fool and becomes sensible at seven, and of half sense at fourteen', and in the *Senchus Mór*, clerics, women, boys, those incapable of wounding, protecting, or forbidding (that is acting in self-defence), imbeciles and incapables were all exempt from punishment. At the same time reparation must be paid by relatives, though on this point it is said in the *Book of Aicill* (III. 159) that some authorities gave the uninstigated fool, committing a furious assault, over to chastisement.

The actual punishments inflicted in Irish Law for crime as distinct from reparation are not clearly stated. The differentiation was in embryo, but there are incidental references to banishment and punishments for feeding an outlaw, but nothing more.

Communal responsibility for reparation is fully maintained.¹

§ 17. The early English Laws contain no theory of punishment. The conception of crime was fully established, but there are very distinct traces left, up to and beyond the time of the Conquest, of most acts being regarded as torts against individuals, and of the communal responsibility of kinsmen to make reparation for murder, theft, and insult.

The characteristic of most penalties is compound: penalties generally consisting of 'bôt' or reparation together with 'wite' or fine.

In so far as there was any theory as to the object of punishment in English Law it would seem, by the very savagery of some of its rules, to have been to prevent crime by striking terror.

We have, as in Wales, a system of fines of varying degrees, we have also almost no trace of punishment by imprisonment; but in the English provisions for death and mutilation we have regulations absent from the Welsh Law.

The death penalty was common, and till Æthelstan's time it could be inflicted for the offence of 'theft present' on any child of the age of twelve. Even his amendment, which raised the age to fifteen, did not apply to a fugitive or one evading capture or one guilty of a second offence.

¹ Bk. of Aicill, III. 139, 157, 347; *Senchus Mór*, I. 179, 243.

This continued to be the law till a late period, *vide e.g.* *Ecgberht's Excerpts*, c. 96:

'Parvulus usque annos XV pro delicto corporali disciplina castigetur: post hanc vero aetatem quicquid deliquerit vel si furatur retribuatur seu etiam secundum legem exsolvat.'

In London, under the *Judicia Civitatis*, c. 1, the old age of twelve was maintained, and in the time of Ine we see it was as low as ten.

But it was in its provisions for mutilation that the early English Law revelled.

The Laws of Cnut were a conscious effort to mitigate the severity of the ordinary punishments. The second paragraph of his *Secular Laws* gives the keynote to what follows:

'We command that Christian men be not on any account for altogether too little condemned to death; but rather let gentle punishment be decreed for the benefit of the people; let not be destroyed for little God's handywork, and his own purchase which he dearly bought.'

What was regarded as 'gentle punishment' may be inferred from cc. 30, 32.

Under c. 30 any one twice convicted was to have his hands or his feet or both cut off, according to the nature of his offence, and should he thereafter 'have wrought greater evil', the law said 'let his eyes be put out and his ears and the upper lip be cut off, or let him be scalped'. Under c. 32 should a 'theow' fail in an ordeal he was branded for the first offence and executed for the second, while under c. 36 a perjurer was to lose his hands.

In the laws of Ælfred, c. 25, and of William the Conqueror, c. 17, emasculation was the penalty for violation, and there is a grim humour in the *Carta Regis* of the Conqueror, desirous of straining the quality of mercy by reducing the occasions on which the death penalty could be inflicted:

'Interdicimus eciam ne quis occidatur vel suspendatur pro aliqua causa, sed enerventur oculi et abscondantur pedes vel testiculi vel manus, ita quod truncus remaneat vivus in signum prodicionis et nequicie sua.'

Perhaps the horrors of the early English system of punishments will be sufficiently indicated by reference to the provision in Æthelstan's *Law of Witlanburh* that a thief when

sentenced to death was to be broken on the wheel, and to the rule which Cnut abolished and which is quoted in his laws thus :

‘ In the old law (where stolen property was found in a man’s house) the child which lay in the cradle, though it had never tasted meat, was held by the covetous to be equally guilty as if it had discretion.’

Forfeiture of property was known in the early English Law : it was under Cnut’s Law the ordinary penalty for a ‘ flymo ’ or fugitive (Secular Laws, c. 13). ‘ Wites ’ or fines of varying extent were common, which could be trebled and quadrupled, and the sale of persons into slavery, even beyond the seas, finds occasional expression. In such cases, however, it would seem that the sentence of slavery could be avoided as in Wales by the payment of the redemption value of the person sentenced.

Banishment, as distinct from slavery, does not occur in the early English Laws, either as a substantive or an alternative penalty.

§ 18. In the numerous Germanic Laws we have much the same characteristics as in English Law ; but we need only here concern ourselves with noting that those laws maintained the coexistence of reparation and punishment. It is perhaps sufficient to quote the *Lex Baiuor.*, Tit. II, wherein we find the idea of reparation by slavery best expressed.

After saying that treason was the one irredeemable offence, it proceeds :

‘ *Ceteras vero quascunque commiserit peccatas, usque habet substantiam componat secundum legem, si vero non habet ipse se in servitio deprimat et per singulos menses vel annos quantum lucrare quiverit persolvat cui deliquit donec debitum universum restituat.*’

III

‘SARAAD’ OR INSULT

1. *Definition of ‘saraad’.*

The first offence to consider is that of ‘saraad’. Throughout the whole of the Welsh Laws ‘saraad’ remained a tort, and at no time is there any trace of its growing into a crime.

The term ‘saraad’ means primarily an injury to honour or insult, and secondarily the reparation payable to the person insulted. It must not be confused with injury to life and limb, for which there was a separate and additional compensation.

Every man and woman had a ‘saraad’ value or honour-price, which we have already described in the chapter on the Worth of Men and Things, and this honour-price was the measure of compensation payable to a person suffering insult.

2. *Acts causing ‘saraad’.*

§ 1. Insult to a man consisted in striking, assaulting, or taking from him by violence, i. e. theft openly committed in the presence of the owner by threat, intimidation, or force.

In secret theft there was no insult, inasmuch as there was no show or use of intimidation or force insulting the personal honour of the man deprived of his property.

Striking included pulling a man’s hair or beard, and the placing of the hand, during the making of a bargain, on the shoulder of the other party instead of in his outstretched hand, was likewise ‘striking’.

The act of insult was additional to any other offence caused by the act, e. g. when a man was murdered there was insult for the blow as well as homicide.¹

§ 2. In addition to these acts, which were insult to all

¹ e. g. V. C. 260 ; D. C. 508 ; G. C. 700 ; VI. 108 ; XI. 448 ; XIV. 644.

men, a number of other acts was insult to particular individuals.

Insult to a married man was committed by 'misuse of his wife' (which is defined as adultery, kissing, and caressing), by violation of any 'protection' he was authorized by custom to give to another, and also by the use of rude words uttered by his wife to him. Insult by adultery was compensated for both by the wife and her paramour.

Insult to an official was likewise caused by violating the right of protection granted to him.

Insult to the King was caused by violating his 'protection', killing his messenger, or murdering a man of his when in conference on his own boundaries with another lord, if such murder were committed by a man of the other lord in the presence of the lords and their hosts. Violation of the King's highway, which protected every one, is also mentioned as an insult to the King, likewise the violation of a woman within his dominions.

§ 3. Insult to a woman, married or unmarried, was caused by striking her, by violation, by kissing or caressing her against her will, and by desertion by the man to whom she had allied herself by 'personal bestowal'. Kissing and caressing were not insult to a woman, if occurring while indulging in the game of skipping, or during a carousal in honour of the arrival of some one from a distance.

Violation of a woman of easy virtue was not insult to her; it was an offence, but the woman had no honour, insulted by the act, to be compensated for. Other insults, however, to her involved the payment of honour-price. So also no honour-price, other than a contemptuous penny, was payable to a woman voluntarily surrendering herself.

§ 4. Special compensation or 'gowyn' was due to a married woman for her husband's adultery or for a beating administered without just cause. This insult is commonly called 'wynebwerth'.

Just cause for chastisement occurred when the wife gave away things she was not entitled to give, when she was discovered flirting with another man in a covert, and where she had been offensively rude to her husband.

The insults to the Queen are specially mentioned, and consisted in violation of her protection, striking her and taking things from her by force. These, however, as we have seen, were common to other persons as well.

§ 5. The Welsh Laws give, in very great detail, the extent of the protection (*nawd*) that could be granted by the King or an officer of the Court: the exact limits of each one's protective area or precincts are given, a breach of which was insult to the protector, but the protection affordable by a non-official is not defined, though it would seem it was similar to that in the Irish and English Laws, and covered the actual house and nine paces around.

§ 6. Special honour-price was payable also to the kinsmen of a murdered man by the murderer, by one who despoiled the corpse or by one who struck the corpse with his foot. This was always additional to and paid before the blood-fine.

Special honour-price or 'wynebwerth' was also payable to a judge, the correctness of whose judgement was wrongly challenged.

Notice must not be omitted, too, of the fact that insult could be caused by a father chastising his son after the latter had attained the age of fourteen.

3. *Necessity of intention in insult.*

§ 1. For there to be insult there must be 'onset and attack', that is the act must be intentionally committed and the person insulted must be cognizant of the 'onset and attack'. There could be no insult, therefore, in an unintentional or accidental blow; but if such blow resulted in blood or a wound or a conspicuous scar, the injury had to be compensated for as an injury, and not as insult. So, too, if a man shot an arrow at another, and it transfixed two men, honour-price was payable to the man against whom the insult was directed, but not to the second man; for, though the act was illegal and injury caused to him had to be compensated for, there was no insult to him, as there was no intention to insult him.

§ 2. Again, if two men were walking through a wood in single file, and the one in front let a branch swing back so

as to strike the one behind, causing him to lose the sight of an eye, no honour-price was payable, for the blow was unintentional; but the loss of the eye had to be compensated for, unless warning had been given, on the general principle that for every injury committed unwittingly there must be redress wittingly.

§ 3. So there could be no honour-price for murder by poisoning, for the person poisoned was not cognizant of 'onset and attack'; nor was honour-price payable for an act accessory to murder, the onset and attack being by the murderer and not by the accessory.¹

4. *Justifiable and permissible insult.*

§ 1. But every intentional blow was not insult. Some intentional blows are recognized as justifiable. If a father gave his son, under the age of fourteen, a slap in correcting him, there was no insult.

The Anomalous Laws also say that there was no insult in a blow in lawful anger, which appears to mean a blow in self-defence. In self-defence of body or property a blow or injury might be inflicted if the effect were similar to that which it was intended by the aggressor to inflict upon the person acting in self-defence, and the right of defence of property allowed the killing of any one found in the King's chamber at night without a light in his hand.

Likewise honour-price was not paid where there was a fair open fight, though the injury or wound would have to be paid for if one side only were injured. If both sides were injured the injuries compensated for each other.

Honour-price was not payable also if an insult were avenged. Hence abuse for abuse wiped out the insult.²

§ 2. Certain permissible insults to the officers of the Court are mentioned, which display, as do so many other passages in the Laws, a strain of not unconscious humour.

The 'land-maer' could not complain of insult if he were insulted by the servants of the Court when he got in their way while carrying drink or victuals for the hall from the kitchen or mead-cellar.

¹ V. C. 220; D. C. 508, 598, 600; IV. 2; V. 40, 44, 46; VIII. 210; X. 326, 382.

² D. C. 442, 600; X. 326, 362; XI. 408.

The keeper of the door, if he left his charge for the distance of the length of his arm and rod after the King had entered the hall, could claim no honour-price, as a reminder to him to keep within the circle of his duties.

The usher, if he were rash enough to seat himself while in Court, also exposed himself to insult, as he was not allowed to sit in the presence of the Court. If insulted, he received a farcical honour-price of a sieve of oats and an eggshell in North Wales, a sieve of oats and an addled egg in Dinefwr, and a bundle of chaff and an addled egg in Gwent.

The dignity of the chaplain of the household, of the judge of the palace, and of the medical attendant of the King could be offended with impunity whenever they were intoxicated, 'for they know not when the King may need them'.

§ 3. The rule that it was intention that made a man liable to pay honour-price involved the conclusion that a boy under fourteen could not cause insult, though one passage limits the freedom to be rude to a child under seven. Along with the irresponsible child was the irresponsible idiot. At the same time they could not suffer insult, nor could a leper nor a dumb person, but injury to them entailed compensation and perhaps even a 'dirwy'.

Likewise a bondman had no honour-price, but injury to him had to be paid for to his owner, and adultery with a bondwoman, while not insult to her, was an injury to the lord for which 12*d.* was exacted, and if the woman died or became enceinte the offender had to supply another in her place.

§ 4. Insult being dependent upon intention there could be no insult where a man was killed or injured by the act of an irresponsible animal, by the falling of a tree after warning, or by the bite of a mad dog.

§ 5. Two interesting cases occur where honour-price was payable for insult, in which there would have been neither honour-price nor blood-fine if the person insulted had been killed.

If a person were falsely accused of murder and did not

trouble to deny the charge, or if a person, mulcted in a blood-fine, failed to pay the full amount due by him, he could be killed with impunity; but if he were insulted, without being killed, honour-price must be paid for the act of insult.¹

5. *Rate of honour-price.*

§ 1. The rate of reparation for insult we have already stated in the Law of the Worth of Men and Things. We have also there noted that there could be augmentation in some cases.

Honour-price was augmented once, twice, or thrice, if a conspicuous scar were inflicted on the foot, hand, or face. It was trebled where a wife was abducted or violated, and doubled for adultery.

§ 2. For insult caused to a wife the reparation was payable to the husband and could be augmented and diminished. In the case of a kiss it was reduced to two-thirds, while adultery increased it, the standard rate being for caressing.

6. *Recipient of honour-price.*

§ 1. Generally speaking, the sufferer of an insult received the honour-price.

Exceptions to this are the case of the Queen, two-thirds of whose honour-price went to the King; a bondman, who had no honour-price, but whose injury-value went to his lord; a wife, with whom adultery was committed, the insult there being not to her, but to her husband; and a cleric, his honour-price, fixed by the Church, going to the Church, though one authority gives in the latter case two-thirds to the King.

§ 2. Where honour-price was payable for insult to a corpse, it is said that a third went to the widow, if the deceased were married, the rest being added to and shared with the blood-fine, according to some authorities, and, according to others, paid to the relatives within four degrees.

If the murdered man were unmarried, it went, according to some authorities, likewise to the whole 'galanas-kin'; but, according to others, to relatives in the fourth degree, or to the father, mother, brothers, and sisters.

¹ D. C. 598.

The Venedotian Code limits the sharing to relatives in the fourth degree, while conceding that other authorities admitted the 'galanas-kin' to a share. In all cases where honour-price was payable for murder, one-third went to the King as his exacting third.

7. *Contributors to honour-price.*

§ 1. As regards payment of honour-price, generally speaking, the offender paid it himself. If he were a bondman and he insulted a freeman, the insult could not be compensated for, as the bondman had no property. The bondman was liable to have his right hand or foot cut off—one of the few cases of mutilation mentioned in the Codes—unless the master redeemed him by paying the value of the limb plus the honour-price.

§ 2. Even in the case of murder, though it would seem that the kin might be responsible to pay it, the Gwentian Code, p. 702, provided that no kinsman need pay honour-price if the offender had property of his own; and, if he had not, then it was leviable only on relatives in the fourth degree.

§ 3. It is possible that custom varied, but the trend of authority is to the effect that it was, in all cases except where murder was committed, the duty of the offender to pay, and in cases of murder it was the duty of relatives within the fourth degree to contribute.

§ 4. There could be no prosecution for insult, because it was not a crime. Honour-price due, but not paid, could be recovered by a quasi-civil suit, which must be filed by the person insulted, the truth or falsity of the ground of action being determined by compurgators.

8. *Honour-price in other laws.*

§ 1. In England, Ireland, and Scotland there was a law of honour-price, but in none of them are its principles so clearly asserted as in the Welsh Laws.

As we have already seen in Irish Law, the honour-price was termed 'eneclann'.

Honour-price was in Ireland determined, as in Wales, 'according to dignity', and the offender's own honour-

price suffered entire 'diminutio capitis' for theft, treason, fratricide and secret murder, and partial for other offences, until he made reparation.

Under Irish Law, 'eneclann' was payable for personal insult, violation of a virgin, attempted adultery, quarrelling in precincts, injuries to the body (in addition to compensation), theft of a woman against the will of the tribe or husband, and satire.

§ 2. It is, however, in the law of 'protection' or 'precincts' that the Irish Laws throw a most interesting light on the Welsh Law of 'nawd'.

Every person in Ireland had a 'maighen', a precinct or area of protection, in which he had the right to insist on peace being kept. The area of the 'maighen', said to have been determined at a convention of the men of Erin at Siab Sliabh Fuaid, varied according to rank, just as the Welsh 'nawd' of officials varied, and was often fanciful.

The object of the 'maighen' was to protect the right of the owner to quiet enjoyment thereof in extending the duty of hospitality, and not for the purpose of protecting a fugitive.

The violation of a 'maighen' was compensated for by a fraction of the 'eneclann'.¹

§ 3. The Irish Laws are also of interest as showing how the Irish capacity for meticulous calculations found ample scope, for they carried the idea of insult much further than did the Welsh, e. g. in a case of theft in a house the Brehons discovered no less than seven persons, besides the owner, whose honour was offended by the act of theft, and many crimes or torts entitled the victim to 'eneclann' in addition to compensation for the loss occasioned.

But perhaps as throwing some light on the persons entitled to share in 'eneclann' the Irish Laws are of most comparative value, for they definitely rule that 'eneclann' did not concern the 'fine', and it never ascended beyond the brother of the person insulted, and it descended only among male lineal descendants.

§ 4. In English Law the law of insult was in process of

¹ Ir. Laws, I. 67, 165-7, 171, 459; IV. 227, 299.

developing into a crime by the time of Æthelberht (c. 2) and of Hlothaire and Edric.

There was for insult a twofold 'bôt' as reparation to the person insulted, and a fine to the King, and in some cases even a third 'bôt', where the insult was uttered on the land of a third person.

We do not, however, get it clearly enunciated in the English Laws that the 'bôt' for insult was additional to the 'bôt' for injury, where both insult and injury occurred together.

§ 5. The English Law shows distinctly that the law of precincts prevailed there. In fact the value of such provisions as there are in English Law relative to insult is mostly in connexion with the law of precincts or 'tûn'.

In the Laws of Æthelstan IV, c. 5, for example, for the King's 'grith' or protection a definite area round the palace was fixed as precincts. In the Laws of Æthelberht, cc. 8, 15, and 17, penalties for 'mund-byrch', that is the breaking of the peace in a third person's precincts and for the breach of a man's 'tûn', are stated; while the breach of the sanctity of the premises of a 'ceorl', specially termed 'edor-byrch', is separately provided for in c. 27.

In the Laws of Hlothaire and Edric (cc. 11, 12, 13, 14) the utterance of insults within, the commission of offences upon, and the bloodying of the earth of, the 'flat' (homestead) of a 'ceorl' had to be compensated for by payment of penalties both to the 'ceorl' offended and to the King. In the Laws of Ælfred, cc. 36, 39, compensation was provided for as payable to all house owners, whether 'ceorl' or six- or twelve-hynde men, for fighting on their respective 'flats', and in c. 40, which more or less reproduces Ine's Laws, c. 45, for trespassing upon the 'burh' of any one. Similarly, we have numerous references to enhanced penalties for the breach of the 'grith' or 'frith' in Church and palace,¹ while the VIIth Law of Æthelred consists almost entirely of a statement of the law of precincts as it had

¹ See, e. g. Æthelberht's Laws, c. 2; Dooms of Ine, c. 6; Ælfred's Laws, cc. 6, 7, 38; and Æthelstan's Laws, c. 5; Cnut's Eccles. Laws, cc. 2, 3; and his Secular Laws, cc. 59, 60.

formerly stood, and then stood in Kent and in North and South Anglia.

§ 6. Full details as to what constituted insult in early English Law are not apparent. Personal abuse was insult, and that there was a correspondence with the Welsh Laws seems likely, for we find 'feax-fang' or pulling a man's hair entailing a special 'bôt' of 50 'sceatts' in Æthelberht's Laws, a provision which also occurs in the *Lex Frisionum* III, c. 40.

The English Law treated adultery exactly as the Welsh Law did, viz. as a tort and not as a crime. It was part of or cognate to insult. The 'bôt' payable, in so far as regards slaves, adultery with whom was a tort committed against the owner, is detailed in the Laws of Æthelstan, cc. 10, 11, 14, and 16, as regards 'esnes' in c. 85, and as regards freemen in c. 31, also in Ælfred's Laws, c. 10, and the Secular Laws of Cnut, c. 51.

The Laws of Æthelstan and the Conqueror fix the 'bôt' as equivalent to the 'wergild', with the additional penalty that the offender must buy a new wife for the injured husband.

In the Laws of Ælfred, cc. 11, 18, we have similar provisions to those pertaining in the Welsh Laws relative to insult by caressing, and to the right of a woman to compurgate herself when charged therewith.

The Laws of Cnut, however, make adultery a quasi-crime when committed by a wife, and provide that she forfeited all her property to her husband and had her ears and nose cut off (c. 54).

§ 7. The fragments of Scots Law are similar in character. Not only is there, as already noticed, in the 'Leges inter Brettos et Scottos', a scale of 'kelchyn' or honour-price, but we find that where homicide occurred there was a special sum, in addition to 'cro' or 'gallnes', payable to the owner of the precincts in which the homicide was committed. This insult to protection was valued higher than the 'kelchyn' to the person.

So, too, we find in the same Leges that in case of homicide, at least of a woman, the 'kelchyn' was paid separately

from the 'cro' and 'gallnes'. The former went to the husband of a free woman or the lord of a 'carl' woman, while the latter went to the woman's kin.

The same rule regarding precincts occurs in the Laws of King David I :

'Gif wythin gyrrh or ony place quahar the pece of the King or of the lord of the tenement beis askyt ony man thruch il will lytis his neff to stryk anothis . . . he sal geyff to the King IIII ky, and to him that he walde haf strikyn a blow.'

§ 8. Traces of the same law are found throughout the German Codes, valuations being given for different insults.

Adultery and immorality of a woman was insult to her husband,¹ or to the relatives,² and not a crime; undue familiarity by caressing, pinching, &c., was insult to the woman,³ to which in some laws⁴ a 'wergild' was added; common abuse and insult also entailed compensation;⁵ adultery with a slave was insult to the lord,⁶ compensated for at fixed prices.

Insult by breach of precincts of the Church or palace is also frequently mentioned.⁷

¹ *Lex Salica*, Cod. I, 15; *Lex Alamman.*, Tit. LI; *Lex Burgund.* VIII, XXXVI, XLIV.

² *Lex Sal.*, Cod. I, XXV; *Lex Alamman.*, Tit. LI; *Lex Langobard.*, cc. 184-9.

³ *Lex Sal.*, Cod. I, XX.

⁴ *Lex Frision.* IX; *Additio Wulemar*, &c.

⁵ *Lex Sal.*, Cod. I, 30, 75.

⁶ Cod. I, 25; *Lex Sal.*; *Lex Alamman.*, Tit. LXXXII; and *Lex Burgund.*, Tit. XXIV.

⁷ e. g. *Lex Alamman.*, Tit. XXIX, XXXI; *Lex Baiuor.*, II, cc. 10, 11 XI; *Lex Burgund.*, Tit. XV, XXV, CIII; *Lex Langobard.*, Ed. Roth., cc. 34, 40; *Lex Saxon.*, c. 2; and *Lex Angl. et Werion.*, c. 50.

IV

'GALANAS' OR HOMICIDE

1. *Introductory.*

§ 1. Homicide is the first of the three 'columns of law'. It is of particular interest not simply because we know that the same view of killing was taken by nearly all European peoples, but because in no legal survivals are the full ramifications of the law presented with quite the same completeness as they are in the Welsh Codes.

§ 2. In its inception homicide was a tort, for which vengeance was due, and we see in the Welsh Law relating to it the full expansion of the law of reparation in lieu of vengeance and the beginnings of the idea that killing was a crime.

At the time of the redaction of the laws the indiscriminate right of vengeance had disappeared. The amends for killing was payment of reparation, to which was added, in certain cases, punishment when the killing was deliberate.

§ 3. Llywelyn ap Iorwerth or his son Dafydd is credited with having abolished the old law of 'galanas' in Wales, but its complete abolition did not take place until the Statute of Wales was passed at Rhuddlan.

In the interval between Hywel Dda and Llywelyn there was indubitably a development of the tendency towards substituting the conception of crime for tort in respect of killing, but the force of customary ideas was strong enough to keep the conception of tort more alive in killing than in any other class of wrongdoing.

2. *Definition of 'galanas'.*

§ 1. Just as the term 'saraad' had a double meaning—the insult offered and the compensation payable therefor; so, too, the term 'galanas' had a double meaning—the killing of a person and the compensation which had to be paid for the killing, estimated according to the status of

the person killed, the amounts of which, the blood-fine, have already been stated in the chapter on the Worth of Men and Things.

§ 2. Homicide is defined in the Dimetian Code, p. 404, in the following words: 'Galanas yw llad dyn, Galanas is the killing of a man'; that is homicide was not merely premeditated murder, but homicide in any circumstances whatsoever, even accidental slaying, and though the definition includes only men, the law applied equally to the slaying of women.

§ 3. We must not, however, suppose that every killing carried with it of necessity the liability to make reparation, or that the reparation for all killing was the same.

Brynmor-Jones in his article on 'Foreign Elements in Welsh Mediaeval Law',¹ implies that blood-fine was due for all killing at the time of the Codes, and that mitigation of that rule is to be found only in the Anomalous Laws. It is possible that originally all killing did entail vengeance; but the mitigation of that rule, if it were ever of universal application among the Cymry, was coincident with the growth of the idea of reparation. It is a mistake to suppose that, in the earliest Welsh Laws we have, killing always involved the payment of blood-fine.

There are very distinct references to the fact that it did not.

§ 4. Though no express attempt is made in the Codes or laws to distinguish between different grades and kinds of killing, there is no doubt that such distinctions were recognized. The laws recognized a distinction between what we may term justifiable or excusable homicide, accidental homicide, and deliberate homicide with or without aggravated circumstances. They further recognized that certain persons were not subject to any penalty for killing, e.g. persons of unsound mind and children.

§ 5. Homicide committed in self-defence was not visited with any liability to reparation or penalty. It is true that in the Codes the exercise of the right of self-defence is not mentioned; but there is mention even in the Codes of

¹ Trans. Cymm., 1916-17.

facts which excused homicide, and the references in the Anomalous Laws are too detailed to lead us to suppose that the idea of self-defence was altogether a new growth. In fact they expressly credit the excuse of self-defence to Hywel Dda.

According to the Anomalous Laws, every one in Wales was entitled, in the exercise of this right, to cause just as much harm in defence as the person attacking and defended against was in the act of perpetrating. To avoid being killed, killing was justifiable; to protect property the thief could be killed. In the words of the laws :

' If a person injure another, whatsoever injury it may be, if in defence by the one injured, and the effect be similar to what was attempted to be inflicted on himself, he is not to make any reparation by law, nor to suffer punishment on the part of the lord. . . . Every one is at liberty to make a defence in a similar mode and cause as he is attempted to be injured. . . . If a person, in the defence of himself or his property, kill another, he is not to make reparation, if in sincerity he can prove it to be true that in defending himself or his property he committed the deed.'¹

§ 6. We find also in the laws and Codes constant references to what are termed 'lawful disturbances' (*thrywf cyfreithiawl*). Where a person was wrongfully kept out of possession of his 'tref tadawc', it is said he could enter upon it and commit one of the three lawful disturbances, viz. breaking a plough on the land, burning a house and killing a person thereon. Not all the references contain the latter; the Codes themselves mention only the two former, but the Anomalous Laws frequently include the killing of a man. This, though sometimes presented as a case of justifiable homicide, was not really so. Some of the references distinctly say that killing is not lawful, and that the effect of killing in a 'lawful disturbance' was something quite different from justification. Such killing entitled the person, who had so killed another, to plead, as a reason for extending the limitation within which he might sue to recover his 'tref tadawc', the fact that he had committed the offence, not by proving the offence itself—for the law regarded that as iniquitous—but by proving that he

¹ X. 362; XI. 408.

had made reparation after conviction. If he proved that, the period of limitation was extended or rather limitation ceased to run from that date, a date on which he had made an effective assertion of his right.¹

§ 7. Homicide was excusable also sometimes according to the circumstances in which the killing was committed, and sometimes owing to the incapacity of the slayer to understand his act or owing to his status. The former did not involve the payment of blood-fine; the latter did, but in neither case could any penalty be imposed by the King.

Homicide excusable according to circumstances included lawful executions, slaying in revenge for blood-fine due and not paid after demand in three courts, the murder of a husband's concubine by the injured wife, the slaying of outlaws who had not surrendered to law or had returned in defiance of an edict of banishment, the killing of traitors and ferocious men, and the killing of thieves prowling about the King's chamber at night.²

Some of these acts were excused because of the provocation offered, others because the person killed was outlawed or infringing the law himself.

Every one of these excuses is mentioned in the Codes, and some of them are indistinguishable in principle from killing in self-defence.

§ 8. The Welsh Laws also frequently state that persons suffering under certain disabilities could not be punished for their acts. Children under the age of fourteen and idiots are so mentioned; but, though it is true that they could not be punished for killing, those who were responsible for them, their kinsfolk, were liable to pay the blood-fine of persons killed by them. One exception even to this liability is mentioned, viz. when a person became mad and bit another, so causing death. In that case, probably because it was beyond the reasonable limits of control which could be exercised, the kinsfolk were not responsible for blood-fine.³

¹ V. C. 178; D. C. 548; V. 76, 90; IX. 276, 304; XIV. 580, 690, 738.

² V. C. 226, 254; D. C. 452, 462, 600, 614; G. C. 778, 794; V. 64; X. 316; XI. 406.

³ IV. 2; VI. 100; X. 390.

§ 9. We also find that the liability of a married woman for acts done by her is sometimes excused on the ground that she was under the dominion of her husband, but there was no excuse for a woman, whether married or not, for an act of homicide.

§ 10. Persons exempt from punishment, by virtue of status, were the King, a priest, and a minstrel. This was a personal privilege, and none of these persons could be executed whatever crime they committed.

§ 11. As regards accidental homicide the laws are in some particulars at variance.

The most interesting passage dealing with death caused accidentally is in the Xth Book, p. 382. It says that there is one inadvertency (*anodeu*) and two advertencies (*odeu*).

The standard rule in regard to inadvertent acts was that for every injury committed unwittingly redress was to be made wittingly,¹ and the illustration given as to what was an 'inadvertent act' is illuminating.

If a person, it is said, cast a stone over a house or cast a weapon, and it fell upon the head of another, honour-price was not to be paid, for there was no insult to honour intended, but if death ensued blood-fine was because there was loss occasioned.

The two advertencies are referred to as: (1) in what a person may do for the good of another, though harm may come to another thereby; and (2) where a person endeavours to save the life of another, and who from that act should die. That is to say, if, in endeavouring to save one person the death of another were accidentally caused, or if the person, whose life it was intended to save, were killed by the act intended to save, no reparation was to be made. The act was deliberate, but the intention was good, and the result was accidental.

But if any one did anything with a design to harm, and death ensued, blood-fine was paid.

The principle laid down in this passage was that death caused intentionally had to be compensated for; if death were caused accidentally, it had to be compensated for if the

¹ IV. 2.

act were a negligent one, but not if the act causing death were intended to benefit the person killed or another person.

§ 12. The view that accidental killing, if caused through negligence, involved the payment of blood-fine is supported by other authorities.¹

We get the same illustration elsewhere, that if any one threw a thing and it rebounded and killed a person, blood-fine, though not honour-price, was to be paid; and it is provided, also, that if a man felled a tree and in falling it killed a man, blood-fine was to be paid, subject to the qualification that where there was contributory negligence by the person killed, e.g. by disregarding a warning, the man who felled the tree was free.

So, too, if a person shot an arrow in the direction of one man and the arrow transfixing two, honour-price for the insult and blood-fine were to be paid for the first man, but only blood-fine for the second, he being killed by an act, which in so far as he was concerned, was not intentional, but negligent and accidental.

One passage, however, indicates that there could be no blood-fine payable for accidental death, unless the act causing death were directed against the individual killed. If it were directed against one person, and another perished against whom it was not directed, it is indicated that blood-fine might not be payable.

If, says the passage, a person frightened another and death ensued from the fright, an inquiry was to be made as to what the fright arose from, and, if it were found that it arose from an act done to something other than the person who died, there was no redress, but if from an act done to the man who died, blood-fine was paid.

We have, perhaps, in this passage an attempt to absolve a person from responsibility for results remote from the act causing them.

The conclusion to be drawn from these authorities is that negligence involved the payment of blood-fine, if the result were directly attributable to the negligent act, unless there had been contributory negligence by the other side.

¹ D. C. 598, IV. 34; V. 42-4, 56; VIII. 210.

§ 13. The full blood-fine was not necessarily payable for every accidental death. It was not, for example, so payable in all cases where the death was caused by the negligent control of property.

The Gwentian Code provides that one-third blood-fine was payable by the owner of a weapon with which murder was committed, though the owner was guiltless of the death.

The principle was that a person was responsible so to keep and guard his property that it did not cause death to another; but, if the act which brought the property into contact with the person killed thereby was not the act of the owner, the owner was not necessarily liable for the full reparation.

We have another illustration of this rule in the two Southern Codes. All free Welshmen carried spears, but when they entered the precincts of a court they had to place their spears in 'lawful rest'; that is, the butt of the spear had to be so deeply thrust into the ground that it could hardly be moved by both hands, or its point had to be buried in a bush completely hiding it, or it had to be placed on top of a bush as high as a man. If it were not placed in 'lawful rest' and a man were accidentally killed by coming into contact with it, the owner paid one-third blood-fine.¹

§ 14. The laws are at variance apparently as to the liability of a person for death caused by his animals.

The original rule was that the owner was responsible for such death, if he admitted the animal was his, and he could either resign the animal or pay blood-fine. At any rate this was the definite rule in respect of death caused by swine, but the Anomalous Laws say that blood-fine was not to be paid for the death caused by any animal or a mad dog, though the animal itself was to be surrendered to the King.²

There are in many early laws traces of the execution of animals for acts committed by them, and it is possible that

¹ D. C. 440; G. C. 784, 792.

² D. C. 576, 600; G. C. 718; IV. 46; VIII. 210; XIV. 624.

we have in this rule of surrender of the offending animal survivals of a similar rule in more ancient Welsh society.

§ 15. The law of fire imposes very strict restrictions on the manner in which it could be used. This was due to the fact that houses were made of wood, and so highly inflammable. Negligent use of fire entailed the payment of compensation for most property burnt in consequence: but this liability did not extend to the payment of blood-fine for a person killed by accidental fires. If, however, a person were burnt in a house deliberately ignited, the burner was liable for his blood-fine. In the words of the law, 'Galanas does not follow fire, but the hand of him who burns.' This is a striking instance of the limitation of responsibility, in case of negligence or accident, to approximate results.¹

§ 16. We have already noticed that the law provided that death caused by an act intended to save life was not to be compensated for. With grim humour, however, it is laid down that this did not protect a medical man under whose hands a patient died. The life of the doctor was not easy, for he was liable to make reparation if his patient died, unless he had taken an indemnity beforehand.²

§ 17. For murder or culpable homicide there was not only reparation but punishment, i.e. it was a crime as well as a tort. Murder was divided into two classes, aggravated killing and non-aggravated killing.

In the former was included waylaying or secret, planned, and concealed murder. It is said not to include killing on a road or other place without preparation, hiding or concealment, but if a person were killed on the road and taken or dragged five paces out of the road, i.e. 15 feet, or killed in some place and concealed, that constituted waylaying.

Aggravated murder also included killing by secret means or privily by night, killing with savage violence, and by poison.

Murder might also be aggravated by reason of the status of the victim, e.g. the 'pencenedl'.

¹ V. C. 260; G. C. 688.

² V. 56.

Non-aggravated deliberate killing may be taken to be ordinary open and sudden homicide, including what English Law calls manslaughter, in which the element of guilt was not so pronounced as in wilful murder.

This division into aggravated and non-aggravated murder is not explicit in the Codes: it is, however, a distinction deducible from the penalties accruing, and if we do not bear it in mind we will be faced by apparent contradictions in the law.¹

3. *The levy of blood-fine.*

(i) Introductory.

§ 1. We come now to the important question as to who paid the blood-fine of a person killed.

The broad general rule was that, wherever a man was killed and blood-fine became due, it was paid by the relatives of the slayer to the relatives of the slain, that is by and to people related to the offender or victim in 'galanas-degrees'.²

It mattered not whether there was a criminal penalty attached to the killing or not, the payment of blood-fine had always to be made, except where the killing was justified or excused by the circumstances.

§ 2. The principles of the levy and distribution of blood-fine are at first sight extraordinarily complicated, and we can sympathize with the moan of one of the commentators who says that one of the three complexities of the law is the sharing of 'galanas', 'for it is difficult to remember and reduce to rule'.

This complexity is a very real one, especially so because the authorities are not uniform in all details.

The language is oftentimes involved, and, whenever the commentators have tried to elucidate the system, they have only made matters more involved.

Still, with all the apparent complexity, it is possible to deduce the main principles, and, when we do so, the system takes upon itself a comparatively understandable appearance.

¹ V. C. 230; D. C. 412, 436, 550, 594; IV. 22; X. 306-8; XI. 404-8 XIV. 628.

² D. C. 408.

§ 3. Let us at the very beginning rid ourselves of the idea that the 'galanas-kin' was an *organized* body termed the 'cenedl'. It was nothing of the sort. Each man had his own 'galanas-kin', which could correspond with no one else's except his own full brother's. A man's 'galanas-kin', as already stated, was the body of people related to him, both on the male and female side, in seven degrees.

(ii) The murderer's share.

§ 1. The levy of blood-fine was divided into two portions, the first being one-third of the total, commonly denominated the 'murderer's share', the second being two-thirds, and spoken of as the 'kinsmen's share'. That is the universal rule in all the Codes. There is some variation as to who contributed to the murderer's share. All authorities agree that the murderer, his father and mother did, but they differ as to the apportionment *inter se*.

Some include the brothers and sisters of the murderer as contributories to this share, and some also include the children of the murderer.

§ 2. The oldest MS. states that the murderer's share was subdivided into three portions; the murderer paying one-third thereof or one-ninth the whole blood-fine, his mother and father paying one-third in the proportions of one to two, and his brothers and sisters the remaining one-third in like proportions, two shares by the brothers, one share by the sisters, meaning thereby not that, if there were three brothers and one sister, the three brothers contributed two-thirds and the sister one-third, but that each brother contributed twice as much as each sister.

The children of the murderer are not included by this authority among the contributories.

It proceeds to say, and this is of great importance as showing that the debt did not die with the murderer, that, if the murderer were dead, his share was made up half by the father and mother in the same proportions of two to one *inter se*, and half by the brothers and sisters; that, if the murderer alone were alive, he paid the whole murderer's share; and, if only some of the contributors to this share existed, those existing were responsible for the share which

would have been assessed on the non-existing person, had he existed, in the same proportions as were laid down for each one's original contribution.

Thus, supposing the family consisted of the murderer, his father, his mother, and one brother and one sister, whose original contributions to the murderer's share would have been one-third, two-ninths, one-ninth, two-ninths, and one-ninth respectively; then, if the mother were dead, the murderer would pay his own one-third, plus one-third of his mother's one-ninth, the father would pay his own two-ninths, plus one-third of his wife's one-ninth, the brother would pay his own two-ninths, plus two-thirds of one-third of his mother's one-ninth, and the sister her own one-ninth, plus one-third of her mother's one-ninth; or, in other words, the murderer's share, in this particular case, would be divided into 81 portions, of which the murderer would pay 30, the father 21, the brother 20, and the sister 10, as against the figures murderer 27, father 18, mother 9, brother 18, sister 9, payable if the mother had been alive as well.

The rule, as we see from this, was that a woman was grouped with her corresponding male relative and paid half of what he did, and this rule runs through every rule of assessment in the other authorities.

§ 3. A similar rule as to the murderer's share is given in the Dimetian Code, which likewise includes brothers and sisters in, and expressly excludes children from, the list of contributories. No lineal descendant, it is clearly and emphatically stated, of the murderer paid towards a blood-fine.

§ 4. The Venedotian Code, while in one passage asserting that the son of a murderer paid no share of blood-fine, as the relationship of the son to the father could not be fixed—though a father paid a share for murder by his son—in another passage says that the murderer's share was payable as to two-thirds by himself, and as to one-third by the father and mother in the proportions of two to one. It further says that if the murderer had children of age, they paid one-third of their father's two-thirds, the son

paying twice what the daughter did. It excludes from mention the brothers and sisters altogether as contributories to the murderer's share.

§ 5. In another passage the Venedotian Code states that the Law of Hywel Dda, still observed by some judges, was that the murderer's share was paid by the murderer, the father, mother, brothers, and sisters, the murderer paying eight shares, the father four, the mother and brother two each, and the sister one, each with his or her offspring, the murderer paying as much as his two sons would do. This Code, it may be added, like the Dimetian Code, included children of a murdered man among the recipients of blood-fine.

§ 6. The Gwentian Code appears to be silent as to the apportionment of the murderer's share, but Titus D. II and the Dimetian Code are supported by the IVth Book, in so far as to include brothers and sisters among the contributories. That authority, besides including brothers and sisters, included the children of the murderer, and, after dividing the murderer's one-third share of the whole blood-fine into 63 shares, made the murderer and his children responsible for 21 in the shares of 14 and 7, the father and mother for 21 in like shares, and the brothers and sisters for 21.

§ 7. We see, therefore, conflict between the authorities, first as to whether the liability to contribute descended to lineal descendants of the murderer, secondly as to whether the brothers and sisters contributed to the murderer's share or were included as contributories to the kinsmen's share, and thirdly as to whether the murderer paid two-thirds or one-third of the murderer's share.¹

(iii) The kinsmen's share.

§ 1. With reference to the kinsmen's share—two-thirds of the whole blood-fine—there is agreement that two-thirds thereof was payable by the murderer's paternal kinsmen, and one-third by the mother's kinsmen.

There is, however, divergence on two points: (*a*) whether

¹ V. C. 220, 222, 224, 226, 228, 230, 232, 234, D. C. 408, 410; G. C. 688; IV. 20.

brothers and sisters were included in the list of contributories, and (b) whether sixth or only fifth cousins were included among the contributing kinsmen.

§ 2. The common recognized rule followed in computing degrees of relationship is to count upwards from and including the person whose relations it is desired to ascertain, generation by generation, up to and including the common ancestor, hence second cousins being descended from a common great-grandfather, are related to each other in the fourth degree, third cousins in the fifth degree, and so on.

Another method adopted is to ascend generation by generation from the person whose relations it is desired to ascertain and, having reached the common ancestor, to continue counting downwards until the relation is reached. By this method a second cousin would be in the seventh degree, and a second cousin once removed in the eighth degree.

Yet another method is similar to the first and second methods, except that the counting begins from the father of the person whose relations it is desired to ascertain. This method, as compared with the others, makes a difference of one or two degrees.

In the Welsh Laws the second method is never adopted: the first is almost universally used, the third in some rare instances, and the computation is always made from the murderer or the murdered man as the case might be. In folk-tales, however, Prof. Rhys indicates that at times a combination of the second and third is used.

The differences that exist in stating where the seventh degree ends in the Welsh Laws is sometimes attributable to the different method of computation adopted.

However, what we are particularly concerned with now is that descendants of any surviving person in a definite degree to the murderer were assessed not separately but as part of the stock of the living ascendant; thus grandsons of a person related to the murderer in the fifth degree, if their grandfather were alive, would pay a share of a stock in the fifth degree, if the grandfather and father were dead they would pay as relatives in the seventh degree.

§ 3. The oldest MS. of all says that the kin's two-third share was payable two-thirds by the paternal kinsmen, one-third by the maternal up to the fifth cousin, but not including the son of the fifth cousin, each grade paying double what the grade below paid, males in each grade paying twice as much as females, repeating once more that brothers and sisters contributed not to the kinsmen's share, but to the murderer's share.

The Venedotian Code, as we have already noticed, included brothers and sisters among the contributories to the kinsmen's share, having excluded them from the murderer's share, and it imposed one-third of the kinsmen's share on the descendants of every female ancestress up to the great-great-great-great-grandmother, that is on sixth cousins. It provides further that, where any degree could not be traced, the amount, which would have fallen on the unascertained female kin, was to be paid for by the remaining female-kin.¹

§ 4. The Dimetian Code is difficult to follow. It states that there were nine grades of relationship, viz. the father and mother, the grandfather, the great-grandfather, brothers and sisters, cousins, second, third, fourth, and fifth cousins. Though the reason of this grading is difficult to follow, it is quite clear that, in computing degrees, the common ancestor and the murderer were both included, so a sixth cousin was not in the 'galanas-kin'. Elsewhere the Code expressly says a fifth cousin pays blood-fine and a sixth does not.

The first passage says that each grade paid twice as much as the grade below it, and the inference is that, though fathers and mothers, brothers and sisters contributed to the murderer's share, they also contributed to the kinsmen's share. This cannot possibly be the intent of the law, for, if it is, it means that the father and mother between them paid more than the murderer did, and likewise the brothers and sisters did, a most improbable conclusion.

We appear to have recognized here, what we have not elsewhere, the possibility of an ascendant, other than the father, being alive when murder was committed, and being

¹ V. C. 222-8.

responsible to pay a separate share from the share payable by his living descendants, that is that assessment was on individuals and not on stocks.

This is in express contradiction to what follows, for the Code says that collateral members are included in each grade. The word 'collateral' in the Welsh Laws means relations other than lineal descendants or direct ascendants, so a brother of the murderer's grandfather would be a collateral of the murderer, and, though a descendant of the murderer's great-grandfather, he would not be assessed separately, but as a member of his ascendant's stock, paying a portion of the amount levied on that stock.¹

§ 5. The Anomalous Laws give two lists of the contributories to the kinsmen's share. In the first only cousins are included down to the sixth cousin, the first cousin paying twice what the second cousin did, and so on; and the father, brothers, and sisters, who were included in the contributories to the murderer's share, are excluded.

In the second list, brothers are included in the contributories, the ultimate contributor being the fifth cousin, the brother paying double what the first cousin did, and so on. With this the Gwentian Code agrees.²

§ 6. It is impossible to reconcile these divergent versions, but it seems as if Titus D. II. contains the original law. What frequently strikes one in the different versions of the laws is that the ancient Welsh were not mathematicians. Over and over again when they try to divide and multiply and deal in fractions they come to grief. They are capable of laying down with extraordinary clarity a broad legal principle, but as soon as a mathematical calculation is required they get into trouble. We have to bear this in mind and try therefore to get back to general principles.

If we do that we can, I think, determine what the real rules of apportionment were.

(iv) General rules of levy.

§ 1. These general rules appear to be as follows:

(a) The blood-fine was divided into a murderer's one-third share and a kinsmen's two-thirds share.

¹ D. C. 410, 596.

² G. C. 700-2; IV. 20; X. 314

(b) The contributories to the murderer's share were, the murderer himself paying one-third thereof, his father and mother paying one-third in the proportion of two to one, his brothers and sisters paying one-third, each brother paying double what each sister paid.

(c) Wherever any class of contributory to the murderer's share was missing, the survivors within the list of contributories paid for him or her in the same proportions as they paid for the original contribution.

(d) The children of the murderer did not contribute.

(e) The kinsmen's share was payable two-thirds by paternal kinsmen and one-third by the maternal kinsmen. If the father-kin or mother-kin failed, the other kin was not responsible to make good the deficiency.

(f) The paternal kinsmen consisted of:

- (1) The grandfather and his lineal descendants, other than the father.
- (2) The great-grandfather and his lineal descendants, other than the grandfather and his stock.
- (3) The great-great-grandfather and his lineal descendants, other than (2) and (1).
- (4) The great-great-great-grandfather and his lineal descendants, other than (3), (2), and (1).
- (5) The great-great-great-great-grandfather and his lineal descendants, other than (4), (3), (2), and (1).

(g) Each of these five stocks, as a stock, paid twice as much as the stock below it, and if any stock were missing, the remaining stocks paid for it in the same proportion.

(h) Within the stock itself, liability to contribute did not descend to a lower generation; thus, so long as the great-grandfather was alive a separate liability did not descend to the great-grandfather's sons other than the grandfather. Descendants in the lifetime of an ascendant paid a quota to the ascendant's liability, that is, so long as the prepositus of a stock was alive the quota were assessed per stirpes and not per capita. When, however, the prepositus of a stock was dead, each lineal descendant in the next generation contributed equally, and so on.

(i) In every grade a female, subject to the limitations to be noted hereafter, paid one-half what a corresponding male paid.

(j) *Mutatis mutandis*, the apportionment of the maternal kindred's share followed the same rules.

§ 2. We must not, however, forget the modification of these rules provided in Titus D. II, p. 232, where the murderer committed murder in territory of which he was not a native.

That authority says that if an innate 'boneddig' of Powys had settled in Gwynedd or vice versa, and had become subject to a blood-fine within the dominion where he had settled, the body of his kinsmen being in the ancestral country, all the relatives he might have within the dominion of residence were collected together. The murderer and his children and his father and mother were then mulcted in one-third, and the remaining two-thirds was levied, apparently per capita, on the whole of the relatives residing in that dominion, without distinction of paternal and maternal kin.

§ 3. It is probable, too, that in actual practice the strict refinements of the law were not adhered to, and that a murderer and his near relations contributed all they possessed and then indented on their various relatives up to the seventh degree for the balance, the mathematical calculations of the law being an attempt to describe how among relatives a blood-fine should be levied, so that particular individuals should not be pressed unduly.

4. *Distribution of blood-fines.*

§ 1. We may now turn to the ordinary rules of distribution of a blood-fine among the relatives of a murdered man.

The broad rule was that it was to be distributed among the relatives of the person murdered in the same shares as they would have contributed to a blood-fine due by them.

§ 2. Before proceeding further we must notice two points. The first is that before distribution the lord was entitled to deduct one-third as his exacting share, leaving only two-thirds of the original blood-fine to go to the kindred. We

have in this the inception of the idea of a breach of the lord's peace, and the beginnings of the fine by the State for an offence.

§ 3. The second is that there was an increment to this blood-fine in respect of insult done to a corpse.

We have seen in dealing with insult that, when a man was killed, the insult to the honour of the dead man had to be compensated for in addition to the blood-fine. It was the first payment which had to be made. This honour-price was payable, according to the best authorities, by the murderer and his relatives in four degrees, and not by the whole 'galanas-kin'.

How was it distributed? The murdered man to whom the honour-price was personally due was dead: hence who was entitled to it? The authorities are at variance on this. It is generally agreed that one-third went to the widow, if there were one, and the remaining two-thirds, or, if there were no widow, all, to the relatives.

Some authorities, however, say that only relations connected within four degrees were entitled to it, and others assert that it was attached to the corpus of the blood-fine and distributed with it among the whole 'galanas-kin'.¹

§ 4. Even on the question of the lord's exacting third there is some ambiguity.

In one passage the Venedotian Code appears to give one-third of the murderer's share only, i.e. one-ninth of the whole, to the lord. The language is ambiguous, and the other authorities leave no doubt that the lord got a full third share when he was called in to exact. We must not, however, omit a reference in the VIth Book to the payment of two-thirds to the lord and one-third to the 'uchelwr's' when an 'uchelwr's' man was killed.²

§ 5. In the distribution of blood-fine we have exactly the same variations as we found existing in regard to the apportionment of the levy.

Titus D. II, at one place says one-third of one-third went to the father and mother, and one-third of one-third to the

¹ V. C. 230-2; D. C. 408; G. C. 634, 746.

² V. C. 226-8, 230-2; D. C. 510; G. C. 694, 780; VI. 100; X. 328, 370-2.

brothers and sisters, being silent as to the other one-third of one-third and the two-thirds or kinsmen's share.

Elsewhere it is very clear, and, after assigning one-third of the whole to the lord as his exacting share, it provides that the remaining two-thirds was to be divided into three shares, one of which went to the father, mother, brothers, and sisters, and two to the kinsmen (two-thirds thereof to the paternal kin and one-third to the maternal kin), leaving it to the kinsmen to divide *inter se* as they thought fit up to the seventh degree.

The Venedotian Code assigns, in one passage, one-third of one-third to the lord, and two-thirds of one-third to the father, mother, and their children, and then proceeds to say two shares of that two-thirds went to the father, one share to the mother, and two shares to the children, some MSS. adding, ' to the children of the murdered man '. The texts are clearly corrupt here.

The remaining two-thirds are allotted, one-third to the mother-kin and two-thirds to the father-kin, without describing how the share was divided *inter se* among the kinsmen.

Elsewhere it states that the father, mother, brothers, sisters, and their offspring (not the murdered man's offspring) obtained one-third of the blood-fine, but in this passage there is no reference to the remaining one-third.

The Dimetian Code provides that one-third of the 'galanas' was to go to the father, mother, brothers, and sisters, and the remaining one-third was distributed as in the Venedotian Code up to the fifth cousin, each grade receiving twice as much as the grade below. It specifically provides that children of the murdered man had no share in the 'galanas', and it is silent as to the lord's exacting share, but provides for it elsewhere.

In Domesday it is definitely said the King gets one-third.¹

5. *Miscellaneous provisions in the levy and distribution of blood-fine.*

(i) Exemptions.

In the levy of blood-fine, idiots, dumb persons, and minstrels were excluded from contribution, and likewise

¹ V. C. 224-6, 230-2; D. C. 408; Domesday, s.n. Hereford.

they were excluded from all participation in blood-fines received.

Clerics were also excluded, unless they had children.

Women, as we have noted, were liable to contribute, but the rule was subject to two very important modifications

Widows could receive no share of their husband's blood-fine, and no woman could receive a share or was liable to contribute if she were childless, past the age of child-bearing (54), and swore she was unlikely to have any children; that is to say a woman was liable not for herself, but for her children, she acting as a conduit to pass the rights or liabilities on to her existing or possible children.¹

(ii) Miscellaneous.

We must note also that where a woman was murdered, blood-fine due for her was payable not to her husband's kinsmen, but to her own kinsmen; that, according to the Gwentian Code, where a man was commended the 'pencenedl' got a special share, the amount of which is not indicated, for a man of kin to him, the father also receiving a penny, and an 'uchelwr' got three or six kine for a freeman with him, if killed.

We should note, too, that if any of the kinsmen were absent or too poor to pay, the VIIIth Book allowed the murderer to pay his amount, and recover the same from the person responsible by an action for contribution, whenever the latter returned or acquired property.²

6. *Additional powers of levy.*

(i) The spear-penny or 'ceiniog baladr'.

It might, and no doubt did, sometimes happen that the whole of the blood-fine was irrecoverable from the kinsmen in the seventh degree. At the best of times the amount to be levied was considerable, and the kinsmen might be poor or limited in numbers. In that case the law gave the murderer two other modes of raising the balance, the first of which was the levy of the 'ceiniog baladr'.

This could be levied from anybody related to the murderer in the eighth and ninth degrees.

¹ V. C. 98, 206, 224, 226, 228, 232-4; D. C. 410-12, 598; G. C. 702, 780; X. 328.

² V. C. 240; G. C. 638, 780; V. 48, 96; VIII. 206.

When this additional assistance was needed by the murderer to make up the blood-fine, he was to proceed with the lord's servant, carrying a relic with him, and, should they meet any person said by the murderer to be related in those degrees to him, the murderer demanded, by placing a cross in front of him, the contribution of a spear-penny. The person accosted had to pay or give a pledge or surety for payment, unless he swore on the relic that he was not descended from any ancestor common to himself and the murderer.

The 'ceiniog baladr' could not be levied on women or clerics because they did not carry a spear, but, if a woman killed a man, she was entitled to demand this aid.

The levy of a spear-penny had to be completed within a year and a day, and could not be demanded subsequently, while the right to participate in the sharing of a blood-fine did not accrue to any one liable to pay the spear-penny.¹

(ii) Blood-land.

The power to raise funds to meet a blood-fine did not end here. If a man found, after exacting spear-money, that he was still short of the sum needed, he could then fall back upon his interest in 'tir gwelyauc' or other land.

This was one of the lawful necessities for which a man could alienate ancestral land, but it would seem that it was not so much a right to sell as a right to deliver the land over to the relatives of the murdered man.

The Venedotian Code says that land so delivered was designated blood-land (waed-tir), and it seems that for the resignation of land as 'waed-tir' the consent of all members of the family holding jointly was necessary. That land once resigned was irrecoverable, 'for peace was brought to the sons thereby as well as to the father.'

It may be mentioned that, though the person resigning might become landless, he did not lose his status as a free-man, and that the land surrendered was divided, according to the Venedotian Code, among the kinsmen of the murdered man as if it were a blood-fine.

Apparently it was thought by some that 'waed-tir' was

¹ V. C. 98, 102, 224-6, 234; G. C. 702-4; V. 64; VI. 116; X. 328.

land on account of which a person was killed, which, after his murder, went to his sons; but the Codes repudiate that and assert that it was land surrendered to make up a blood-fine when all other sources had failed. The idea that it was land on account of which a man was killed survived in the Anomalous Laws, which assigned such land to the children of the murdered man.

The Dimetian Code also permits the surrender of land on the failure of spear-money to meet the blood-fine, and allows a 'priodawr' to surrender without his son's permission.

The Gwentian Code also refers to the power, and tells us that, where land was so surrendered, the revenue or 'geld' thereon was payable by the murderer, as the land went free to the other side, but no crops were to be grown on such land, except clover, vetches, and thistles, and the value of a cow grazed thereon deteriorated. The land carried a blood taint with it.

Should the murderer afterwards become an officer of the Court, and, as such, free from liability to pay 'geld', the 'geld' was recoverable from the land.

A peculiar reference to 'waed-tir' is made in the Anomalous Laws. It is there indicated that if a man killed a person in revenge for the loss of one of his maternal kin, and in consequence had to surrender his own land as 'waed-tir', he could claim land from his mother's kinsmen, proving in a claim therefor not the murder itself—for a man could never plead his own crime—but the suit for 'galanas' imposing upon him the penalty to pay.¹

(iii) 'Cyfarch cyfyll.'

§ 1. It is obvious from what has been said that the recollection of relationship was of primary importance among Welsh people; the land laws made it equally necessary, and this explains the great importance paid in Wales to genealogies. But, notwithstanding the importance of such recollection, it is clear that, under this far-extended communal liability, questions must arise at times as to whether, as a matter of

¹ V. C. 176-8; D. C. 604; G. C. 794; IX. 266, 304; X. 330; XI. 422; XIV. 576, 736.

fact, a particular person was or was not related in 'galanas' degrees to another. To determine this question a procedure is laid down for inquiry into the matter and determination of the question. This inquiry was known as 'cyfarch cyfyll', or inquiry as to stock, the very existence of which is almost sufficient to dispose of the contention that Wales was divided into 'cenedloedd' of men related to each other in fixed degrees.

§ 2. An interesting comment on the meaning of this phrase occurs in the Anomalous Laws, IV. 18-20 :

'Some say', says the passage, 'that "cyfarch cyfyll" relates to a person divested of everything (i.e. a claim to land by *ach ac edryf*); others say it implies an oak cut down without permission on the "tref tadawc" of a "proidawr", and over which a mantle is spread to conceal it, lest it be seen and become a disgrace to the "tref tadawc" by being thus seen. The real meaning is this, that when a relative refuses the murderer his share of "galanas", asking, "Whence is the stock in which I am related to thee?" it is necessary for the murderer to explain to him in what way he is related, and to his having common relatives enough to testify to the truth of his assertion, because common relatives are proper evidences in such a case, for strangers are neither to connect a person with kinsmen, nor to separate him from kinsmen.'

The meaning of the hazard that 'cyfarch cyfyll' related to an oak is inexplicable. However, the real meaning of the phrase in Welsh Law is clear.

Affinity was proved by the oath of the murderer, supported by common relatives, after the murderer had sought a contribution by placing a cross in front of his relative and had been refused help.¹

7. *The murder of relatives.*

§ 1. In his 'Tribal System in Wales', Dr. Seebohm has urged that there was in ancient Wales a rule that the law of 'galanas' did not operate within the limits of the 'cenedloedd', composed of relatives in fixed degrees.

This contention will be found in his 'Tribal System in Wales', pp. 104-5, and in his 'Tribal Custom in Anglo-Saxon Law', in the latter of which he sums up as follows :

'A murder within the wider kindred was regarded as a family matter. The murderer was too near of blood to be

¹ XIV. 708, 716.

slain. No atonement could be made for so unnatural a crime. There was no blood fine or "galanas" within the kindred. The murderer must be exiled.'

He supports the argument by comparative references to other systems of law.

§ 2. As already explained, the view here taken is that the term 'cenedl' does not connote an *organized* community limited by degrees of relationship, but that 'cenedl' means a tribe unlimited by degrees, and also those bodies of men related to every individual in varying degrees of relationship.

Applied to the law of homicide, the view taken here is that killing a kinsman was as much a tort as killing a non-kinsman. Such tort had to be paid for, but inasmuch as, in the law of homicide, where a near relative was killed, the men who would have to contribute to a blood-fine would be the same as the persons entitled to receive it to a large extent, the law provided that compensation had to be paid to the relatives of the slain by the murderer alone. He could not ask his relatives to pay themselves the blood-fine. It is maintained that the Welsh Laws establish that where a man killed his own brother or perhaps a relative of his own 'gwely', he himself paid the full blood-fine, or so much as he was able, to the relatives of the person slain, and that the Welsh Law does not establish or support the contention that there was any kindred system limited by degrees within which murder was not to be compensated for.

The point is of importance, and we have to examine the Welsh authorities, as well as the alleged support from outside, with care.

§ 3. As regards the Welsh Laws, neither the Venedotian nor the Dimetian Code has anything in them in the remotest way suggesting support to Dr. Seebohm's view. The only reference to the Codes used by Dr. Seebohm is drawn from the Triads attached to the Gwentian Code, G. C. 790, admittedly a late addition. That reference runs :

'Three persons hated by a "cenedl" . . . a person who shall kill another of his own "cenedl"; since the living relative is not killed for the sake of the dead kin, every one will hate to see him.'

This Triad is reproduced in the Triads of Dyfnwal Moelmuð with a very important difference :

' Three objects of detestation to a " cenedl " . . . one who shall kill a person of his own " cenedl " . ' ¹

The Triad proceeds to say the persons hated are to be proclaimed, and makes no mention of the murderer being freed from liability to pay blood-fine.

In what appears to be an excerpt from the substantive part of the Gwentian Code, p. 774, the rule is stated differently :

' Whoever shall kill his brother (*brawd*), because he will not share " tref tadawc " with him, with such a slayer the " cenedl " is not to pay " galanas ", but he is to pay " galanas " to the relatives, and let him forfeit the " tref tadawc " for ever.'

The rule is stated in similar terms in the XIVth Book, p. 656 :

' Three cases where the " cenedl " pays not " galanas " with a relative ; where a man murders his brother because he will not share the " tref y tad " with him. . . .'

The last-mentioned authorities give a totally different complexion to the rule. They do not exempt any one from liability for murder within the ' galanas-kin ' ; they merely assert that where a man killed his brother, whose ' galanas-kin ' must of necessity be identical with his own, he cannot ask the assistance of his kinsmen to pay the blood-fine due to themselves.

They do not provide that any one killing a relative within seven or nine degrees is free from liability to pay blood-fine ; they establish, on the other hand, that fratricide involved a more serious penalty than murder of a stranger, viz. liability to pay the full blood-fine by the murderer himself, plus the forfeiture of ' tref tadawc '. There is nothing outside the one Gwentian Triad to suggest that in default the murderer was not liable to be slain. There could naturally be no feud between the kinsmen of the slain and the kinsmen of the slayer, for, where they were brothers, exactly the same people were kinsmen to both. What appears to have happened was that a man who killed

¹ XIII 532.

his own brother paid the blood-fine himself, was deprived of all his property, and put out of law.

§ 4. Dr. Seebohm relies on certain outside instances.¹

The first case mentioned was where Hethcyb, in the ' Song of Beowulf ', accidentally killed his own brother, Herebald, and the poet says :

' It was a wrong, past compensation. . . . Any way and every way it was inevitable that the Etheling must quit life un-avenged. . . . He (the father) could not possibly requite the feud upon the man-slayer.'

This authority appears merely to show that no penalty could be exacted for an accidental death ; it does not seem to be an authority for the proposition that murder of a relative in seven degrees entailed no penalty.

The next reference, also from the ' Song of Beowulf ', is in apparent contradiction to Dr. Seebohm's view.

Eanmund, a paternal relative of Beowulf, murdered Heardred, a maternal relative of the latter. Beowulf did not take revenge, and Dr. Seebohm concludes, inasmuch as Beowulf had become chief of his mother's tribe, that he could not avenge owing to kinship.

The murder was not within a kin, like the ' cenedl ' is represented to have been by Dr. Seebohm, for that alleged organized ' cenedl ' traced descent through males only. Further, Eanmund and Beowulf did not belong to Heardred's male kin at all, and hence it was no business of Beowulf's to avenge the murder. The murderer, Eanmund, was as a matter of fact, killed by Weohstan, another paternal relative, in open fight without a feud resulting, perhaps because Eanmund had become a ' lawless exile ', and could be killed by any one because of his crime.

The next reference is from the Lex Ripuar., Tit. LXIX, which provides, among a people where communal responsibility of relatives had almost died out, that the murderer of one ' near in blood ' was exiled and his goods forfeited to the fisc. The reference does not establish the existence of an organized kindred-group limited by degrees, and is in

¹ *Vide* Tribal Custom in Anglo-Saxon Law, pp. 63, 66, 164, 176, 241-2, 335-6.

no way inconsistent with the view that the murderer must pay himself or be put out of law.

The next reference is to the Lex Alamman., Tit. XL.

This provides that a murderer of a father, uncle, brother, or maternal uncle, or his brother's son, or uncle's son, or mother, or sister, i.e. descendants of one or other of his two grandfathers, was to be deprived of all his goods. Surely it is a stretch of this provision to say that the murder of a relative went unpunished except by exile.

The rule is in full accord with what it is maintained was the Welsh rule, that the murderer of a near relative became himself, at least to the extent of his possessions, responsible for the blood-fine.

The reference on pp. 241-2 to the Guthaling Law, c. 164, provides that where a man slew his father, son, brother, sister, or mother, or where a mother slew her child, the slayer was debarred in perpetuity from inheritance, and the whole of his property was forfeited to the next of kin or the King. Here again the rule is that the slayer, to the fullest extent he could, must pay the blood-fine himself where the murdered person was a near relative.

The last reference is from the so-called *Leges Hen. I.*, c. 75, which provides that a slayer of any of his 'parentes' was to do penance, and then proceeds to say that should any relative of the deceased demand compensation, the murderer must pay according to the scale fixed by the 'wise men'.

This reference again is in full accord with the Welsh rule that the slayer of a near relative must pay the full blood-fine or so much as could be exacted from his property, and that relatives were not to be deprived of compensation merely because the murderer was also a relative.

§ 5. We may here refer to some other provisions on the subject unnoticed by Dr. Seebohm.

The Anglo-Saxon Laws nowhere suggest that compensation was not payable for the murder of a relative. On the contrary the *Dooms of Ine*, c. 76, appear to provide that compensation in such a case was termed the 'maegh-bôt', payable by the slayer to every one of 'maegha' (kinship) to the slain, such 'maegh-bôt' increasing exactly as did ordinary 'wergild'.

In the Irish Laws¹ we have the same type of provision as in the Welsh Laws.

It is there provided that a dun-fort in which fratricide was committed lost its honour-price, that is there was violence upon the tribe, 'until the man who does it pay and do penance', while in *Heptads*, V. 463, it is added that a man who committed 'fingail' (tribe-murder) lost his tribal land.

Among the Germanic tribes also there are some further references. The provision in the *Lex Frisionum*, Tit. XIX, specifically provides for payment of 'galanas' for the murder of a brother :

' Si quis fratrem suum occiderit solvat eum proximo heredi, sive filium aut filiam habuerit, aut si neuter horum fuerit, solvat patri suo vel matri suae vel fratri vel etiam sorori suae ; quod si nec una de his personis fuerit, solvat eum ad partem regis.'

With this may be compared the provision in the *Lex Langobard.* (Ed. Roth.), c. 163 :

' Si quis in mortem parentis sui insidiatus fuerit, id est si frater in mortem fratris sui aut barbanis, quod est patruus seu consobrini insidiatus aut consiliatur fuerit, et ille cui insidiatur filius non dereliquerit non sit illi heredes cuius de anima tractavit nisi alii parentes proximi et si parentis alius proximus aut legitimus non habuerit tunc illi curtis regis succedat. De anima autem illius homicidae sit in potestatem regis iudicare quod illi placuerit ; res vero quas homicida reliquerit parentes proximi et legitimi habeant, et si parentes non habuerit tunc res ipsius curti regiae socientur.'

Under the same law² provision is made for succession to the estate of a homicide slaying his own brother, and further enacts that, if the slain person left a son, composition was to be paid to him out of the murderer's property, the murderer himself falling into the 'misericordia' of the King.

This evidence appears to corroborate the view here taken of the Welsh Law.

8. *Murders of or by men not possessed of recognized kinsmen.*

(i) Non-Welshmen.

§ 1. It was a rule of Welsh Law that no one except a Welshman could demand assistance from his relatives as

¹ *Heptads*, V. 172.

² Ed. Luitprandi, c. 17.

of right, and consequently the right to share in compensation for injury to a relative, being co-extensive with the duty to give assistance, did not accrue to any one who was not Welsh.

But it is quite inaccurate to assert that non-Welshmen had no 'galanas-worth'. The difference was this that the penalty, payable by a non-Welshman murdering, was paid without the enforced assistance of the murderer's relatives, and the penalty for slaying a non-Welshman was paid to persons other than the relatives.

§ 2. For the murder of a bondman or foreigner the murderer paid the 'legal worth' to the master or overlord owning or to whom the bondman or foreigner belonged or was commended.

If the foreigner were homeless, that is on a visit to Wales, he was under the King's protection, and his legal worth was paid to the King: if he were a hostage, his legal worth was that of the person on whose behalf he had been given as a hostage, and if either a bondman or a foreigner murdered a Cymro, his master or overlord paid the legal worth of the victim and the murderer was hanged.¹

(ii) Sons of Cymraesau by foreigners.

§ 1. The application of the law of homicide to men who were only partly Welsh is of considerable interest.

The son of a Welshwoman by a foreigner father had no paternal relatives on whom by law he could call for help; but, just as the son of a Welshwoman, given in marriage to a foreigner, could demand land from his mother's family by virtue of 'mamwys', so he could demand help from that family up to the fourth degree—not let it be noted up to the seventh degree—in paying blood-fine for a murder committed by him.

§ 2. Payment on his behalf by such relatives was termed 'gwartheg difach'. 'Difach' has been variously translated as 'di-fach' (without surety) and as 'dif-ach' (of defective lineage). Though the former appears to be the generally accepted signification, the latter seems to be

¹ D. C. 598, 604-6; G. C. 794; VI. 104; IX. 258; X. 330; XI. 402; XIV. 592, 604, 624.

more in consonance with the causes which gave rise to the law.

§ 3. All Codes agree that the son of a Welshwoman by a foreigner was subject to the law of homicide; he was 'pro tanto' a freeman, but, as he had no paternal kinsmen on whom he could call for help, it was provided in the Venedotian Code that the maternal relatives were to pay two-thirds and the murderer and his father one-third, while in the Southern Codes the whole mulct fell on the mother's kinsmen in four degrees.

If he were murdered the compensation due for his death was paid to the mother-kin, the Venedotian Code limiting their share to two-thirds.¹

(iii) Reputed sons.

§ 1. Cognate to the position of a son with a foreign father was the position of a son not yet affiliated.

Such a son was invariably on the privilege of his mother's relatives, though one passage in the Anomalous Laws confines the liability of the mother's relatives to pay blood-fine to the case of a son of a foreigner and Cymraes, at the same time indicating that distribution of blood-fine received was made to them.

§ 2. In the law of affiliation we saw it provided that a woman could affiliate her son to the alleged father by oath, and that the father or his kinsmen could reject him forthwith, accept forthwith, or delay acceptance or rejection for a year and a day.

In the latter case the son was reputed, doubted, or on sufferance ('cyswynfab, mab amheuedig' or 'mab dioddef'). If the mother had made no attempt to swear her child, the child was on the privilege of her kinsmen; likewise if her attempt to affiliate had been repudiated by the alleged father or his kinsmen. If, however, the son were on sufferance the reputed father-kinsmen were responsible to pay, and could not repudiate the son until they had paid. They could repudiate after payment to avoid liability for any subsequent offence. The reputed father-kin could not,

¹ V. C. 98, 208; D. C. 552; G. C. 750; IV. 12; V. 64; X. 326-8; XIV. 656.

however, claim to share in blood-fine for the murder of a reputed son, who had not been accepted. The blood-fine in that case went to the mother's kinsmen.

§ 3. The murder of or by a reputed son was classed as one of the calamities of kin.

If, after the crime, the mother swore an oath of affiliation declaring who the father was, the reputed father and his kinsmen were not responsible; the mother's kinsmen were.

The test of liability in all these cases was whether the mother had sworn to the paternity or not, and whether the alleged father had repudiated the son or kept the question in abeyance or not at the time of the crime.¹

(iv) The son of a Cymro and a foreign woman.

Connected with the son of a Cymraes and a foreigner is the case of the son of a Cymro and a foreign woman. Such son was a Cymro, even if illegitimate, but as he could not call on his mother's relatives for help, the only assistance he could get was as to two-thirds of a blood-fine from his father-kin, the remaining third he had to make up as best he could.²

9. *The recovery of blood-fine.*

§ 1. We come next to the question as to how a blood-fine was recovered. Undoubtedly, in the later law, it could be sued for as damages due on account of tort. Model plaints are given in the Anomalous Laws. Such suits could be heard by the lord or one appointed by him, and must be disposed of in his life, and were cognizable by the supreme Court alone.

Trial was by jury of compurgation.

This was the law at the time of Hywel Dda, but we are told that in the time of Dyfnwal Moelmud the ordinary procedure was by ordeal—a more than doubtful assertion.³

§ 2. At the same time we get glimpses of an earlier procedure.

In Titus D. II, p. 222, we are told:

'Whoever shall have murder charged upon him, let the kindred pursue him, and first the lord on the day on which

¹ V. C. 208-10; D. C. 412; G. C. 602, 702, 776; IV. 38; V. 40-2; VI. 98; X. 326.

² VI. 114.

³ X. 328, 372; XI. 400; XII. 466; XIV. 622.

his man is killed or he hear thereof; what he can get of his spoil or that of his kindred is to be without question to the lord: if he get no spoil, then full "galanas" ensues.'

Again, in the Gwentian Code it is said, 'What the King shall find of the property of the homicide upon the land belongs to him entirely', and in the Venedotian and Dime-tian Codes, 'harrying spoliation' was allowed for murder.

The Codes also say that it was the duty of the kinsmen to demand satisfaction and slay the slayer if he gave none; and we are picturesquely informed that the kin would be excited to revenge by the wailing of women, by the inquiry, 'Who killed this man?' and by seeing the dead body on the bier, or by looking on the murdered man's grave without atonement having been made.

Here we have survivals of the ancient method. There was no judicial procedure. The injured kinsmen arose and pursued the murderer to avenge themselves upon him, and the lord joined in and harried and despoiled the murderer's property.

§ 3. But, notwithstanding these provisions, it is beyond doubt that by the time of Hywel Dda the right to take revenge was postponed until after the invocation of the Courts had been made, finding given, and default made in payment. We shall see in the Law of Procedure that there was a regular procedure laid down for such suits in the time of Hywel Dda.

The trial was by compurgators, whose adjudication was final and conclusive, the accused charged being acquitted if the jury compurgated him.¹

§ 4. But if the jury failed to exonerate, what happened? First and foremost, in every case of killing, the blood-fine had to be levied and paid.

Time was given, but not much, to get the blood-fine in. Till it was collected and paid there was an unsettled feud which operated as a bar to the evidence of a man of 'galanas-kin' on the one side against a man of 'galanas-kin' on the other, or even of a servant of such a man. There was a state of suspended hostilities between the kinsmen.

¹ V. C. 246; D. C. 442, 450, 510, 554; G. C. 694, 778, 780-2; XIV. 626.

The Venedotian Code provides that the blood-fine must be apportioned among the persons liable to pay within fourteen days of the summons of the lord directing its levy, and it was the duty of the eldest son to point out the kinsmen liable.

After that another fourteen days was allowed for assembling the responsible kinsmen and exacting payment. The actual delivery of the blood-fine was to be effected in three instalments, the first two consisting of the delivery of two-thirds from the paternal kinsmen, and the last of the delivery of the amount due by the maternal kin. As each payment was made one hundred men of the best standing among the kinsmen of the murdered man swore to forgiveness, and when the last payment was made oaths were taken for peace, and thereupon 'everlasting concord is to be established on that day, and perpetual amnesty between the kinsmen'.

Titus D. II allows fourteen days for each lordship in which the kinsmen responsible to pay resided. The Gwentian Code lays it down that complete blood-fine must be paid in fourteen days if the kinsmen of both sides dwelt in the same country, with an extension of fourteen days for each country in which the kinsmen dwelt, if scattered. Elsewhere it allows only a general period of fourteen days.

If the blood-fine were paid, the kinsmen must rest satisfied; but, if it were not, the old rule, 'an eye for an eye, and a tooth for a tooth', came into operation. There was unsatisfied bloodshed between the kinsmen, and the laws are laconically grim.

'The law', they say, 'permits revenge'; 'If "galanas" be not paid the slayer is to be delivered up to the "cenedl" of the slain'; 'Unless an answer come in nine days the law frees the avenging.'¹

§ 5. The blood-fine had to be paid in full to avoid vengeance. One penny short entitled the offended kinsmen to slay in revenge, and what had already been paid was lost beyond hope of recovery. Even if before the payment of

¹ V. C. 160, 178, 226, 228, 230; D. C. 440, 484; G. C. 702, 776; IX. 276; XIV. 624.

the blood-fine the slayer was killed by a man other than a kinsman of the murdered man, the debt was not wiped out, it still had to be paid.¹

§ 6. Now was this delivery of the slayer to the kinsmen of the slain a true case of vendetta? Apparently not. It was so originally; but true vendetta implies a continued state of war between two opposing factions, each side killing a member of the other side in revenge for the slaying of one of its own side. Vendetta does not confine the exaction of revenge upon the slayer. But the Welsh Laws of Hywel Dda did. Not only is it clear that it is the slayer who was to be delivered up to be slain, but the oldest MS.² is very explicit:

'Ny deleyr llad nep am y gylyd namen llourud nac am ran or alanas nac am peth arall.' 'No one is to be killed on account of another except the murderer, neither for a share of "galanas" nor for any other thing.'

That at any rate was the law of Hywel Dda, and perhaps this was one of the reforms he introduced, limiting the exercise of revenge upon the actual slayer.

There is no doubt that there are some indications of a true vendetta being carried on. For instance, in the Gwentian Triads, some MSS. say that where murder was not denied or blood-fine paid no reparation was to be made for the slaying of 'a man of cenedl', but other MSS. say for 'the slaying of *the* man', i.e. the murderer. In the same Triads it is said that, though a lord and a 'pencenedl' got some share of a blood-fine, none of them were to be killed in revenge for non-payment, implying, perhaps, that men who were in law relatives might be killed in revenge; and the Dimetian Code, while excluding clerics and others from all liability to contribute to or right to share in blood-fine, precludes the exercise of vengeance upon them, again perhaps implying that other relatives could be killed. However, the direct prohibition shows that, whatever may have been the older custom, the codifiers definitely limited the right of vengeance upon the person of the slayer.³

§ 7. The question arises here as to whether there was

¹ V. C. 226; D. C. 412, 600; G. C. 702, 776; V. 62.

² V. C. 228.

³ G. C. 776, 780; D. C. 410.

any other method whereby kinsmen could absolve themselves from liability to pay blood-fine other than by handing the slayer over to be slain. With tribal sentiment so strong it is almost the last thing we should expect to find, and yet it is clear from the laws that there was some right in the kinsmen to decline all responsibility.

In the Venedotian Code, pp. 228, 230, it is said :

' If the kinsmen disown the murderer, there is no claim upon them, nor are they, unless the lord exact it, to pay ;'

and again :

' If the murderer pay his share he is not to be killed, although the kinsmen may not have paid their share, and so the kinsmen are not to be compelled although he may not have paid.'

The later provisions of the XIVth Book, p. 656, direct that the kinsmen are not to pay ' galanas ' where a murderer refused to conform to law with them or where he confessed to murder without a previous denial and submission to compurgation.

These provisions are at first sight difficult to understand. The Venedotian Code is possibly referring in the first case to a case where alleged kinsmen repudiated the allegation that the murderer was of kin to them, but the second is inexplicable except on the assumption that kinsmen could refuse to pay if they wished.

The provisions of the XIVth Book are more understandable. Relatives were responsible to support a relative only so long as he submitted to law ; and they had to be protected against the possibility of a man confessing to a crime he had never committed, and thereby imposing on his kinsmen a liability which it was not right for them to bear.

The true solution, however, of these apparent difficulties appears to be that there was a tentative effort, comparable to what, as we will see later, was occurring in England at the same time, an effort to break down the tribal law imposing liabilities upon kinsmen in murder cases by giving such kinsmen a right to repudiate responsibility. It was one of the steps taken along the route which was to convert a tort into a crime.

10. *Homicide as an offence against the State.*

§ 1. What we have said above shows that the primary conception of slaying was that it was a tort to be compensated for, whether the slaying were deliberate or caused by negligence. The idea that murder was an offence against the State, a crime, was gradually finding expression nevertheless.

§ 2. It found it first by insisting on the postponement of vengeance until the lord had been invoked to levy the blood-fine ; but, even when recognition of the lord's right to intervene had got so far, the State had to step aside when retribution was to be inflicted for failure to satisfy the kinsmen.

§ 3. The conception, however, that slaying was a crime would not necessarily involve the abolition of the idea that it was a tort as well. There are numerous instances in modern law where persons injured are entitled to recover compensation in addition to the imposition by the State of a penalty upon the offender. French Law in particular maintains the differentiation and allows both remedies. So also the abolition of the idea that accidental slaying (at any rate if it were negligent) must be compensated for is no necessary preliminary to the growth of the idea that deliberate slaying must be ' punished '.

§ 4. If we look at the Welsh Laws we shall find, not only in the Anomalous Laws but also in the Codes, very distinct traces of the upspringing of the idea that slaying, provided it were deliberate, must be punished, and also of the idea that the penalty might vary according to whether the circumstances showed the deliberate slaying were aggravated or not.

We have already noticed that the Welsh Laws do appear to distinguish between aggravated and non-aggravated deliberate slaying. It found expression not only in the fact that the former required a double compurgation, but in the penalties to be imposed.

For waylaying and other aggravated murders the blood-fine was doubled ; one blood-fine was paid to the kinsmen, and for the other the King executed the offender, subjecting

him also to 'harrying spoliation' and sometimes loss of patrimony.

Over and over again we get an increased penalty referred to, and, though the penalty imposed is by no means uniform, there seems no doubt that aggravated murder, waylaying, murder with violence, murder by poisoning, secret murder, and murder of a King, lord, or 'pencenedl', were offences against the King's peace as well as a tort.

The Venedotian Code speaks of the blood-fine and penance for killing with savage violence being double. The Dimetian Code fixes, for waylaying, a twofold mulct (*dirwy*) to the King and double blood-fine to the kinsmen; forfeiture of property for killing a lord and others; elsewhere death irredeemable for waylaying if caught, and, if not caught, a double mulct and double blood-fine; and yet in another place of a double mulct and double blood-fine for waylaying, murder by secret means or murder at night privily.

In the Anomalous Laws there are several such references. Poisoning entailed a double blood-fine, being a 'ferocious act'—some MSS. here mention waylaying—and death is said to be incurred in lieu of one of the blood-fines. Again it is said that the blood-fine was doubled for waylaying, because it was violence to kill and theft to conceal, and 'that', it is added, 'is the instance where spoliation and hanging are due for murder'. In a third passage, forfeiture is allotted for waylaying, but if caught the waylayer 'is to forfeit life more signally than a thief', and in the XIVth Book we are repeatedly told that death was the punishment for violent murder.¹

§ 5. There are other cases also where slaying was undoubtedly a crime. The legal worth of an idiot under the King's protection was payable to the King, so also was the blood-fine of the Queen, and though some authorities say the blood-fine for a murdered priest went to his kinsmen, others say it went to the Church, and yet others assign two-thirds to the King.²

§ 6. The law of homicide seems, therefore, to show that

¹ V. C. 230; D. C. 412, 436, 448, 550, 594; IV. 22; IX. 264; X. 306-8; XI. 408; XIV. 622, 624, 626.

² D. C. 602; XI. 408; XIV. 624, 706.

killing, deliberately or accidentally, if there were negligence, was originally a tort and a tort only, to be avenged or compensated for. We see an effort to limit the right of vengeance, that is the abolition of the vendetta, to vengeance upon the body of the slayer, and we see also the growth, without abolishing the tortuous conception of the idea, of crime, entailing penalties over and above the compensation for the tort.

The Welsh Law of homicide in the time of Hywel Dda was, in fact, a composite one, containing in itself an attempt to regulate the exercise of the old right of vengeance by postponing it until there had been a failure to pay the fixed compensation and to reconcile the right of vengeance with the newer idea that the guilty person, and the guilty person only, should be punished by the King for a breach of the King's Law.

II. *Murder in early English Law.*

§ 1. The early English Laws have a number of references to slaying, which show not merely that the essentials of the law of murder were originally and contemporaneously with the time of Hywel Dda, the same in England as in Wales, but that in matters of detail also the resemblance was frequently maintained.

§ 2. We must not, however, expect to find complete parallels in all matters, and this for two reasons. Homicide, as we have noticed in Wales, was intimately bound up with kinship.

In England the communal tie, based on kinship, broke down much earlier than it did in Wales, and the growth of the centralized power, progressing as it did more rapidly there, led to the substitution of murder as a crime for murder as a tort more easily.

§ 3. The second reason why we must not expect to find complete parallels in the laws of the two countries is that, as already pointed out elsewhere, the early English Laws were not a codification of custom like the laws of Hywel Dda, but a series of enactments amending custom in particular points. What we get, therefore, in English Law, is not a full statement of the customary law relating to killing,

but fragmentary alterations effected in that custom from time to time by legislative enactment.

Nevertheless we do find many parallels, and it will be well to refer to these in much the same order as has been adopted in explaining the Welsh Law.

§ 4. No more than in Welsh Law do we get an express division of killing into grades or kinds, but that all killing was not on the same basis is clear.

Slaying in self-defence, as an excusable act, is not mentioned in the English Laws, but, inasmuch as the justifiable slaying in defence of another is, we may fairly assume that English Law did permit slaying in self-defence.

The provision referred to occurs in the laws of Ælfred, composed at much the same time as Hywel Dda's Laws.

Under Ælfred's Laws, c. 42, it was no offence to slay a man attacking the slayer's lord, or his servant or his born kinsman, subject always to the exception that there was no justification for slaying one's own lord, even if the latter were attacking the kinsman of his vassal.

Provocation as an excuse for slaying is mentioned in the early English Laws also. Under the Laws of Wihtraed, c. 25, Ine, c. 35, and Edward the Confessor, c. 36, it was made permissible to slay an escaping thief, and in the Laws of Ælfred, c. 42, a man might fight 'orwige', if he discovered another committing adultery with his wife, daughter, sister, or mother. Similar is the rule reproduced in the Laws of the Conqueror, c. 35.

§ 5. Excusable homicide, excusable on the ground of the offender's capacity or status, is also referred to.

We need not do more than note that the laws progressively exempted children under seven, ten, and twelve, and it is of interest to note the law relative to priests, who were exempt from execution under the Welsh Law.

The English Law on the subject appears to have been much the same; but the Laws of Ælfred suggest that that exemption was partly done away with, for by cl. 21, it was provided that if a priest were guilty of slaying, everything in his house was to be given up at once, the bishop was then to secularize the priest, and he was to be given up

from the minster (? for vengeance), unless the lord were prepared to compound for his 'wer'.

We get a more complete statement of murder by and of clerics in Cnut's Eccles. Laws, cc. 2, 5, 39, and 41, and it appears that there was little if any difference in liability between a cleric and a non-cleric.

§ 6. As regards accidental killing, Ælfred's Laws, c. 13, provide that if a person killed another 'unlawfully' while engaged in a common work, apparently of cutting down a tree, the kindred of the slain man were to have the tree within thirty days. The passage is obscure, but it seems to refer to one of those cases where an inanimate cause of death, viz. the falling tree, was regarded as the criminal, and was handed over to the kindred to wreak vengeance upon at the expiration of the same term of thirty days as was applicable in the case of a person committing wilful murder and not compensating for it.

We have also a parallel to the Welsh Laws as regards responsibility for animals causing death in Ælfred's Laws. After reciting the Jewish Law that a goring ox was to be stoned to death, c. 24 of those laws provided that if a 'neat' wounded a man, the neat was to be given up to the person injured or the wound compensated for.

§ 7. We have a further parallel in the liability of a man with whose weapon killing was committed.

According to the Law of Æthelberht, cc. 18, 19, a man furnishing a weapon to another, where there was strife, paid a 'bôt' of 6s., even if no harm resulted; and if robbery or slaying by the borrower ensued, the lender paid 6s. or 30s.

In the Laws of Ælfred a person lending another a weapon to kill with, was liable to pay part of the 'wergild' of the slain—one-third, plus a wite or fine, if the principal and the owner of the weapon did not agree among themselves as to the apportionment of the 'wergild'.

§ 8. Elsewhere also we get provisions similar to those in Welsh Law relative to the lawful rests of spears.

In the Laws of Ælfred, c. 36, it was provided that 'if a man have a spear over his shoulder, and any man stake

himself upon it, he shall pay the " wer " without the " wite ". If he stake himself before his face, let him pay the " wer ". If he be accused of wilfulness in the deed, let him clear himself according to the " wite " ; and in the Laws of Cnut, c. 76, a man was rendered liable for his weapon unless he could show the deed was not done by his will, control, counsel, or cognizance.

§ 9. In connexion with the levy and distribution of ' wergild ' (= *galanas*) the English Laws have little to say. Sufficient exists in those laws, however, to establish that the system was similar, if not identical.

It is quite clear that under English Law the levy and distribution of ' wergild ' was a liability and right of the relatives of the murderer or murdered man, and that the right to share in and the liability to contribute to ' wergild ' were coextensive.

The so-called *Leges Hen. I*, c. 75, § 8, make this clear :

' Si quis hujusmodi faciat homicidium, parentes ejus tantum werae reddat, quantum pro ea reciperent, si occideretur.'

What the exact liability of the kinsmen was is not expressed clearly. The Laws of Æthelberht, c. 30, would appear to suggest that, in the earliest days in Kent, the liability of kinsmen was limited to making good any deficiency in the ' wergild ' due after the whole of the murderer's money and other chattels had been exhausted. The same laws (cc. 22-3) provide also that, if the slayer gave up his land, his kinsmen had to pay half the ' leod ' or ' wergild ', again suggesting that the liability of the kinsmen did not operate until the murderer had no further resources.

The *Dooms of Ine* (A. D. 688-725) deal in this matter only with the division of the ' wergild ' due for a foreigner who was killed. Two-thirds of his ' wergild ' went to the King, one-third to his son or kinsmen, but if he had no kinsmen, half went to the King and half to his ' gesith ' or host.

§ 10. There are provisions in the Laws of Ælfred dealing with the postponement of revenge (see *infra*) which show that notice had to be given to kinsmen, but they do not touch on the question of the rate of levy and distribution.

We have, however, in c. 8 of those laws an interesting provision dealing with the murder of the child of a nun, an exceptional case specially dealt with, from which we can infer that the general principles in ordinary cases were similar to those prevalent in Wales.

That clause provided that where a nun's child was murdered, the share, which would otherwise have gone to the maternal kindred, was to go to the King, and the paternal kin of the deceased was to obtain the ordinary paternal kin's share. This is clear evidence that both paternal and maternal kin participated in ' wergild ', and that these shares were separable.

Again, under clause 9 of those laws the ' wergild ' of a foetus was assessed at half that of a living person, according ' to the wer of the father's kin '.

Other provisions confirm this. We have in clauses 27, 28, a provision comparable to the case of a foreign son of a Cymraes. The case is not one of a foreigner's son by an Englishwoman, but of a man who had no paternal relatives left, while having maternal ones. The rule then applied recalls the Welsh rule applicable to a foreigner's son :

' If a man, kinless of paternal relatives, fight and slay a man, and then, if he have maternal relatives, let them pay one-third of the " wer ", his guild-brethren one-third (guild-brethren being an artificial creation not known to Welsh Law), and for one-third let him flee. If he have no maternal relatives, let his guild-brethren pay one-half, and for half let him flee.'

Here we have indicated once more the separate liability of the maternal kinsmen and the paternal kinsmen. We have, moreover, the indication that the murderer's share was separate, and a rule which throws light on the effect of kinsmen repudiating liability, for this provision suggests that it was only where the murderer himself failed to pay his share that he could be slain in revenge.

Clause 28 shows that the ' wergild ' was divided among those liable to contribute. This again is established by inference. The clause deals with the case of a man killed, who had no relatives, and says that in such a case the ' wergild ' went half to the King, and half to deceased's ' ge-gildan '.

In clause 13 of the Doms of Edward and Guthrum we have reference to security being given for the payment of 'wergild' by eight of the paternal kin and four of the maternal kin, pointing still more definitely to the liability of these kinsmen in the same ratio of two-thirds and one-third as in the Welsh Laws.

We likewise get in the same section reference to the 'healsfang' (= *saraad*) of the murdered man as belonging to the children, brothers, and paternal uncles. 'That money belongs to no kinsman except to those who are within the knee.'

The Laws of Edmund (A.D. 940-6) are of particular value, for we have there a definite enactment attempting, without destroying the principle of the payment of compensation for tort, to break up the liability of the kinsmen to contribute.

'If any one', runs clause 1, 'henceforth slay any man, it is ordained that he himself bear the "faethe" (feud) unless with the aid of his friends, and within twelve months, he compensate it with the full "wer". . . . But if the kinsmen forsake him and will not pay for him, then I will that all the kin be "un-fah" except the perpetrator, if afterwards they do not give him either food or protection.'

The Doms of Church-Grith of Ethelred (A.D. 1013), which deal with Church matters, contain two clauses¹ relative to slaying by clerics, who were divided into ordinary clerics and monks. They also illustrate the point of the responsibility of kinsmen to contribute to the levy:

'If any one charge one in holy orders with "faeththe" and say that he was a perpetrator or advisor of homicide, let him clear himself with his kinsmen, who must bear the "faeththe" with him, or make "bôt" for it. . . .'

'No minster monk may demand nor pay "faeththe bôt", for he forsakes his law of kin who submits to monastic law.'

The same provision is repeated in Cnut's Ecclesiastical Laws of Winchester, c. 5 (A.D. 1016-35).

In the Secular Laws, cc. 40, 57, we find 'wergild' being made payable to the kinsmen of the man murdered unless cleared by compurgation, and the King standing in the place of a kinsman to a stranger.

¹ IX. 23, 25.

The Laws of the Confessor, cc. 12, 15, even in breaking through the old kin-duties and in laying special stress on the 'manbote' payable to the King, retained a small portion of the 'wergild' for the relatives of the murdered man; and in the Laws of the Conqueror, cc. 7, 9, a man convicted of murder had still to pay, in addition to the criminal penalty of 'manbote' to the lord, a 'wergild' to the relatives, half of which went to the widow and half to the children and blood relations of the slain man.

§ 11. It is, however, in the regulations regarding the recovery of the 'wergild' that the English Laws are most interesting. The account given in those laws is even more minute than in the Welsh Laws, and when we place them side by side, we see that they were identical in practically every particular.

In the Law of Æthelberht, cc. 22, 23, it is provided that the 'leodgild' must be paid in forty days: in the Laws of Ine, c. 74, which in this particular deals only with theows, the lord of a 'theow', being a murderer, must redeem him or hand him over to the murdered man's kinsmen, or failing that, enfranchise him, so as to give the slayer's kinsmen a chance to redeem him.

Failing redemption by them, the offender must be delivered over to the kinsmen of the slain.

In Ælfred's Laws, c. 42, we get a detailed procedure showing the first step towards regulating the exercise of revenge:

'We command that the man who knows his foe to be home-setting fight not before he demand justice of him. If he have such power that he can beset his foe and besiege him within, let him keep him within seven days, and attack him not, if he will remain within. And then after seven days, if he will surrender and deliver up his weapons, let him be kept safe for thirty days, and let notice of him be given to his kinsmen and his friends. . . . If he will not deliver up his weapons, then he may attack him.'

With this may be compared c. 5, wherein it is provided that a man obtaining sanctuary was to be kept under the protection of the Church for thirty days, during which notice was to be given to the kinsmen of the offender.

Here we get indicated a period of suspended hostilities

prescribed to enable a slayer to get into communication with his kinsmen in order to find the 'wergild' before vengeance could be executed.

The same period of thirty days appears also in Cnut's Laws, cc. 39, 41.

In the thirteenth clause of the Dooms of Edward and Guthrum we have convincing evidence of the identity of English and Welsh Law :

'If any one be slain let him be paid for according to his birth. It is right that the slayer after he has given wed (surety) for the "wer" find in addition a "wer-borh" (sureties for payment) according as shall belong thereto, that is to a 12-hynde man's "wer", 12 men are necessary as "wer-borh", 8 of the paternal kin, 4 of the maternal kin. When that is done, then let the King's protection be established, that is they all of either kindred with their hands in common upon one weapon engage to the mediator that the King's "mund" shall stand. In 21 days from that day let 120s. be paid as "healsfang" (= *saraad*).

'In 21 days from the day that the "healsfang" is paid, let the "man-bote" be paid, in 21 days from this the "fight-wite" (fine for breach of peace), in 21 days from this the "frum-gyld" (first instalment) of the "wer", and so forth, till it be fully paid within the time the "witan" have appointed. After this they may depart with love, if they desire to have full friendship.'

With this reconciliation we may compare the like provision in Eric's Zealand Law, c. III. 27 :

'And he who has taken the "bote" shall swear that he will never avenge the deed for which he has taken the "bote", neither by counsel nor by deed, neither upon the born nor the unborn, and therewith shall they be reconciled, and lay their hands together and kiss each other.'

Almost identical are the provisions in the Laws of Edmund, c. 7 :

'The "witan" shall appease "faehthe". First, according to folc-right the slayer shall give pledge to his "forespeca" (i. e. his advocatus representing him in negotiations), and the "forespeca" to the kinsmen, that the slayer will make "bôt" to the kinsmen. Then after that it is requisite that security be given to the slayer's "forespeca" that the slayer may, in peace, draw nigh and himself give pledge for the "wer". When he has given pledge for this, then let him find thereto a "wer-borh"; when that is done, let the King's "mund" be levied; within 21 days from that day let the

"halsfang" be paid; 21 days from that the "manbôt", and 21 days from that the "frum-gild" of the "wer".'

§ 12. It will be noticed that this quotation omits reference to the kin. The reason is that it was King Edmund who first attempted in England, so far as we can see, to confine the penalty to the actual slayer, just as we have suggested an attempt was made about the same time by Hywel Dda in Wales.

We have already quoted part of clause 1 of Edmund's Laws allowing kinsmen to forsake a slayer, and that same clause concludes by limiting the exercise of the right of vengeance upon the body of the murderer :

'If any one of the other kindred take vengeance on any other man, except on the real perpetrator, let him be foe to the King, and to his friends and forfeit all that he owns.'

§ 13. The same effort was made on the Continent, and we shall not be far wrong in ascribing the general movement to the Church.

The movement had its setbacks every now and again, but that it was a determined policy continued through many centuries is undoubted.

We may refer to one such setback, made perhaps under Danish influences.

In the Treaty between Ethelred and Olaf Tryggvason we find the old vendetta explicitly recognized, with this change that it was partly a matter of territory as well as kinship.

In clause 6 it is provided :

'If over eight be killed there is "frith-breach". Then, if in a "burh" it happen, let the inhabitants of the "burh" go and get the murderers living or dead, or their nearest relations, head for head.'

§ 14. The Laws of the Confessor tried to break down the old system of kin vengeance in a new way. They fixed the 'wergilds' or 'bôts', but directed that they were to be paid to the King or lord or baron of the man slain, but even so some portion was reserved for the relatives.

These laws provided that the murderer was to be brought to the King's justice in eight days, failing which (c. 15)

the ville or hundred was penalized 46 marks for non-production in lieu of ' wergild ', of which 40 were to go to the King and 6 only to the relatives of the man slain, and the latter 6 were repayable to the ville or hundred if they found the murderer within a year.

This, coupled with the provision that charges of murder were to be decided (c. 16) by the ordeal of fire and water instead of by compurgation, and with the provision (c. 17) that a murderer's land was not to be forfeited, attacked the old system, already weakened by the decay of tribal feeling, so effectually that it never really recovered in England, and the transformation from tort to crime was effected quickly.

Nevertheless, lingering traces continued for some time, and we find marks of it in the *Leges Henry I.*

By the time of Edward I the law of ' wergild ' was dead in England. As already noted, Llywelyn ap Iorwerth is said to have put an end to it in Wales. In the Statute of Rhuddlan, Edward I used the old communal connexions by imposing on the coroner the duty, in cases of suspected murder, of inquiring into and enrolling the Welshery (i. e. the kinsmen), paternal as well as maternal of the slain, and by imposing on such persons the duty of presenting the fact of manslaughter, giving them also the right to sue for murder by appeal. He also used the communal connexion of the slayer by providing that the appellees, on being summoned, were to be replevied on the security of six pledges.

12. *Murder in the Brehon Laws.*

§ 1. The right to demand reparation for murder survived in Ireland to the sixteenth century, for in 1554 the Earl of Kildare received an ' eric-fine ' of 340 cows on account of the death of his foster-brother, Robert Nugent, under the Brehon Law.

§ 2. The *Senchus Mór* appears to state that there were three stages in the growth of the law of murder, viz. ' vengeance ' (' It is the strengthening of Paganism if an evil deed be avenged '), the death penalty for deliberate murder (' It is evil to kill by a foul deed. I pronounce the judge-

ment of death ; of death for his crime to every one who kills '), and reparation.¹

The Brehon Laws show that at the time of St. Patrick's mission the payment of ' coirbh-fine ' (= *galanas*) was fully established as the reparation for murder and killing, and in the song, ' It is the strengthening of Paganism ', they credited the introduction of the death penalty, which they found so difficult to reconcile with Christian teaching, to the influence of the Church putting into operation the principles of the Mosaic Law.

§ 3. The Irish Laws draw a very decided distinction between intentional and accidental killing. ' Coirbh-fine ' was payable for both, and in fact it appears to have been due for mere intention to kill without killing following ; but, whereas the law of the Church was that death was the penalty for deliberate murder, the customary law prevailed and limited the death penalty to cases of intentional murder when the ' coirbh-fine ' was not paid, introducing outlawry as the penalty for unintentional killing where satisfaction was not made. The song already referred to says :

' Let every one die who kills a human being,
Who inflicts any wound intentionally
Of which any person dies,'

and the gloss thereon runs :

' No one is put to death nowadays for his intentional crimes so long as the " eric-fine " is obtained ; and wherever " eric-fine " is not obtained he is put to death for his intentional crimes, and placed on the sea for his unintentional crimes.'²

The later *Corus Bescna* states, obviously under the influence of the Church, that all malice aforethought involved the death penalty.

§ 4. We get also, as in the Welsh Laws, the same distinction between accidental and negligent slaying ; the former was, under the later Irish Laws,³ not compensated for. ' Accidental shedding of blood ', it is said, ' is exempt ' ; and some of the instances recall the illustrations given in the Welsh Laws.

¹ *Senchus Mór*, I. 9, 13

² *Ibid*, I. 15

³ V 157-9.

Exemption was granted where blood was shed through the rebounding of a chip of wood, the flying of a piece from the flesh fork, the backward sway of a branch of a tree, the rebound of a flail from the ground, the casting of a horse's shoe, the rebound of metal in a forge, and the ricochet of one stone from another.

But it is particularly in the rules relative to the liability of kinsmen to assist that the distinction is most clearly drawn (*vide infra*).

§ 5. So, too, as in Welsh Law there was exemption owing to the incapacity of the slayer to commit crime, or owing to provocation or the like. Shedding of blood entailed no penalty if it were caused by a fool, by a physician, by a person enforcing his contract, in defence of his chief, in battle, or by the first wife, 'through just jealousy from an adulteress who goes over her head', or if the person slain were an outlaw. Reduction was also allowed where the killing was caused in 'lawful anger'.¹

§ 6. Similarly, we find that for aggravated deliberate homicide the reparation was increased. There was an increased fine, a double fine, for secret murder or premeditated murder, and this is contrasted with the single full fine for deliberate homicide when not aggravated, for the single full fine was levied for death caused 'through scaring for the purpose of killing'.

The *Senchus Mór* states there were three death levies, viz. for an act of inadvertence, secret murder, and an assault of anger, and that every act of neglect was a fault. We have, therefore, a clear distinction between negligence, deliberate homicide, and slaying under provocation.²

§ 7. The definition of secret murder is practically the same as in the Welsh Laws. It consisted in the concealment of the body or commission in a place where the body was not likely to be discovered, e.g. a mountain or wild place, unless the slayer disclosed the fact of slaying before the discovery of the body.

§ 8. We have also the right of self-defence indicated, and

¹ Heptads, V. 143, 237.

² *Senchus Mór*, I. 177-9, 237; Bk. of Aicill, III. 99.

the right to slay an outlaw. In the former case the Book of Aicill (III. 137, 385, 465) allowed a partial exemption—in one place a total exemption if a thief were seen and were not known and could not be seized except by killing him—and in the latter a total exemption.

Jealousy of a wife also exempted her for killing,¹ also slaying one attacking with a knife,² and the doctrine is well summed up in III. 537, 'The great "eric-fine" and that for compensation are not to be avoided if defence be not made for one whom necessity protects.'

These resemblances are important, for without sufficient justification it has often been asserted that in Celtic Law all slaying, whether accidental or deliberate, carried with it the liability to pay compensation.

§ 9. In regard to levy there are numerous points of resemblance. The Council of Cashel (A. D. 1172) provided that no cleric related to a homicide was to contribute anything to the 'eric-fine', and that the 'eric-fine' payable for the murder of a priest went to the latter's tribe. We have also the further resemblance that in the reparation payable not only was body-fine payable, but honour-fine.³

§ 10. In one important point there was a marked distinction between the Irish and Welsh Laws. The latter creates no communal liability to assist an offender, except in blood-fine and honour-price, but the former imposes that liability upon tribesmen in all offences.

§ 11. The Irish Laws help us in focussing attention upon the principles of the Welsh Law of liability for blood-fine.

We have already stated that the Irish Laws of succession gave the right of succession to four groups in order, and that these four groups may possibly be coincident with the Welsh groupings in degrees. If that be so, there is a curious parallel with the Welsh Laws, but we cannot press the identification.

The Irish Laws seem at times to vary in their rules as to liability.

The tract 'Do breitheamhnus for na huile chin do ni gach cintach' states that there are seven divisions upon the

¹ III. 293.

² III. 469.

³ III. 105.

crime of every criminal, viz. himself and chattels, his father, his brother, his 'geilfine' relations, the chief of the 'geilfine', if no chief his bed, raiment, and food, and the King, and adds that every family was liable to pay, after the evasion of the criminal, in the proportions in which it would divide his property.

They clearly place the liability for all offences except killing, which fell on the family as well, upon the criminal first, then upon his relatives if he defaulted; but in murder kinsmen were at once liable except that in 'unnecessary killing' the family had the choice whether to hand the criminal over and take his land, or give up his land in satisfaction.

Later in the same tract we get the division of blood-fine received, which probably represents also the proportions of levy.

They are difficult to understand, but there were seven parts, distributed on different grades of relations.

§ 12. In the tract 'Ted an fearann a cintaib', the rule is stated that for every unnecessary crime the criminal could be surrendered, but for necessary crime the criminal's land must be surrendered by the tribe before they could hand him over. The distinction between 'necessary' and 'unnecessary' was that between negligent, but accidental, and deliberate.

In the *Senchus Mór*, III. 69, we get the rule stated perhaps more clearly:

'For every crime of necessity, except killing, a man shall pay "eric-fine" for it himself till his cattle and land are spent: what then remains the tribe pays in such proportion as they divide his property.'

Necessity was a crime of inadvertence and unnecessary profit; non-necessity was intentional crime, and such as was not deserved by the injured party. In case of necessary killing the 'eric-fine' was paid by the tribe in the proportions in which they divided property; for every unnecessary crime, homicide, or otherwise, the criminal was given up himself as well as his cattle and land. The man paid first, then his son, then his father, then each family in order

of proximity of relationship to himself until full payment was made.

The Book of Aicill, III. 342, sums up the rule in ordinary offences, other than murder, in the aphorism, 'Cach cin co cintach', every crime to the criminal, that is so long as a criminal was in the territory it was not lawful to sue his next of kin or his kinsmen sureties, but to sue him according to his rank or distraint on him.

§ 13. That, therefore, was the general rule, that for all offences except killing the murderer paid first, then his kinsmen were responsible; for murder all were liable from the start, subject to the proviso that where there was deliberate murder the kinsmen could resign the criminal.

The exact limits of relations liable were the brother, the 'geilfine', the 'diarbhfine', and 'iarfine' in ascending order, with an ultimate power, according to the *Senchus Mór*, to indent on gossips, sons-in-law, foster fathers, mutual friends, and 'on all the best of the fine and the people not of the fine'.¹

The details of the Welsh Law are different, but the general principles were the same.

13. *The Law of Homicide elsewhere.*

§ 1. The law of reparation for murder was general among all European races. It is twice mentioned in the *Iliad*,² and Tacitus in his *Germania* refers to the Germanic rule thus:

'In their resentments they are not implacable. Injuries are adjusted by a settled measure of compensation; atonement is made for homicide by a certain amount of cattle, and by that satisfaction the whole family is appeased.'

§ 2. It existed among the Scandinavian and the Germanic tribes everywhere, but all we can attempt to do here is to point out some resemblances to Welsh Law.

§ 3. We have seen that in the Scots Law the same system prevailed. We may add that even so late as the Assize of William, c. 15, the rule prevailed. It is there definitely stated that the slaying of a thief was permissible, and that

¹ *Ir. Laws*, I. 239, 259, 261, 263, 265; IV. 241-5; III. 489.

² See Pope's *Iliad*, IX. 743-6, and XVIII. 577-80.

if the kin of the thief took vengeance, such kin must be regarded as breakers of the King's peace to be punished, and even if the King remitted punishment on them, the kin of the man on whom vengeance had been taken were still entitled to 'tak vengeance of them that slew thar kyn'.

§ 4. In regard to the Germanic Laws it will suffice to take a few provisions from some of the Codes.

The Lex Salica is interesting as showing how the sum was collected (Codex I, Tit. LVIII). It provides that the slayer, having paid as much as he could pay and finding himself still short of the necessary funds, had to produce a jury of twelve men to swear he had no more property either above or below ground. He was then to enter his own enclosure and gather earth from the four corners, proceed with it to the boundary line of his precincts, and, still looking inwards towards his own premises, to throw the dust collected over his shoulders upon him who was most nearly related to him.

If his father and brother had already contributed, he was to throw the earth on the nearest three relatives, both of his mother-kin and his father-kin. It is important to note here that the liability went through female ascent, and the other Codices add that, if the mother had contributed, the earth was to be thrown over her sister and that sister's sons.

All these relatives were bound to contribute to the extent of their ability, the richer paying for the poorer, but if they were all unable to find the necessary amount, the culprit had to be produced by those who stood surety for his appearance in four courts, and if he could then find no security to pay the 'wergild', he had to make satisfaction with his life.

Here we get a similar, though not identical, rule to that prevailing in Welsh Law.

§ 5. The same law (Tit. LXII) throws further light on the division of the 'wergild'. Where a man was slain his sons collected half the 'wergild', the other half was collected by the nearest relations both on the father and mother side, and they divided their half among themselves, no ratio being mentioned. If there were no near relations the fisc

collected and annexed the sum. In a later addition by Childibert, Tit. CI, half the 'wergild' went to the son, and the rest apparently to the three nearest relatives of the father-kin and mother-kin.

§ 6. In regard to slaves the rule was simple. The lord of the slayer paid the 'wergild' of a slave killed to the lord of the victim (Tit. XXXV): if the victim were a freeman the slave was delivered over to the 'parentes' to be slain, and the lord paid half the 'wergild' in addition.¹

What the exact limitation of the 'parentilla' liable to contribute was is nowhere explained in the Germanic Laws.

§ 7. The Lex Salica (Tit. CIII) also imposed a heavier penalty for slaying in a wood or other hidden place. This, comparable to the Welsh 'waylaying', was termed 'creu beba', and in other Germanic Laws is identical with 'mordritum' or deliberate murder.

In the Decretio Childiberti II, c. 5, slaying deliberately without cause was made punishable with death and irredeemable by the payment of 'wergild'. Even if the relatives of the slain were prepared to accept 'wergild', the relatives of the slayer were prohibited from aiding him, for as the law said, 'it is just that he who knows how to kill, should learn to die'.

In the Lex Frision., Tit. CXX, 'mordrito' was satisfied by a ninefold 'wergild'. Likewise, in the Lex Saxonum, c. 19, and the Lex Angli. et Werion., which, however, added that accidental death entailed only a single 'wergild'.

§ 8. In the Capitulaire A quis granense, c. 32 (A. D. 802), the taking of revenge was prohibited altogether. Parties were allowed to receive 'wergilds', but were debarred from revenge, and this rule, it may be remarked, applied equally to persons slaying near relatives as to those slaying strangers.

In the Capitulaire Exercitati, circa A. D. 810, c. 9, the pursuit of relatives of the slayer was strictly forbidden, and an attempt made to limit responsibility to the slayer alone; and in the Capitulaire Ludovic, c. 7, the slayer was

¹ Lex Frision., Tit. CXX.

made responsible for the payment of ' wergild ' for slaying, ' ex levi causa aut sine causa ' alone.

We see in the latter provisions an attempt to break down communal liability.

The Lex Salica provides a simple ceremony for effecting that purpose. By Tit. LX, Cod. I, a person, desiring to break ' parentilla ' ties, broke four alder-wands on his head and cast them on to the ground in public court, saying he wished to sever himself from all oaths, inheritances, and reckonings with his ' parentilla ', and thereafter should any of his kin be killed or die, he had no part in the ' wergild ' or inheritance, and likewise his kindred had no right in his.

The same thing occurred among the Scandinavians ; see Asega Buch VI, c. 9.

§ 9. We need only refer now to justification for murder. On this matter there are numerous provisions, but it is enough to mention where they are to be found in part : Lex Salica LXVIII, Lex Baiuor. VIII, Lex Burgund. XXIX, LXVIII, CIII, Lex Frision. V (Ed. Roth.), cc. 32, 33, 212 ; and to say that adultery, theft by night, and outlawry justified slaying.

What has been said, though it by no means gives the whole Germanic Law, suffices to show a general resemblance to Welsh Law, which is all that is required here.

V

THEFT AND SURREPTION

1. *Introductory.*

§ 1. It has already been stated that it appears that the offence, which ceased to be regarded as a tort and came to be regarded as a crime first in early communities, was the offence of theft.

It had in Wales at the time of Hywel Dda ceased entirely to be a tort, it had become definitely and finally a crime ; but its old character as a tort, nevertheless, left traces, particularly in procedure. The law of procedure in a trial for theft is described in detail elsewhere, and it suffices to say here that the old character of tort left its impression on procedure in the ' oath of the absolver ', in the fact that no one could prosecute for theft except the owner of the stolen property, and in the fact that actions, where the property was discovered, partook of the nature of suits to recover property.

§ 2. The early transformation of theft from a tort into a crime was not confined to Wales : it was not so transformed in Ireland, but it was elsewhere.

Theft was one of the ' three columns of criminal law ' in Wales, and a considerable portion of the Codes and of the Anomalous Laws is devoted to statements of the law pertaining to the subject.

Over and over again it is impressed in the Codes that a knowledge of the law on this subject was one of the prime qualifications of a judge, and when we see the quantity of material there is, treating not only of the substantive law but of the procedure at trial, we can well understand why its apparent complexity struck all who had anything to do with it.

§ 3. The crime of theft was particularly abhorrent to early communities, and in the Welsh Codes this attitude

finds frequent expression. So serious was it considered that the law laid it down that, in no circumstances whatsoever, could the crime be compensated for. We might compare, *passim*, the rule in the Scots Assize of William II, which provided that a person convicted of theft

'Hastily he sal be hangyt. Alsua lefful it is to na man to take redempcioun for thyft eftur dome gevyn of wattir or of batel.'

Once a charge was levied it had to be carried to final disposal. Neither the lord nor the complainant himself could withdraw or compromise the complaint or receive back the stolen property without trial, or let the thief go.

Nor could the lord substitute for the extreme penalty, once passed, any lesser punishment.

A withdrawal by the complainant, after he had given sureties to prosecute, was to be punished with a fine of three kine.¹

Surreption was, however, compromisable before suit, but if a complaint were filed it could only be withdrawn with the consent of the lord.

§ 4. Not only were the punishments severe, but a conviction for theft carried with it civil disabilities. The word of a thief could never be accepted in testimony against another. He could never be a compurgator, nor occupy any post of honour among his kinsmen, and 'a fortiori' he was rendered incapable for life of exercising judicial functions.²

2. Definition of theft and cognate offences.

§ 1. But all that we would nowadays include in the definition of theft was not theft in Welsh Law. The Welsh Laws draw a distinction between theft, violence, surreption, and error.

§ 2. The essential features of theft were secrecy, denial, intention to appropriate, and movement of the thing stolen.

All of these ingredients had to be present before theft

¹ V. C. 76; D. C. 438, 448; G. C. 790; V. 80, VI. 112, 120, IX. 258, 264, XI. 346, XIV. 624.

² D. C. 422, 596; X. 326, XI. 406, 410.

could be constituted, and we have, in the law of theft, an illustration of the underlying characteristic of Welsh criminal law that a thing done secretly was more infamous than a thing done openly.

The definitions given in the Codes of the offence of theft and its cognates do not, perhaps, fulfil all the requirements of a scientific definition.

The Venedotian Code, p. 254, says, "theft" was everything that was denied of what shall have been taken; surreption, everything taken in absence and not denied; "treis", or violence, or robbery, everything taken in presence and against consent; and error, everything that was taken in mistake for another.'

The Dimetian Code describes theft as moving from its place the thing that shall be stolen, and elsewhere as everything taken in absence and denied; surreption, that which is taken in absence and not denied; 'treis', that which is taken in presence and against the owner's will; and inadvertence, the taking of a thing instead of another thing. A similar definition is given in the Anomalous Laws.¹

In the latter there is one passage to the effect that some judges held that there was no such offence as surreption, and that if a thing were taken in the absence of the owner, it was theft, if in the presence of the owner, 'treis'; but the commentator himself disagrees with this view, and says that the correct law was that a thing taken in absence and not denied constituted surreption.²

Elsewhere, the same commentator says that 'error is a thing done instead of another, that is in seeking to do good to do harm, for instance, taking another man's property in place of one's own, for which act there is no penalty'.³

§ 3. There is no intention here of giving a complete scientific definition of theft, but the outstanding points in the Welsh Law may be noted.

There could be no theft where a man, under a mistake, took away another man's property in the bona fide belief

¹ D. C. 404, 614-16; XIV. 672.

² XIV. 728. ³ XIV. 596.

that the property taken was his own, provided he was prepared on ascertaining his mistake to restore the property.

Such an act was error or inadvertence, and was no offence. There could also be no theft where a man took away another's property and diverted it temporarily to his own use, without any intention of detaining it as his own. Doing so without consent of the owner, or, if taken with consent, exceeding the limits of the owner's permission as to use, was an offence, but it was an offence of surreption, and not of theft.

There could also be no theft if the property were stolen in the presence of the owner with every intention of retaining the property stolen and of denying the commission of the act. The act was open and not secret, and, therefore, though it was an offence, it was an offence of 'treis' and not of theft. Theft was the secret removal of another's property with intention of appropriating and denying commission of the act.

The act of theft or of 'treis' might be aggravated by the commission of an act of savage violence or a ferocious act (*ffyrnigrwydd*). That signified rendering the property stolen useless to both the perpetrator of the offence and to the owner. Such an act involved a higher penalty.

We must note, however, that 'treis' does not mean simply 'robbery'. 'Treis' was the use or show of physical force or violence: if that show accompanied a stealing, the act was dealt with in law, not as theft, but as 'treis'.

Hence there could be 'treis' not only in stealing, but in depriving a man of his life or his liberty, his land, or his movables, and also in freeing a man from custody. Likewise the use of 'ffyrnigrwydd' could accompany murder, burning, stealing, or any other act, and invariably involved an enhanced penalty.¹

§ 4. We have next to notice a very marked line drawn—a line drawn in other laws also—both in respect to procedure and penalty, between what was known as 'theft present' and 'theft absent' ('lledrad cynhyrchawl' and 'lledrad angynyrchawl'). The terms constantly recur in the laws and a clear understanding of their meaning is essential.

¹ V. C. 254, 260; D. C. 594, 614-16; XI. 410.

Where a thief was discovered with the stolen property in his possession, and that property was produced in court, the theft was said to be a 'theft present'; where the thief was not discovered with the property in his possession, and it was not produced in court, it was said to be a theft absent.

If a man were seen driving stolen animals in front of him, or if stolen property were discovered in the same enclosure as himself and under his control, or if he were seen to throw the stolen goods on the ground, or if he were seen carrying them, he was said, however, to be guilty of 'theft present'.¹

§ 5. The law recognized certain excusable thefts, that is, thefts for which no penalty could be imposed. There was the case of the 'necessitous' thief and the case of the wife acting under the domination of her husband. These excuses are dealt with in considering punishments awardable for theft.

Likewise, the law recognized excusable surreptions, for which the only liability was to make compensation to the owner.

A person seizing a horse in order to hasten to warn the countryside of the approach of a foraging enemy, or to fetch a priest or a doctor to see a person 'in extremis', was guilty of no offence. The 'surreption' was justifiable.

So, too, if two persons held property in common, and one used it and expended it for his own benefit, he committed no offence, unless the other co-sharer had placed an interdict against sole user by the procedure of placing a cross against it.

The seizing of a mare in order to facilitate the capture of its colt, which was trespassing and causing damage to corn or a meadow, is also referred to as a justifiable surreption, and, of course, the seizing of any animal under the law of cattle trespass was permissible.²

§ 6. On the other hand, there were definite offences which were not theft, but which were to be prosecuted as theft.

The Dimetian Code includes building on another man's

¹ D. C. 612; IX. 212, XIV. 600, 676, 722.

² V. C. 328; D. C. 602; IX. 230-8, X. 390, XIV. 582, 600, 640, 670.

land, felling his timber and ploughing his fields; but the Venedotian and Gwentian Codes regard these acts as surreptions, and in reality they were acts of trespass. Building on waste land, ploughing a clearing, waste, or wood, without the lord's permission, were also prosecuted as theft. The removal of the 'pentanfaen', the stones of a kiln, &c., without the lord's permission, were also treated as theft.

The fact that these acts were treated as theft means, however, only this, that the procedure applicable to a trial for theft was, 'mutatis mutandis', applied thereto, and that such acts were regarded as crimes.¹

3. Punishments.

§ 1. Inasmuch as theft had become a crime and a crime only, the only penalty imposable, on conviction, was punishment by the lord or King.

In awarding punishment, the first question was whether the theft was 'present' or 'absent'.

§ 2. If it were present, the punishment awardable was practically the same throughout the Codes and commentaries.

For the purpose of punishment, theft present was divided into two classes, according as to whether its legal value exceeded or did not exceed four legal pence.

If the theft present exceeded fourpence in value, the punishment was death; if it were less, the convict became a 'saleable thief'.

The Dimetian Code inflicts the death penalty in all cases of stealing animals, other than dogs and birds; but the Venedotian Code, while referring to this as the view of some authorities, says it is safer to confine the death penalty to cases exceeding fourpence in value.

One humane authority expresses what after all was only a pious aspiration. 'Sound law is not answerable for hanging a person for fourpence, there can be no hanging but for £100.'²

§ 3. Not every one, however, even guilty of theft present

¹ V. C. 196; D. C. 444; G. C. 764.

² e. g. V. C. 252; D. C. 462, 602; XI. 408.

to the value of fourpence was liable to be hanged. It was prima facie a penalty reserved for a freeman. It could not be inflicted upon a bondman for a first offence; probably not so much out of a consideration of mercy, as out of consideration for the master, who would be deprived of a valuable property if his bondman were executed.

If a bondman committed theft he was punished for the first offence with a fine of 10s., for the second with a fine of £1, and for the third offence he had to sacrifice a limb, one of the very few cases in Welsh Law where mutilation was inflicted on any one for crime. Thereafter he became a 'notorious thief' (*lleidr cyhoeddog*), and had to be dealt with as if he were a freeman convicted of crime, that is he became liable to the death penalty, though even here some authorities say there was to be another limb amputated and no death penalty.

The same penalty was inflicted upon a foreigner, unless he were a fugitive, when he became liable to death; and it was the duty of a lord to defend his bondman or foreigner and redeem him when convicted, provided always that the theft was committed while under his dominion. If the lord would not redeem him, he could redeem himself, and thereafter he became free of his lord, assuming the status of a King's foreigner.

A youth under fourteen also could not be executed; his father, however, made good the theft; nor could a tonsured clerk, but, in his case, as he was sheltering under the privilege of his orders, he was regarded so far as a fugitive from justice, that the lord was entitled to forfeit his property, and he was handed over to the Church for punishment. That punishment involved degradation from orders, so a second theft by him rendered him liable to the same penalties as a layman.

So, too, a necessitous thief was exempt from execution, that is a man who, while in want, had traversed three 'trefs' and had called on nine houses in each 'tref', without obtaining hospitality, to relieve him. If he then stole eatables, not exceeding 5s. in value, he could not be executed, but he had to make good his depredations.

This exemption is extended in the Venedotian Code only to a foreigner from beyond the sea, or who spoke a different language to that of the country, and in one passage of the Anomalous Laws to a foreigner cast ashore from his ship.

A married woman was also exempt if she had committed theft jointly with her husband—this on the ground that a wife was under the ‘dominating rod’ of her husband, but a woman committing theft on her own account was liable. In that case, however, if the woman were married, the husband had to make good the stolen property, and his house and all that was therein was forfeited.

The form of defence a married woman charged with ‘theft present’ was entitled to make was limited to an ‘arddelw’ of an ‘arwaesaf’ (q.v. under Procedure). She could not claim the ‘arddelw’ of birth and rearing or custody before loss. If her defence was that the alleged stolen property was her own, she had to call her husband as her ‘arwaesaf’ or guarantor, and he could then plead the other ‘arddelw’, asserting that the property was his.

A pregnant woman could not be executed, and the lord had, in every case where a woman was liable to death, to satisfy himself whether she was pregnant or not, without the woman raising the question. He was responsible to see that two lives were not taken for one theft.¹

§ 4. In addition to the exemption of particular people from execution, the theft of certain things, no matter what their value, did not involve the death penalty.

The list is a lengthy one, and includes a tame fowl, dogs, birds of any description, garden or field herbs, a wild animal out of an enclosed park, a tree or wood not to be used for building, or one unworked on. For these goods, if stolen, the penalty was a ‘camlwrw’ of 180 pence.

The stealing of a king’s hart was punishable with a ‘dirwy’ only, and in this and in the low penalty for stealing animals from a park, we see that the game laws of early Wales were not severe.²

§ 5. We have also to mention the peculiar provision that

¹ e.g. V. C. 104, 254-6; D. C. 462, 512, 596; V. 60, XIV. 668.

² e.g. V. C. 256; D. C. 462, 496; G. C. 730-2.

if a thief were parted, after arrest and before judgement, from the property alleged to have been stolen, and that property were consumed before trial, the thief could in no circumstances be executed. The reason was that the theft ceased to be ‘present’, and so could not be sworn to, and the accused was so deprived of the power of raising an ‘arddelw’.

Similar was the rule if the stolen property were left in the accused’s hands, and it was destroyed by another. If the thief himself destroyed the property, he derived no benefit thereby; but if some one else did, the original thief could not be proceeded against. The destroyer was punishable either as a thief or the liberator of a thief, but we are expressly told that the destroyer could not be punished with death, ‘as it is not right to execute any one for theft without property being found in his hand’.¹

§ 6. Spoliation, i. e. seizure and forfeiture of all property of a thief, was never inflicted where the death penalty was imposed, unless the thief were a fugitive or were convicted of a double offence. In the latter case he was hanged for one offence and despoiled for the other.

A thief’s house was not forfeit if he were discovered, and even if he were not discovered, the forfeiture was limited to his own property in the house.

Forfeiture, however, was applied to any house wherein stolen goods were hidden.

§ 7. In a case of theft absent, trial for which was by compurgators, the sentence of death could never be inflicted, even where the jury failed to compurgate the accused.²

It has been asserted that the institution of compurgation encouraged perjury, because the kinsmen felt bound to acquit a fellow kinsman in jeopardy of his life. A careful consideration of the laws leaves no room for doubt that compurgators were never in that quandary, for in no circumstances could a man be executed without the stolen property being found in his possession, and compurgators were not called to exculpate a man found in possession of stolen property.

¹ IX. 228, XIV. 616, 670, 722.

² V. C. 252; XIV. 668-70, &c.

§ 8. The ordinary penalty for 'theft absent' was a 'dirwy' of £3—reduced to £1 if a bondman stole less than a penny's worth—the same penalty being exacted whether there was failure of compurgators to exonerate or admission by the accused.

It made no difference whether the charge was supported by the 'lliw' of an informer (q.v. under Procedure), or was based on suspicion because the accused resisted search.

Sometimes the 'dirwy' is stated to be £7, but where £7 is mentioned, it is in special circumstances.

In addition to the 'dirwy' which went to the lord, the convict had to recoup the claimant for his loss.

No doubt the Venedotian Code, p. 242, does say that some authorities assert death was the penalty where the thief failed to pay the 'dirwy' imposed, that is as a punishment in default, but it asserts expressly as the true law that the penalty was £7, and that no one could be put to death on whom no stolen property was found.

The model plaint in the XIIth Book for theft absent also demands a fine of £7, 'on account of its not being theft in hand'.

In one passage of the Anomalous Laws there is an expression which might, at first sight, be construed as an authority for the proposition that the death penalty could be inflicted for 'theft absent'.

It runs :

'Whatever it may be, whether in hand or absent, if against consent, where swearing to the stolen property is appropriate, unless shields be had against the swearing, execution follows.'

It proceeds, however :

'Where a raith shall pertain for theft, if the raith fail, a "dirwy" is due, however small the worth of the thing.'

Now there could be no swearing to stolen property, unless it were present; 'shields' were ordinarily used only in actions for theft present, and a 'raith' was used only in cases of theft absent, except where there was 'dognfanag' or a 'tafodiog' statement of a co-thief (q.v. under Procedure), in both of which cases special penalties were imposed.

This one authority is no authority for the proposition purporting to be made in it, and it is safe to assert that the death penalty was not and could not be imposed for theft absent.

The ordinary penalty, as said, was a 'dirwy' of £3 or £7, and such was the penalty fixed where the accused had declined the 'oath of the absolver', or where an 'arddelw' of custody of guests had failed.¹

§ 9. The only cases where a heavier penalty than a 'dirwy' was exacted for theft absent was where there was a conviction on proceedings instituted through 'dognfanag' or the 'tafodiog' statement of a thief sentenced to death (q.v. under Procedure). In those cases the convict became a 'saleable thief', i.e. he had to pay £7 or undergo banishment.²

§ 10. Banishment was awardable in default for non-payment of 'dirwy' unless security for payment were given, and it was also imposed wherever a man was sentenced to be a saleable thief in theft present when the thief could not redeem himself. It was not imposed as a substantive punishment.

If a person banished in lieu of 'dirwy' returned without permission, he was liable to be sentenced as a saleable thief. If in lieu of that he was again banished and again returned, he was liable to death, under the law of Bleddyn, who substituted that penalty for the penalty of amputation of a limb ordained in the law of Hywel.

If a person were sentenced to banishment in lieu of the redemption value of a saleable thief, he became liable, if he returned without permission, to be executed.³

§ 11. The death penalty was also imposed on a saleable thief who could redeem himself, but refused to do so, though one authority states that in such a case the person in contempt was imprisoned and his property forfeited. The death penalty was also inflicted on a person sentenced to banishment who did not vacate the country in the period fixed by law.

Even here the death penalty was not imposed if some one

¹ e.g. V. C. 242-6; D. C. 424, 432, 462; XIV. 600.

² V. C. 246; D. C. 418, 462; XIV. 616, &c.

³ e.g. V. C. 242; IX. 226, XIV. 668.

redeemed him, and the period of exile was limited to the duration of the life of the lord.

Further, should any thief, exiled for failure to pay a 'dirwy', return, he could escape the enhanced penalty of banishment if he were able to find a surety to pay the equivalent fine of £7.

A fugitive thief, however, that is, a thief who fled from justice, and in respect of whom two captors swore they had sought him at his own house in vain for three nights and had eventually caught him when fleeing, was hanged outright.

He was not even allowed to compurgate himself. It was a case where, as the law says, 'notoriety hangs', and the death penalty was inflicted not so much for the theft, as because the fugitive had put himself outside law.¹

§ 12. We may now deal briefly with the penalties for allied offences.

For 'treis', absent or present, the penalty was £3, doubled if the act occurred in Church or Court: there could be no death penalty for 'treis', as the crime was open and not secret. If there were 'ffyrnigrwydd', i.e. if the thief rendered the stolen property useless, the penalty was double that of theft; death and forfeiture in the case of goods present, and in the case of goods absent the offender became a saleable thief of double value.

For surreption the penalty was ordinarily 180 pence, but if the subject of surreption was a horse, the fine was £3, plus 4 pence for mounting and 4 pence for every 'randir' traversed, the latter going to the owner as compensation.

There could be no proceedings or conviction for error. The owner must demand his goods back without legal proceeding, and if he were met with a refusal, the person refusing became guilty of either theft or surreption. No person who had refused restoration could plead error.²

4. *Receiving stolen property.*

§ 1. The law deals very fully with the reception of stolen property.

¹ V. C. 244; D. C. 600; IX. 226-8, XIV. 616, &c.

² e.g. V. C. 222, 254, 260, 262; D. C. 432, 462; G. C. 708, 778.

We have seen how under 'theft present' the person in possession was treated as a thief, and, in the law of procedure, we shall see how he could hand on the charge to another by pleading the 'arddelw' of an 'arwaesaf', but over and above this very effective provision the law contains other provisions.

§ 2. The most striking of these is the case of the 'hundred recurrences' (*cyhyryn canastyr*).

The rule was a very ancient one, and finds a place in the Codes as well as in the commentaries.

The rule provided that any person, through whose hand any part of a stolen animal passed or any part of a hart killed by the King's hunting dogs and stolen, or any part of a carcase of an animal killed by wolves or wild dogs, removed against the owner's will, could be proceeded against up to the hundredth hand receiving it, whether he received it by gift, purchase, or otherwise.

The mere possession, however bona fide, was no defence. The possession was prosecuted as theft absent, and it was punishable with a fine varying from 180 pence to £3.

To guard, however, against a false charge, no complainant could recover the value of any of the property from a person subject to a charge of 'cyhyryn canastyr'.¹

§ 3. So also it was an offence if any one found property and did not disclose its whereabouts, as soon as he ascertained the owner was inquiring about it. Such a person was liable to pay the full value of the property.²

§ 4. Likewise any one, however innocently, who permitted his house to be used as a receptacle for stolen property, rendered his house and all in it, except a deposit belonging to another, subject to forfeiture.³

5. *Miscellaneous allied offences.*

Removal of boundary stones and the like were punished with a 'camlwrw'. Killing a horse, which was tried as theft absent, entailed a double 'dirwy', and the removal of the carcase of another man's animal was also dealt with as theft absent, and punished with a single 'dirwy'.⁴

¹ V. C. 246; D. C. 448; G. C. 782.

² XI. 412.

³ V. C. 244.

⁴ V. C. 196; D. C. 568-70; G. C. 706.

6. *Theft in contemporary systems.*

§ 1. We have noticed that in the Welsh Laws the conception that theft was a crime had developed fully by the time of Hywel Dda, while traces were still retained of the conception that it was a tort.

The change in conception was not fully achieved in Roman Law, for Gaius classified 'theft' as a civil wrong, and even in modern French Law the double character of theft as both a crime and a tort is maintained, for that law allows, not only a criminal prosecution, but also an action in tort by the owner.

§ 2. In Irish Law theft remained a tort always: in early English Law it developed into a crime as early as it did in Wales.

Neither the Irish Law nor the early English Law appears to have made any effort to define theft, nor is there any conscious division apparent between theft, on the one hand, and surreption or error on the other.

There is a division in English Law of theft, according to the number of men taking part in the act; it was theft say the Dooms of Ine, c. 12, up to seven men, thence up to thirty-five a 'hloth', and thereafter a 'here'.

§ 3. The characteristic of Welsh Law in its division of theft into 'theft present' and 'theft absent' was present in Roman, Irish, Scots, and English Law. In Roman Law, e.g. detection in 'furto manifesto' involved, in the case of a freeman, corporal punishment or delivery of the thief into the bondage of the owner of the property, and in the case of a slave, corporal punishment and death.

Moreover, as we shall see in the chapters on Procedure, the procedure in actions of theft in English Law had so many points of contact with the Welsh provisions that we are safe in assuming that the general juridical ideas on the matter were very similar in both systems.

§ 4. Irish Law has not much to say about theft. It would appear from the Senchus Mór (I. 157) and the Book of Aicill (III. 139) that the ordinary penalty for theft was, in addition to the restoration of the property, a 'dire-fine' payable to the owner of the property, that is in essence

a penalty for insult to the owner, recoverable as any other civil damages. It is mixed up in the law of 'stay' with civil claims, and the procedure for recovery by distress was identical with that applicable to other civil claims.

In the assessment of the 'dire-fine' the Irish Laws are extraordinarily complicated. Starting with the conception that theft was a tort, the Brehons proceeded to consider whose honour had been injured by theft in a house. They discovered that not merely was the owner of the house and property affected, but all sorts and conditions of people who had rights of hospitality and the like in such house, with the result that a 'dire-fine' was due for theft, not merely to the owner, but to the tribal chief, and hosts of relatives and retainers of the house owner as well.

Another peculiarity of the Irish Law of theft was that the responsibility of a kinsman of a thief for his theft was not abolished.

It is true that the Book of Aicill (III. 343) lays down the proposition, 'Every crime to the criminal', and that for theft the next of kin or surety could not be sued; but it asserts that that rule only applied while the criminal was in the country; and if he had fled the country, leaving no 'seds' therein on which distress could be made, the next of kin or the thief's surety could be sued. This liability of kinsmen to compensate for the theft of a fellow-kinsman crops up constantly in the Irish Laws.

§ 5. The early English Laws are much closer in resemblance to the Welsh ones. Like the Welsh Laws they deal largely with theft, and they are almost plaintive in their denunciations of the prevalence of theft and the inability of those in authority to cope with it.

The earliest laws we have, those of Æthelberht of Kent, disclose theft partly as a tort and partly as a crime, for in cc. 9 and 28 we have a penalty laid down of a threefold bôt for theft from a freeman and in a dwelling, coupled in the former case with a 'wite' and forfeiture of chattels. The general penalty was a bôt, i.e. compensation, but it was multiplied two-, three-, or ninefold (cc. 4, 9, 28, 88,

98), and, as noted, in certain cases it carried a 'wite' or fine payable to the King.

In the Laws of Wihtraed of Kent, c. 26 (A. D. 690-726), we have it provided also that if a freeman were discovered with stolen goods on him, i. e. a case of theft present, the King was to have power to award punishment, the appropriate punishments being death, slavery beyond the seas, or the levy of the criminal's legal worth by way of redemption.

In fact, throughout the whole of the early English Laws we have the amount of the penalty frequently stated, so showing that theft was becoming a crime. The conception of theft as a tort, coincident with its conception as a crime, continued for a long time. Even the idea of the communal responsibility of kinsmen for theft endured until a late period. We find, for example, in the Laws of King Edward (A. D. 901-24), c. 9, a provision that 'if any one through a charge of theft forfeit his freedom and deliver himself up, and his kindred forsake him, and he know not who shall make bôt for him, let him be worthy of the theow-work, which thereto belongs, and let the "wer" abate from the kindred'.

Another interesting illustration of this communal responsibility in theft is to be found in c. 11 of Athelstan's Laws, which provided that 'he who shall pray off a criminal charge from a slain thief should go with three others, two of the paternal, and the third of the maternal kin, and give oath that they knew of no theft by their kinsman'.

We have already noticed the responsibility of children for crimes and of a household for the offence of the head of a family, which points also to the survival of communal responsibility for theft. The conception of theft as a tort died much more hardly in England than it appears to have done in Wales.

We find also in English Law, as in the Welsh, that there was a division of theft according to the magnitude of the theft, where the theft was theft present (*hand hæbbende*).

In the *Judicia Civitatis Lundoniae* (*temp.* Athelstan), c. 1, it is provided that 'no thief is to be spared for over 12

pence', and in the Ordinance of Greatanlea, c. 1 (A. D. 924), the figure was fixed at 8 pence, but the division indicated is not so completely developed as it was in Wales.

In the matter of punishment the English Laws provided constantly changing penalties in marked contradistinction to the Welsh Laws, and the severity of these penalties shows the wide prevalence of the offence in early England.

As we have seen, Æthelberht fixed the penalty at a multiple bôt, plus a 'wite' and forfeiture of chattels in some cases. In Wihtraed's Laws, c. 26, the penalties included death, slavery beyond the seas, and full 'wergild'.

In the Wessex Laws of Ine (A. D. 688-725), the penalty where a thief stole without knowledge of his family, was, according to one section (c. 7), to be 60s. 'wite', but if his wife and children were cognizant of the theft, the whole family was to be sold into slavery; while in another section (c. 12) it was said that a thief caught with goods in his possession was to be slain or redeemed, according to his 'wer'. We have here the same distinction as in the Welsh Laws, whereby 'theft absent' entailed a lesser penalty than 'theft present'.

The same laws provided (cc. 18, 37) that where the thief was a 'ceorl' and a notorious thief, he was to have his feet and hands cut off.

The Laws of Edward, c. 9 (A. D. 901-24), provide slavery as the penalty for theft, and the Laws of Ælfred, c. 6, 'angylde' (i. e. the single value of the property), 'wite' and amputation of the hand, redeemable according to 'wer', where the theft was in church. The *Judicia Civitatis Lundoniae*, cc. 1, 4, imposed the death penalty, restoration of the property or its value, and forfeiture of a quarter of his property (the remainder going to the widow and 'gegildan'), if no defence were raised; and, if a defence were raised and the ordeal went against the accused, with death, unless redeemed by his kinsmen or lord on payment of the 'wer' and value of the stolen property. In case of a second conviction, the thief was to be broken on the wheel.

The Laws of Ethelred (A. D. 978-1016) provide that thieves, being 'theowmen' (c. 2), were to be branded for

the first offence, and slain for the second ; while for freemen (c. 4), death was the penalty if the accused failed at the ordeal, or, according to another section (c. 1), double bôt and 'wer' with death for the second offence.

Under the Laws of Cnut, a notorious thief was outlawed (c. 26), and housebreaking and theft present were 'bôtless' (cc. 2, 26, 65), and punishable with death. In c. 77, Cnut changed the law whereby the whole household dwelling in a house containing stolen property was executed or sold into slavery, and limited the liability to the thief alone.

We see there the final victory of the conception of theft as a crime.

§ 6. We may conclude that, in spite of certain minor differences, the similarity between the Welsh and English law of theft was pronounced, and that both started from the same general juridical ideas as prevailed in the Brehonic Laws. In this particular offence the Welsh Laws appear to have progressed a little more rapidly towards modern conceptions than did the English law, just as the English law, after the Conquest, in the matter of murder, anticipated the Welsh law in its approach to present day ideas.

§ 7. The fragments of Scots law we have indicate a similar view of the law of theft. We have the same distinction between theft present and theft absent, e.g. in the Assize of King William a separate penalty was prescribed for theft in hand.

Generally, punishments were, so far as we can see, similar. The old rule making a convicted thief saleable obviously existed, for by c. 16 of the Assize of David I, the sale of thieves was forbidden, and we have the same or a similar rule apportioning punishment according to the value of the thing stolen. On this point c. 13 of the Assize of King William runs :

'Of byrthynsik, that is to say of the thyft of a calf or of a ram or how mekil as a man may ber on his bak, thar is no court to be haldyn, bot he that is lord of the land quhar the theyff is tane on suilk maner sal haf the scheip or the calf to the forfelt. And the theyff aw to be weil dungyn on his er to be schorn. . . . Na man aw to be hangyt for les price than twa scheip of the quhilkis ekane is worth 16 pence.'

§ 8 To enumerate the resemblances in the Germanic

Laws would take too much space. It suffices to note briefly some of the resemblances, which show sufficiently that the general law was the same.

The Lex Frision., Tit. VIII, drew the same distinction as the Welsh Laws did between theft and 'treis', and the Lex Ripuar., c. 45, regarded the possession of stolen property as equivalent to theft. The Lex Salica provided endless grades of punishments for the theft of animals according to species—pigs, cows, sheep, goats, dogs, birds, bees, horses, &c.—and according to quantities, age, and place where stolen, and also according to whether the theft were present or absent,¹ while a distinction was drawn also between the theft and surreption of a horse.²

Similar rules occur in the Lex Baiuor., Tit. IX, the Lex Burgund., Tit. LXX, the Lex Frision., Tit. III, the Lex Langobard. (Ed. Roth.), c. 281 et seq., the Lex Saxon., Tit. II, cc. 29–36, and the Lex Angl. et Werion., cc. 35–9.

A distinction is also drawn between thefts by freemen and thefts by the unfree, in both cases the punishment varying according to value. In the case of slaves the general penalty for the first offence was scourging, for the second mutilation, and sometimes even for a first offence.³

Ploughing and sowing on another man's land were dealt with as theft,⁴ and sometimes as an insult,⁵ likewise also slaying an animal secretly.⁶

In the Lex Burgund., Tit. XLVIII, we have reproduced the old English law that the wife and children over ten of a thief were to be sold into slavery: in the same law, Tit. LXXI, the harbouring of a thief was dealt with as theft, and we might note the resemblance to the English law found in the Capitulaire of Charlemagne (A. D. 779), c. 23, in the view taken that mutilation was a merciful sentence compared with death. A thief was not to be put to death for a first offence, he was to be blinded ; for his second offence his nose was to be cut off, and for his third he was to be executed.

¹ Tit. II, III, IV, V, VI, VII, VIII, XXII, XXVII, and XXXVIII.

² Cod. I, Tit. XXIII.

³ Lex Salica, Tit. XI, XII; Leges Alamman. Extravagantes; Lex Baiuor., Tit. II, IX; Lex Burgund., Tit. IV; and Lex Ripuar., Tit. XVIII.

⁴ Tit. XXVII, Lex Salica.

⁵ Lex Baiuor., Tit. XIV, XVII.

⁶ Lex Baiuor., IX. 9.

VI

FIRE OR ARSON

1. *Introductory.*

§ 1. In early Wales fire played an important part in the social life of the people, and the law relating to it is of importance more as illustrative of social conditions than from any peculiarity in the unlawful use of it as an offence.

§ 2. The centre of social life was the hearth-stone. Ancient Welsh homesteads, even the King's palace, were made of wood, with pent-houses or adjuncts of the same material, apparently thatched with straw or broom, or, in some cases, with sods. In the centre of the house, between the middle pillars supporting the roof, lay the fireplace. At the back of the fireplace stood the fireback stone, the 'pentanfaen', and once it had been placed in position it was an offence to remove it.

The house itself might be destroyed, the owners might desert the site and go to another part of the country or seek other lands in the scattered acres of the tribe to cultivate, but the 'pentanfaen' was never removed. It stood as a perpetual sign that the site where it stood was the site of an occupied homestead, which no one else was allowed to take possession of in such a way as to prevent the original occupiers recovering it, if they so willed.

So long as the homestead was occupied the fire was never allowed to go out. Every evening the embers were raked low, and a sod of peat or of earth was placed on top. In the morning the sod was removed, and the embers, which had been kept glowing under the peat, were supplied with new fuel for the day's use.

We see, therefore, why the law of fire was regarded with homicide and theft as one of the three columns of law.

§ 3. The law of fire brings before us the village smithy, situated a few paces from all other habitations, roofed over

with shingle, broom, tiles or sods, the village bath, and the general kiln.

Many proprietors had their own kilns, but some hamlets had a common one, and no hamlet was complete without one.

The kiln or 'odyn' was placed in a kiln-house, in front of the fireplace in which there was an excavation. This was covered with lathes of wood a little distance apart, and over the lathes straw was spread. On top of the straw corn was placed, and above the straw corn was heaped to dry before being hulled and ground for meal. This was the 'odyn' of the Welsh Laws.

2. *Use of fire as a tort or crime.*

§ 1. In the use of fire the law laid down strict rules, because of the dangers involved in its negligent or criminal use, and it is in the different rules relating to the use of fire that we have an indication of tort developing into crime.

Originally all damage caused by fire, whether accidentally or deliberately, was a tort for which compensation was paid. In North Wales it is apparent that burning, conceived of as a crime, had not become accepted in the time of Hywel Dda. The Venedotian Code provides no penalty for burning; what it does is to provide for the payment of damages.

In both north and south the invariable rule was that every burner paid for the damage which he caused, and if there were abettors they paid a portion of the damages. But in North Wales there is nothing to indicate that an incendiary was liable for anything else.¹

§ 2. Many minute regulations occur in the Venedotian Code as to the use of fire, the breach of which was sometimes criminal.

It was an offence of surreption to remove fire from another man's house without permission, and the person doing so was fined a 'camlwrw', paying also for the damage caused by such fire. He was entitled, in order to avoid being mulcted in damages, to show, if he could, that the damage

¹ V. C. 258; D. C. 414; G. C. 690; XIV. 710.

was caused not by that part of the fire which he removed, but by the actual fire from which he had taken a portion.

If a person lent fire to another, the lender was not responsible for damage caused, if he took the trouble to satisfy himself it was needed for a lawful purpose, but if he did not take that precaution he had to pay one-third of the damage caused.

So too, if any one borrowed a house with fire in it and rekindled it three times, he became responsible for all damage caused by the fire to the house or anything else; and if any one lit a fire in another's house he was responsible for all damage caused within three days and nights thereafter.¹

§ 3. Property deposited with any one had to be strictly guarded against fire. Any one allowing a deposit in his charge to be burnt paid for it, and the rule applied specially to weaving women who let webs or bales of yarn, entrusted to them, get burnt. But no one was responsible for damages caused to the person of another by fire, unless he had done something to bring the fire into direct contact with the sufferer; and hence was born the rule that 'galanas did not follow fire' unless caused deliberately, in which case it 'followed the hand that caused the fire'.²

§ 4. One provision of interest brings vividly before us the herds of pigs which wandered about the villages, and the responsibility of their owners for them. If swine entered a house, and scattered the fire about, burning the house down, the owner of the herd paid for all damage done, if they escaped; but he paid nothing if the pigs were destroyed in the fire they had caused. There was then, says the Code, 'an equation between them, as being two irrational things,' for which there was no redress.³

§ 5. In North Wales if any one caused a fire he was responsible to pay for all damage, no matter how far the fire spread. Some MSS. confine the liability to the house actually burnt; and, if a fire arose accidentally in one man's house, they limit liability to damage caused to the adjacent houses on each side, provided that these two houses were separated

¹ V. C. 258, 260; D. C. 414; G. C. 690.

² V. C. 258, 260; G. C. 688.

³ V. C. 260.

from other houses by a space. If the fire crossed that space it became an uncontrollable fire for which no reparation was to be made.¹

§ 6. In order to avoid damage from kilns strict regulations as to their use existed.

No one could make a kiln on another's land. If he did he was fined three kine, payable to the King, and the owner of the land was entitled to four pence for land-breach and all the materials used in the kiln. Here, however, the criminal action lay not in using the fire but in trespassing.

If any one dried corn on some one else's kiln he had to pay for all damage caused by the fire in the next three days and nights, and if the owner of the kiln lit it and lent it to another he was responsible for one-third of the damage unless he took security from the borrower to indemnify him. So too, if any one borrowed a kiln and lit a fire and then handed it on to a third person to use it, it was his duty to protect himself by taking an indemnity for keeping the fire safe and for its extinguishment when done with; if he did take security or, if before handing the kiln over, he put out his own fire, he ceased to be responsible, and the new user became entirely responsible.

Any one using a kiln had to see the fire was put out when done with. If he failed to do so, the layer of the fire and the kindler each paid half the damage caused, and, if any one left a fire smouldering in a kiln and another person came along and rekindled it, the damage was divided equally between them.²

§ 7. In certain circumstances no damages for loss by fire was paid at all.

The first instance illustrates the freedom to burn heath. That could be done in North Wales in March, in South Wales from the middle of March to the middle of April, provided it was waste land on which there were no habitations. No reparation was payable for damage caused by such fires, but if the heath were burnt at any other time, damage was paid for.

¹ V. C. 258; D. C. 414; G. C. 688; XIV. 576.

² V. C. 258, 260; D. C. 414, 552; G. C. 690, 720-2, 766.

A fire caused by a spark from a village smithy was not to be compensated for if the smithy were covered with shingles, brooms, tiles, or sods, and if it were not within seven fathoms or nine paces from any house. A spark, however, from a smithy setting fire to property in another village had to be paid for. A fire arising from the village bath had not to be paid for, provided it was lit at the same distance from houses, and the damage did not arise in another 'tref'. Likewise was the rule where the fire originated from the village kiln.¹

§ 8. These minute provisions, occurring in all the Codes and commentaries, provide the law for reparation in all cases, accidental or deliberate; but it is clear that in South Wales deliberate burning had not only to be compensated for but was punishable with a criminal penalty. That is to say, arson was beginning to find a place in the law of crime in South Wales. When this happened it is impossible to say, but inasmuch as in Domesday it was punishable in Arcenfeld with a fine of 20s., it probably arose some time before the eleventh century.

The Dimetian Code and the XIVth Book both define arson as a crime. The former defines it as 'the putting fire to the thing that shall be burnt', and the latter as 'the thrusting of the brand into the building that is to be burnt'.

The essence of arson as a crime was the actual application of a flame to property with the intention of burning it so as to cause loss or damage.

The Dimetian Code gives definite penalties. If any one were caught in the act of stealthily burning a house he was to be executed; if he were charged for any other act of deliberate burning, he became on conviction a saleable thief.²

3. *Fire in other contemporary systems.*

§ 1. There are few references to arson in early English law, but what there are show clearly that deliberate burning was regarded as a crime to which a criminal penalty attached; the original idea that it was a tort surviving, however, in the provision that damages caused must be paid for.

¹ V. C. 258, 260; D. C. 446; G. C. 780; IX. 262.

² D. C. 404-6, 614; XIV. 710.

It will be noticed, however, that in so far as the early English Laws are concerned, there is no mention of accidental burning; but that fact, in view of the fragmentary nature of the English Laws, is insufficient to justify a conclusion that damages were not to be paid for by the person responsible for an accidental fire.

In the Ordinances of Athelstan, c. 6, incendiaries were to be tried by the triple ordeal, and if found guilty were to be imprisoned for 120 days, fined a 'wite' of £6, and placed in 'borh' for the future. Under Cnut's Secular Laws, c. 65, arson was made punishable with death, the same penalty as was provided by the XII Tables of Rome; and it is expressly said that it was 'bôtless', that is a matter not to be settled by the mere payment of damages.

§ 2. The Irish Laws are silent, but the Scots Law have a few rules comparable to the Welsh ones.

In the *Leges Quatuor Burgorum* it appears that it had become necessary, when towns grew, to limit the liability for accidental fire, showing inferentially that the older rule coincided with the Welsh one whereby all fire had to be paid for:

'Gif that fyr passis out of ony mannis hous quhar thruch hapnis mony housis be brynt to the nyctburis, na greyff nor na dystroblens sal be done til hym mar than he has for sorow and hevines has he in such foroutyn mar.'

In the *Collecta*, p. 387, § 13, however, we have a rule identical with the Welsh rule operative in the country:

'Giff fyr pass thru ony place and findis ethekris and overtakis ane other manis corne outhur in barne yard or in felde standande he sall mende the scath that lychtyt the fyr.'

In the *Leges of the Four Boroughs* we have practically the same rule re kilns as in Wales:

'Rycht sua it is of hym that brynnis ane mannis kyll bot he sal tyne his service. And quhasa has lent his kyll til ony man and it brynnis, he that it to was lent is heldyn to restore it in sic ply as he it borowyt. Bot an he hyryt it for pennys, and it bryn, he that it hyryt aw nocht to mak na mendis for it bot the hyre.'

§ 3. In the Germanic Laws there is not much mention of arson.

Under the *Lex Salica*, Codex I, Tit. CXVI, if fire were caused by chance to a place where men were sleeping, compensation had to be paid to the men, apparently for the disturbance to their honour; and if any one were burnt 'wergild' was paid. Sums are fixed also for damages by fire to wattle huts and corn sheds, and in the same title of Codex II, juries of compurgation were provided for where a Romanus was charged with burning.

Under the *Lex Alamman.*, Tit. LXXXIII, damage by fire had to be made good, and in addition there was a fine varying from 40s. to 12s., halved if the property belonged to an unfree man; but a slave causing fire had his eyes put out and his hands and feet amputated.

Under the *Lex Baiuor.*, Tit. I, the rules were identical as regards Church property burnt by night, so also in the *Lex Ripuar.*, Tit. XVII, except that there was honour price or 'hreavunti' to every one within the building burnt, or 'wergilds' if burnt by deliberate arson.

Under the *Lex Burgund.*, Tit. XLI, crops burnt by negligence had to be paid for unless the fire were carried by the wind; and under the *Lex Frision.*, Tit. VII, all fires, if deliberate, had to be compensated for by double value, and if any one were burnt to death in a house there was a nine-fold 'wergild'.

Similar rules occur in the *Lex Langobard.*, Ed. Roth., cc. 146-9, and the *Lex Angl. et Werion.*, c. 43.

Under the *Lex Saxon.*, II. 68, the penalty for deliberate burning of a house by night was death, and in the *Capitulare Saxon.*, c. 5, we have an echo of the 'lawful disturbances' by fire. It provided that if a person refused to do justice and disobeyed the order of the King to appear, and he could not be forced to appear otherwise, it was permissible to burn his house down. For other burnings the penalty was 120s.

We see in these provisions the gradual growth of the idea that arson was a crime, competing with and slowly displacing the older conception that it was a tort.

The rules spring from exactly the same set of ideas as did the Welsh Laws.

VII

THE LAW OF ACCESSORIES

1. *Accessory acts.*

§ 1. The Welsh Laws speak of nine accessories to each of the three columns of law—homicide, theft, and burning.

§ 2. The nine accessory acts in homicide, or, to use modern legal phraseology, the acts of abetment are said to be:

First Group:

1. Tongue reddening or informing the murderer where the person may be whom he wishes to kill.
2. Giving counsel to the murderer to kill.
3. Plotting against the person killed or consenting to his murder.

Second Group:

4. Spying on or pointing out to the murderer the person whom he wishes to kill.
5. Associating with the murderer when he wishes to kill.
6. Coming with the murderer into the 'tref' wherein the person to be killed may be.

Third Group:

7. Assisting the murderer in killing or holding the victim while being killed.
8. Detaining or keeping the victim until the arrival of the murderer.
9. Looking on at the killing and suffering it to be done.

Some of these acts would in some systems of modern law be just as much murder as the act of the principal, but the Welsh Laws confined homicide to the person who inflicted the fatal blow or performed the fatal deed.¹

§ 3. The nine accessory acts in theft are defined in very much the same terms in all the Codes as follows:

1. Pointing out or informing the thief of the thing to be stolen or suggesting the obtaining of a particular article by theft.
2. Consenting to or agreeing with the thief to commit theft.

¹ V. C. 218-20; D. C. 406; G. C. 686-8; IX. 258, 260, X. 344.

3. Giving provision to the thief.
4. Going with the thief to steal, or carrying provisions for him when going to steal.
5. Helping the thief to break into the place where the property to be stolen was, or to break down the fence of such place.
6. Advising the thief, or carrying or removing the stolen property or receiving it.
7. Travelling by day and night with the thief after the theft.
8. Receiving a share of the stolen property.
9. Concealing the thing stolen, or receiving something from the thief for not disclosing the offence.

Here again the accessory acts include acts which in some systems of modern law would be classed as theft, but once more the Welsh Laws confined the offence of theft to the actual removal of the property.¹

§ 4. The nine accessories to arson are likewise stated in much the same form in all the authorities, thus :

1. Giving counsel to burn or to go and burn a house.
2. Consenting or agreeing to burning.
3. Going to the place to be burnt for the purpose of burning it.
4. Carrying the fuel.
5. Procuring the tinder.
6. Striking the fire.
7. Giving the fire to the person who shall burn it.
8. Fanning the fire till it kindles.
9. Seeing the burning and allowing it.

Once more the list includes acts which in some systems of modern law would be classed as principal acts in the offence, and yet once more the Welsh Laws confined the principal act to the actual application of the brand.²

§ 5. An accessory act is defined generically in the Dimetian Code as ' a cause through which the act is committed by consent, and therefore consent constitutes the accessory act, whether the act be by sight, words, or deed less than the principal's ' .³

§ 6. The first point to note in regard to the Welsh law of abetment is this, that there was no like law applicable to anything other than homicide, theft, and burning. It is

¹ V. C. 238-40 ; D. C. 416 ; G. C. 690 ; IX. 262-4, X. 344.

² V. C. 256 ; D. C. 404, 412-14 ; G. C. 688 ; IX. 262, X. 346.

³ D. C. 404.

even doubted specifically in the XIVth Book if there could be accessories to ' treis '. This principle was maintained in the Statute of Rhuddlan, which dealt with accessories to theft or robbery, manslaughter or murder, and arson alone.

It must also be noted that there could be no abetment without intention ; and that, unless the act abetted were itself a wrong, were committed, and the perpetrator were proceeded against, there could be no act accessory to it.

Consequently, there was no accessory act to an accident, e. g. accidental burning, to the theft of a dog or fowl (which was not ' theft ' in law), to a justifiable surreption, to the slaying of a person by an animal ; and, inasmuch as the crime of murder entailed loss of blood in its original conception, there could be no accessory act to murder by poison. In the latter case the preparation of poison for the purpose of administering it was a substantive offence involving death or banishment.¹

§ 7. A consideration of these acts of abetment shows a distinctly scientific classification.

The accessory acts to murder consist of three groups according as to whether the act was one of conspiracy, assistance before the actual crime, or assistance during the actual commission of the crime.

The accessory acts to arson correspond to the same tripartite division.

The accessory acts to theft at first sight appear to be divided into acts of conspiracy, assistance immediately before the theft, assistance during the theft, and assistance after the theft.

The last two apparent divisions are, however, in reality only one, for the simple reason that the offence of theft was not completed until the act of removal was completed. If we bear that in mind we find the tripartite division identical in all cases.

2. Abetment—*tortuous or criminal.*

§ 1. We have stated that the Welsh law did not appear to recognize any abetment of an accidental act ; and, in

¹ D. C. 604 ; IV. 22, IX. 260, XIV. 616, 706-8, 710-12.

the case of slaying, we have seen that blood-fine was payable for both negligent and deliberate killing, the latter also carrying with it a criminal penalty.

The nature of the penalty incurred for abetment was a fine, a 'camlwrw' or a 'dirwy'. It was a single, double, or triple 'camlwrw' according to the group into which the abetting act fell, provided there was no fighting. If there were fighting there was a 'dirwy', though some authorities assign a 'dirwy' as penalty in all cases.

The majority of the authorities assert that the fine on an accessory to murder went to the King; but there are one or two passages which assign it to the relatives in addition to the blood-fine.

The fact that the majority assign the penalty to the King, coupled with the fact that there could be no abetment of homicide, unless the homicide were a crime, establishes beyond question that in homicide the act of abetment was not a tort but a crime.¹

§ 2. The penalty for an act accessory to theft—which was itself a crime and not a tort at the time of the redaction—was a 'dirwy', with banishment in default, power being reserved to the lord to reduce the 'dirwy' to three pence. The penalty in the case of a ferocious act was a double 'dirwy'. Abetment of theft was, therefore, clearly a crime.²

§ 3. The penalty for an act accessory to arson varies. In North Wales, where as we have seen arson had not developed into a crime, there was no criminal penalty at all. The abettor was liable to pay the whole of the damage caused or contribute a share of one-third. In South Wales, on the other hand, where deliberate arson was a crime, involving both reparation and penalty, an abettor was responsible to contribute one half the reparation and to pay a 'camlwrw' or 'dirwy' for his act.³

3. *The origin of accessory acts in Welsh law.*

§ 1. In a very illuminating article by the late Sir J. Brynmor-Jones, entitled 'Foreign Elements in Welsh Mediaeval

¹ e. g. V. C. 218, 220; D. C. 406, 416, 604; G. C. 688.

² e. g. V. C. 240-2; D. C. 416.

³ e. g. V. C. 256-8; D. C. 414-16; G. C. 690.

Law' (Trans. Cymmrod. Society, 1916-17), the view was held that the development of the law of abetment in Wales was subsequent to the tenth century, and that in that law 'we have the speculation of some lawyer as to possible causes of connivance by persons with the principal perpetrator of a crime'. That is to say, the writer was of opinion that the law of abetment formed no part of the original law of Hywel Dda, though he held that the Welsh law was an indigenous growth. Prof. Lloyd appears to hold the same view.

§ 2. It is impossible to deal here with all the arguments advanced, but it should be pointed out that the conclusion seems to be weakened by the fact that some of the arguments are not based on accurately stated facts.

The most important of the grounds advanced runs:

'I can find in the Anglo-Saxon Laws or the Brehon Laws no such scheme of accessory acts and forbearances as are developed in the Welsh Codes.'

It is correct that, if the passage in Horne's *Mirror of Justice*, admittedly a dubious compilation, be omitted from consideration, there is practically nothing in the early Anglo-Saxon Laws dealing with abetment. The passage runs:

'The nine accessories are those who command, conceal, allow by consent, who see it, who help, who be parties to the gain, who know thereof, and do not hinder by forbidding, who knowingly receive, who are in force.'

§ 3. The Teutonic Laws generally are also deficient in rules regarding accessories. There is trace of an incipient law of abetment in the *Lex Burgund.*, Tit. II, an inducer of murder paying one-third 'wergild' if the murderer escaped. The law appears to have been extended by Wulmar (*temp.* Charlemagne) to theft, but the provisions are rudimentary and make no attempt at any classification similar to that in the Welsh Laws. In the *Leges Langobard.* (Ed. Roth.), cc. 1, 10, 11, we find also mention of accessories to treason and murder, fragmentary and undeveloped in nature.

§ 4. The idea of abetment was nevertheless not a new one. It was recognized in Rome in the lost *Lex Pompeia* (*circa*

B. C. 52) in regard to murder, and Gaius definitely mentions accessories to theft. It should be no matter of surprise if the earliest Welsh Laws did provide for abetment.

§ 5. It is, however, inaccurate to assert that there was no scheme of accessory acts in the Irish Laws. There is a scheme in those laws, which, though not stated in the same form as in the Welsh Laws, has many striking resemblances to the latter.

The most important passage occurs in the oldest Irish authority we have—the *Senchus Mór*, I. 241. Paraphrased, the provision runs :

There are four lookers-on with the Fieni :

1. A looker-on who incurs full fine is a man who instigates and accompanies and exults at his deed in the territory, but who has not inflicted the wound with his own hand.
2. A looker-on, who incurs half fine, is he who does not instigate, does not wound, but does all the other acts.
3. A looker-on, who incurs quarter fine, is one who accompanies only and does not prohibit and does not save.
4. A looker-on, who is exempt, is one who brings against them all his strength and resources.

The last provision recalls vividly the Welsh provision that, though there was no direct penalty for failure to render assistance, yet an innocent bystander, seeing a murder committed, who did not interfere to prevent it, had to prove he was not an accessory by 100 'compurgators', and if he failed he was liable to a 'camlwrw'; while if persons, in the company of the murderer and murdered man, saw a blow struck and did not interfere to prevent a second or a third blow being struck, they became liable to a 'dirwy'.¹

In spite of the different form of expression the resemblances between the Irish provisions and the Welsh Laws is remarkable. There is a tripartite division of accessory acts (the fourth looker-on is of course not an abettor); and in the division, the same elements of conspiracy, participating before, and participating during the commission of the act, though differently handled, occur as in the Welsh Laws, and there is a difference in the penalties incurred, just as we have seen there was in the Welsh Laws, according to the nature of the accessory act.

¹ V. 94, XI. 416,

The Book of Aicill also deals with accessories. On p. 101 it gives the law as to the fines payable by an accessory; on p. 103 it states that if a person find a concealed body and does not give information immediately he is a 'looker-on', others saying he is fined for 'complicity'; and on p. 115, instigation is dealt with where murder was committed by a gang. If a man, it is provided, led out a host by force or through their ignorance to kill, the leader, whether the host were arrested or not, paid the full seven 'cumhals' due; but, if the host were led out by consent and were arrested, then the compensation was divided thus: one-third upon the leader 'on account of his instigation', and two-thirds upon the whole host, the leader paying out of that two-thirds a share equal to that of every other person in the host.

Here again we have a clear recognition of instigation as an act of abetment over and above the actual offence.

On p. 123, a 'daer' man looking on was mulcted in the equivalent of his own 'eric-fine'.

Again, on p. 99, the Book of Aicill imposed a double penalty on every one concerned in a secret murder, including the 'looker-on'. In two other passages it defined the liability of an instigator and the relatives of an instigator, showing beyond question that the Irish lawyers had a full conception of the difference between abetment and the principal act.

'A sensible man', it says (III. 157), 'who incites a fool to strike is not a criminal as regards the striking, but is criminal as regards paying the fine; the fool is criminal *re* the striking, but is free of the crime.'

Again, III. 117 :

'It is the liability of a kinsman of an instigator to be sued for the crime of the instigator, and it is not the liability of the kinsmen of those who have instigated to be sued for the crime of the instigator, but the crime to be charged against him is that of a participator.'

Abetment by provisioning is also clearly dealt with in the Book of Aicill, III. 409, 'As to a man who violates the King's laws, his crimes are adjudged on the seven houses in which he gets beds,' that is on people who have fed or maintained him before or after the crime.

§ 6. It is not possible here to deal with the remaining arguments, but there does not seem sufficient ground for holding that abetment in Welsh law was a recent growth. It would seem to be an indigenous conception shared with the Irish of an early period.

It is certainly remarkable that the tortuous or criminal nature of abetment of fire varied in the localities, North and South Wales, where the act of incendiarism likewise varied ; suggesting most strongly that the conception of ' abetment ' was coincident with the recognition of burning as a tort or as a crime.

VIII

OTHER OFFENCES

I. *Assault.*

§ 1. There are many offences in the Welsh Laws which can be dealt with under the common heading of assault.

In all assault there was ' insult ', and there might also be ' injury '.

We have already given, in the Chapter on the Worth of Men and Things, the compensation payable for injuries, which had to be paid whether the injury were caused negligently or deliberately. There was no exemption from that liability even on account of minority.

§ 2. The causing of injury was primarily a tort, but it might also be a crime.

It could be excused if the injury were caused in self-defence, or inadvertently in an attempt to do good, or by the contributory negligence of the person injured ; the standard instance, in the latter case, being where one of two men, passing in single file through a wood, was injured by the springing back of a branch of a tree pushed aside by the leading man. If the latter gave no warning he was responsible for the injury caused ; if he gave warning he was not, for the person injured contributed by his negligence in disregarding the warning.¹

§ 3. The Welsh Laws do not regard a common assault as a crime ; the only remedy was to recover ' honour-price '. The later laws do mention ' a buffet in anger ' as entailing a fine of 2s. added to honour-price, but this was not the original law.²

§ 4. ' Ymladd ' or fighting was a crime and a tort. ' Ymladd ' consisted in an encounter resulting in blows from which one side or the other received an injury. If there were blows without injury it was not ' ymladd ', and if there were

¹ V. 46, X. 362, 382.

² XI. 448.

mutual blows, whether resulting in injury or not, no honour-price was payable, as each party suffered insult which compensated one for the other.

But all injuries caused by either side had to be compensated for according to the fixed standard, and if there were a difference in valuation between the injuries sustained by each side, the one inflicting the greater injury made good the difference.

Over and above the compensation payable for injuries caused, all persons fighting, from the earliest times, were subject for bloodying the earth or for causing injury to a fine, doubled if the fight took place in Court or Church.

In the latter case the 'dirwy' went to the Church, in all other cases to the King. Fighting was, therefore, a crime as well as a tort. Under early English law the offence of fighting in Church or Court was punishable with death or forfeiture of all property (*Æthelred's Laws*, VII. 9, and *Cnut's Laws*, c. 60).¹

§ 5. Closely allied to fighting was the offence of 'cyrch cyhoeddog' or public attack. For this offence, which was of the nature of rioting with violence, it was necessary that there should be nine aggressors acting in concert to attack an individual. It was a crime whether injury were caused or not, but there must be an overt act of attack, and the penalty for it appears to have been the same as for fighting.²

It bears some resemblance to the English Law of 'hloth' and 'here' mentioned in *Ine's Laws*, cc. 14, 34, and *Ælfred's Laws*, cc. 29, 30, 31.

A 'hloth' was an association of seven to thirty-five men for the commission of any crime, and a 'here' was an association of over thirty-five men for a like purpose.

Under English law the actual member of a 'hloth' or a 'here' who slew an unoffending person paid the 'wergild' of the person slain, each member of the association paying in addition a 'hloth-bôt' varying from 30s. to 120s., according to the status of the person killed; but if it could not be determined who actually struck the fatal blow, each

¹ e.g. V. C. 220, 222, 314; D. C. 432-4, 550; G. C. 778.

² D. C. 420, 594; G. C. 692; V. 54.

member of the gang paid a proportionate share of the 'wergild' plus the 'hloth-bôt'.

§ 6. Another act of assault is specifically mentioned as a crime, viz. the cutting of a man's hair while he was asleep or pulling him by the hair. Such an assault involved not merely the ordinary reparation for insult, but a special reparation and a criminal penalty of a 'dirwy'. The offence is also specially mentioned as 'feax-fang' in the English laws.¹

§ 7. A further allied crime was 'terfysg' or tumult or assault without injury, wrangling, or brawling in Court or Church. 'Saraad' was payable, and in addition a 'camlwrw' to the lord. It was rather in the nature of an aggravated contempt of the lord or Church, or a breach of precincts.²

§ 8. In all the Germanic Codes assault was not a crime, but was insult, e.g. see *Lex Alamman.*, Tit. LVIII, *Lex Baiuor.*, Tit. IV, V, VI, VIII, and *Lex Burgund.*, Tit. V.

Likewise in Irish Law injuries had to be compensated for and there was no criminal fine. The amount varied according to whether the injury were caused by design or inadvertence.³

The Book of Aicill, III. 169 et seq., devotes several pages to considering exemptions from or reductions of the compensation payable due to the most minute causes. Many of them appear ludicrous, but some of them nevertheless are of interest: e.g. servants engaged in lawful work were not responsible for injuries caused accidentally; builders were not liable for purely fortuitous accidents to casual passers-by, if there were no reason to suspect danger, and persons cutting down trees escaped liability, if they gave warning beforehand.

The law is, in fact, a full statement in a primitive cast of the law of justification or excuse for injury, showing that, at a very early stage, the Irish Laws had passed beyond the conception that all injury, however caused, must be paid for.

Speaking generally, the principles of all the tribes of Western Europe correspond with those apparent in Welsh Law.

¹ V. C. 314; D. C. 508; G. C. 700; IV. 38. ² VI. 114, X. 360-2.
³ See Book of Aicill, III. 347, and *Senchus Mór*, I. 139, 141, 147.

2. *Treason.*

§ 1. Treason is defined in the Triads of Dyfnwal Moelmud with some minuteness, but such definition was obviously of later origin than Hywel Dda's time.

Treason is not defined in the Welsh Laws any more than it is defined in early English Law, and there is no reason to suppose that it meant anything but infidelity or treachery to the immediate superior.

It was punishable by irredeemable death and loss of land, to which the Triads alone add attainder of blood and reduction of the family of the offender to bondage.

A traitor not arrested was outlawed, and could be slain with impunity by any one. His 'tref y tad' was forfeited, but reconciliation was allowed on payment of double 'dirwy' and blood-fine, and should the traitor receive absolution, after a pilgrimage to Rome, his patrimony was restored.¹

§ 2. In English law treason was left vague until the reign of Edward III; when, owing to the abuse of the law, an effort was made in the Statute of Treason to define the offence. That effort was not very successful, and the English law of treason has been constantly expanded under the stress of political needs.

In the early English Laws the offence is mentioned four times,² in all of which cases it is identified with plotting against the King's life, the offence being established by a triple ordeal and punishable with death and forfeiture. Beyond that the English Laws have nothing to say.

§ 3. Treason is dealt with at considerable length in the *Lex Baiuor.*, Tit. II, but all the numerous illustrations of the crime resolve themselves into infidelity to the lord. It was the one irredeemable offence, punished with death and forfeiture. It is, however, in the *Lex Langobard.* (Ed. Roth.), cc. 1-9, that the most complete law of treason appears to exist, but it is so detailed as to bear little resemblance to the provisions of the Welsh Laws.

¹ V. C. 254; D. C. 448, 550; V. 46, XI. 404-8, XIV. 624.

² *Ælfred's Laws*, c. 4; *Æthelred's Ordinance of 1008*, V, c. 50, and VI, c. 37; *Cnut's Secular Laws*, cc. 58, 65; and *Athelstan's Laws*, c. 4.

3. *Offences re women.*

§ 1. Offences in regard to women were adultery and rape. The former was not a crime, but a tort, and has been sufficiently dealt with under 'insult' and the law relating to women. As we have seen, it partook of the same nature as in English law, which has not up to the present been altered.

§ 2. Rape is defined as 'seduction without consent', and it bears the characteristics of both tort and crime.

The offence involved the payment of honour-price for insult to honour, the honour-price being payable, if the woman were married, to the husband, either with half or full augmentation, but there was an exception to this payment in the case of a woman of easy virtue, who had no honour which could be insulted by rape.

In addition to honour-price, the person guilty of rape was liable to pay 'amobyr' (except where the woman was married, 'amobyr' being payable only once), 'agweddi', 'cowyll', and 'wynebwerth', the accumulation of which came to a very considerable sum.

These mulcts were all due because the act was a tort, and represented the damages sustained by the woman or her relatives or her lord.

That the act was a crime also is clearly established from the fact that there were criminal penalties due.

A 'dirwy' was payable, variously stated as £7 and £3, and as 'a silver rod and a gold cup with a gold cover on it, similar to that payable to the King for "saraad"'. In default of payment two authorities assert that, if the victim were a maid, the offender was mutilated, but this penalty, if ever enforced, was a later introduction, for we are expressly told it did not prevail in Hywel's Law.¹

§ 3. There is little in the early English laws relative to rape. The distinction between it and adultery is not clearly drawn, because both were torts, and rape was not at first established as a crime. In the laws of King *Ælfred*, cc. 10, 11, compensation for adultery was payable to the husband according to his status, and for insults to women according

¹ V. C. 92, 100, 102, 104; D. C. 434, 442, 510, 520, 526, 528; G. C. 748, 750, 788; IV. 16, 32-4, IX. 232, 302, XIV. 622.

to the woman's 'wer', i. e., the offence was a tort. Rape on a female slave was paid for by 'bôt' and punished by 'wite' of 60s., and it was only in the case of a 'theow' that there was any other penalty. A 'theow' was liable to mutilation (c. 25).

According to Cnut's Law, c. 54, a married woman guilty of adultery had her nose and ears cut off—quite possibly an introduction from Scandinavian sources—and there was 'bôt' and 'wer' for rape (c. 53), which was a less serious matter than marriage within the prohibited degrees, which was punished with 'bôt', 'wite', and 'wer' (c. 52).

It was not really until the Conqueror's time that rape assumed the distinct character of a crime in English law. By sections 12 and 18 of his Laws adultery became punishable by the payment of the woman's 'wer' to her husband, and rape by the mutilation of the offender.

§ 4. In the Germanic Laws rape was sometimes a crime, entailing varying fines according to the circumstances in which it was committed; in some cases death being inflicted if the victim were a free-born maid.

This was the rule under the Lex Salica, but in the Lex Alamman., Pactus III, c. 30, the offence seems to have been still regarded as a tort as there were fixed payments ordered by way of compensation.

So too was the case with the Lex Frision., Tit. IX, while the Lex Burgund., Tit. XXXIII, provided 'compositio' and fine, with death for a slave.

In the Lex Baiuor., Tit. VIII, the offence was satisfied by the payment of 'compositio' varying according to rank, and in the earlier laws the rape of a maid was punishable by a fine payable to the fisc, which was extended later to cover the case of a widow also.

4. Tongue Wound (*Gweli-tafod*).

§ 1. An offence in regard to which we find periodical references in the Welsh Laws is that of 'tongue-wound', or the use of insulting language.

§ 2. The use of insulting language to a private individual was not a criminal offence against the State: such language was dealt with as 'insult', for which compensation was due.

It was a crime when used towards certain officers, and in those cases the penalty was additional to the honour-price due. Rude language to the King was tongue-wound, and was punished with a double 'camlwrw': it was also an offence to insult a judge on the judgement-seat or the Court priest during the three great festivals of the Church or while engaged in reading or writing for the King.

Tongue-wound was also caused by breaking silence in Court, falsely challenging the judgement of the judge, and it was tongue-wound to the Church to brawl within its precincts or the precincts of the churchyard. The punishment in all cases was a 'camlwrw'.¹

5. Land-trespas.

§ 1. The references to land-trespas in the Welsh Laws are not many, but such as there are are stringent.

Trespas as a crime consisted not in going on another's land, for there was no law to prohibit that, provided no damage was done. If damage were done, it had to be paid for as a tort. The crime of land-trespas consisted in using another person's land in a way derogatory to his title. The law provided penalties for such trespasses.

§ 2. The acts of criminal trespass were such as are common to all agricultural communities.

First was building on another's land, entailing a penalty of three kine, the building being forfeited to the land-owner, subject to the right to remove wooden materials within nine days, if no damage were caused to crops in removing.

If the wood were used from the land occupied, there was an additional penalty of 4 pence, and if the building were made in defiance of an interdict, the building went to the King.

§ 3. The second act was ploughing on another's land. This was punished by a fine of 4 pence for breaking the soil, 4 pence for moving the plough, and 1 penny for every furrow ploughed. In addition, the ploughman forfeited the worth of his right foot, the driver that of his left hand, and the plough and oxen were forfeit to the King, if done in

¹ e. g. V. C. 78; D. C. 454, 486.

defiance of interdict. Ploughing a highway or boundary ditch was punished with a fine of 10s.

§ 4. Making a kiln on another's land was punished with a fine of three kine, and 4 pence was paid to the landowner for ground-breach, the landowner also being entitled to the kiln.

§ 5. Squatting on another's land without permission entailed, if continued over three days and nights, forfeiture of all movables on the land to the owner. Digging another's land to conceal anything therein was punished with a like fine of 4 pence for ground-breach, and everything hidden went to the landlord.

§ 6. Similarly, the setting of a snare on another's land involved 4 pence penalty for ground-breach, a fine of three kine payable to the King, and the captured animal was taken by the owner of the land.

§ 7. Stacking trees or stones on another's land was prohibited, but the only penalty was compulsory removal.

§ 8. Cutting timber on another's land, except where it was free timber, was punished by a 'camlwrw' and a charge of one penny for every double ox-load removed.

§ 9. Appropriation of common land was not criminal: as we have seen acquisition of prior rights arose from continued appropriation, but a co-sharer could not appropriate all kinds of common land at will. Any one clearing common woodland for his own use was to surrender similar woodland or old field land of his own; if he had none to surrender, he could cultivate the cleared land for four years, after which it was shared. Similarly, building on joint land made it incumbent on the encroacher to allot to his co-owner a similar site or to admit him to a share in the building, on payment of a proportionate share of the cost of building and the labour expended.

These penalties were, of course, not criminal or tortious penalties: they were merely restrictions on the right to appropriate applicable where appropriation might enure to the loss of other co-sharers.¹

¹ V. C. 180, 196, 288; D. C. 550, 552, 554, 586, 600-4; G. C. 764-6, 794; V. 48, 84-6, VI. 116, IX. 268, XI. 432, XIV. 692.

6. *Perjury*.

§ 1. Perjury was neither a tort nor a crime, but a sin, which it was left to the Church to deal with by spiritual pains and penances. This was also the rule in English law, under the Laws of Ælfred, c. 1.

§ 2. False accusations were, however, punished by fine, as they were under Edgar's Laws, c. 4, and Cnut's Secular Laws, c. 16, under which the penalty was loss of the tongue.

§ 3. In Scotland under the Assize of David I, c. 32, perjury was looked on partly as a sin punishable by excommunication, partly as a crime punishable by '8 ky amendis to the King'.

§ 4. In the Lex Salica, Tit. XLVIII, and Lex Frision., Tit. X, it was regarded as a crime punishable with fine or amputation of the hand, and this characteristic was fairly general in the Germanic Laws.

IX

PREVENTION OF CRIME

§ 1. WITH the growth of the conception of crime, came regulations of the central authority to prevent crime.

The growth of such regulations was naturally retarded—we may almost say they were unnecessary—in communities where the tie of relationship entailed responsibility for the misdeeds of a relation. Such tie itself operated to some extent to prevent the commission of wrong. Regulations aimed at preventing crime grew more rapidly where the tie of kinship was weakened or was weakening.

§ 2. In Wales there are definite traces of a system of suretyship to keep the peace, which was grafted on the law of suretyship to abide law.

In all cases of litigation, parties gave sureties to abide law. In criminal suits such sureties were termed 'gorfodog', and their liability was enforced by distress.

§ 3. This system was adapted to prevent crime by the demand for sureties before crime was committed; and so we find in the laws the term 'gorfodogaeth' applied sometimes to sureties taken to abide law, and sometimes to sureties taken to prevent the commission of crime. In the former case the 'gorfodog' gave surety to produce the accused and to pay the penalty which might be adjudicated on the person charged, and even to pay the penalty in order to avoid banishment or other penalty in default, when the penalty had been adjudicated. Such suretyship could be given for any penalty other than that of death or one affecting the person of the convict.

The 'gorfodog' could cover himself by taking sureties or pledges from the person for whom he was standing surety, and he could base an action thereon to recover any sums paid by him; but no 'gorfodog' could recover sums paid by him unless he had so covered himself. The formality

of grasping hands was employed as in the case of civil sureties.

The liability of a 'gorfodog' enured for a year and a day: he could also claim that amount of time within which to make amends or discover an absconding accused.

The person for whom security was given remained in the custody of the surety.¹

§ 4. It was on this that 'gorfodogaeth' to maintain peace was grafted; but it appears that it grew up much later than the time of Hywel Dda, for we have no mention of it in the Codes. The power to exact security for the maintenance of the peace vested, under the later laws, in the territorial lord, who could act on complaint or on his own motion.

A complaint could be instituted wherever a person had been threatened, and the complaint was sufficiently supported if the person complaining swore on the relics to the threat.

Without complaint also the lord could demand security from anybody threatening another, if the threat were sworn to; from a person who had been injured and did not seek his legal remedy for the injury; and from any stranger who had been in the lordship for three days without commendation to a 'breyr'.

It appears that where a person had stood surety for the maintenance of peace, his liability ended when he produced the person, breaking the peace, to be dealt with by law.

The system of 'gorfodogaeth' was obviously embryonic and of late introduction, because the tie of relationship was strong in Wales, and was, generally speaking, as effective as any artificial scheme would have been in securing peace.²

§ 5. In England the tie of relationship as involving responsibilities broke down much earlier than in Wales.

In the beginning it would seem that, as in Wales, the system of suretyship to keep the peace was grafted on the prevailing system of suretyship to abide law. In Ine's Laws, c. 62, we have the latter system described thus:

'When a man is charged with an offence, and is compelled to give pledge, but has not himself aught to give for pledges, then goes another man and gives his pledge for him.'

¹ V. C. 134-8; D. C. 430; G. C. 708; XIV. 644, 660.

² X. 388, XIV. 630.

In Athelstan's Ordinance of Greatanlea, c. 2, we see the next step, the kin being forced to find sureties and a lord :

'We have ordained respecting those lordless men of whom no law can be got that the kindred be commanded that they reconcile him to "folc-right" and find him a lord in the "folc-mote": if he be not commended he is a thief, who may be slain as a "flyma" (fugitive).'

This was followed by placing every man in a 'frith-gild' of 'gegildan', an association of neighbours to maintain peace and order and to indemnify members for loss.

That is to say, the rule became that every man must be placed in a permanent surety-union (*borh*) or be outlawed.

In the Laws of Edgar (A. D. 958-75), c. 6, it was provided :

'Every man is to have a "borh", who is to hold him to every justice, and if any one do wrong, let the "borh" bear that which he ought to bear. If he be a thief and he catch him in twelve months, let him give him up to justice and be repaid what he has paid.'

In the Ordinance of Woodstock,¹ c. 3, the duty of a free-man having a 'borh' was again insisted upon. Cnut² directed that all men were to belong to a 'tithing', if they wished to be entitled to 'lad' or 'wer', and that all were to be in 'borh' for pleas and peace. Those who were not were regarded as outlaw, and liable to be seized and slain.

In the Laws of the Confessor, c. 20, a drastic revision took place, and it was provided that every man was to have nine others responsible for him, forming with himself the 'tenmanne-tale', liable to produce each other for crime or pay damages caused by any one of them. This association, apparently an extension of the 'ge-gildan', also replaced the defunct kin-association for purposes of compurgation.

The rule was reproduced in the Conqueror's Carta, c. 14 :

'Omnis homo, qui voluerit se teneri pro libero sit in plegio, ut plegius eum habeat ad iusticiam si quid offenderit.'

and c. 25 of the Leges :

'Omnis qui sibi vult iusticiam exhiberi vel se pro legali et iusticiabili haberi, sit in francplegio.'

The wide divergence in this particular between Welsh and English Law was due entirely to the fact that the

¹ Laws of Æthelred, A. D. 978-1006.

² Laws, cc. 20, 25, 33.

mutual responsibility of kinsmen lasted so much longer in Wales, and, even after the Edwardian Conquest, the old Welsh kin-tie was used instead of the 'tenmanne-tale' or 'tithing' to secure the observance of the peace.

§ 6. The system of 'gorfodogaeth' was not the only measure available in Wales to prevent crime.

The most important preventive regulation was that directed towards checking theft, particularly cattle lifting. If the tracks of a thief were followed as far as a house, it was the duty of the owner thereof to show where they had gone afterwards. If he did not his house became forfeited, and if he had no property he was banished.¹

A similar provision was introduced into the treaty between the West Saxons and the Wealhas Dunseatas, which provided for the tracking of stolen cattle either in Wales or England, when lifted from the other side of the Wye. A similar rule existed in Athelstan's Laws, IV. 2, the Jud. Civ. London., c. 8, and Edgar's Laws, cc. 2-5, under which the discovery of tracks, leading to a man's house and not going beyond, stood in the place of an accusation without oath, which the accused could only free himself from by compurgation.

The same law prevailed among the Germanic tribes.²

§ 7. It was a cardinal rule also of Welsh Law that every one must arrest and detain a known thief. Failure to do so, or releasing a thief once caught, rendered the person doing so liable to 'dirwy' or the value of the thief. This was similar to the rule in Ine's Laws, c. 36, Athelstan's Ordinance, c. 1, and the Jud. Civ. London., cc. 2, 3.

The performance of this duty was encouraged by a system of rewards. The defence of property on land against theft entitled the defender to one-third the value of a cow or a horse, and one-fifth of other property. In all cases, in later law, a tithe of the property recovered was paid to the informer who led to its discovery.³

¹ V. C. 244.

² Vide Lex Salica, Tit. XXXVII ; Lex Ripuar., cc. 33, 47 ; Gundebald's Laws, cc. 16, 73, 95, App. I ; Waitz, cc. 156, 158, 159 ; Sohm. Proc. 3, 56 ff., 97 ff. ; and the Lex Burgund., Tit. XVI.

³ V. C. 244 ; D. C. 416, 572 ; G. C. 708 ; X. 328, 388, XIV. 644.

In English Law, in the time of Wihtraed, the rescuer received half the property, in the time of Ine (c. 28), 10s., but in the time of Athelstan, both in the Fragment on Forfangs and in the Jud. Civ. Lundon., c. 7, the amount was fixed at one-twelfth the stolen property.

§ 8. The Welsh Laws have no regulations making a host responsible for his guests. The Brehon Laws have, though the exact liability is not defined, and in England¹ a host was liable for the acts of his guest after three nights. The review of the criminal law of Wales appears to justify the conclusion that, notwithstanding some differences in detail, the law in Wales was essentially the same as it was throughout Europe.

¹ Hlothaire and Edric's Laws, c. 15; Cnut's Laws, c. 28; William I's Laws, c. 48, &c.

PART VII

THE COURTS AND JUDICIARY

I

INTRODUCTORY

§ 1. A JUDICIAL system is only found in a community well advanced upon the road of civilization ; it is not found in a primitive community, and the development of courts, pleadings, and the like is a fair test of the progress made by a race. Put briefly, the steps in judicial development may be indicated thus : first, no courts at all, each person being left to obtain justice as he best can, the period of vengeance ; then the appointment of arbitrators to suggest a basis for settlement, and thereby mitigate the effects of vengeance, but without power to enforce their suggestions, the sanction for enforcement being customary opinion, operating through 'distress' ; then popular courts of the tribe or community ; then regal or baronial courts with the sanction of authority behind to enforce their findings, but circumscribed in action by an elaborate and rigid system of technicalities ; then an equitable jurisdiction tending to become almost as rigid as the legal one it was intended to simplify ; and finally, the sweeping away of the cumbersome technicalities and the establishment of what we may call the modern-day courts.

§ 2. In medieval times most countries, but not all, in Europe had reached the stage of possessing popular or regal courts with a complex system of procedure and pleading. Equitable jurisdiction had hardly arisen on the one hand, and, on the other, there were countries like Ireland, which had developed a system of law, without courts to put it into force.

§ 3. In the Wales of the tenth century a judicial system was fully established, though the courts were not fully seised of jurisdiction in all matters which nowadays would be regarded as falling within the functions of tribunals. The study of this system and a comparison of it with

contemporary ones is not the least interesting in the Welsh Laws.

The existence of courts among the 'Cymric' peoples at as early a date as the sixth century is testified to by Gildas; he remarks on the fact, as if it were an unusual one, that the Welsh people possessed judges. In Ireland, as it has been said, there were none; in England the judicial system was only in embryo, and the comparative superiority of Welsh Law in this particular may be due to the Roman occupation of Britain. The temptation is to ascribe it to that cause, but, if we study the systems side by side, we are struck at once by the fact that the Welsh judicial system has very little in common with the Roman one; in fact the points of contact are negligible.

The Welsh system has every appearance of an indigenous development of elements derived from a more remote period, as those elements, though not the particular form of development in its entirety, are to be found in other systems of law.

§ 4. The Triads of Dyfnwal Moelmud have many passages in which the importance of a judicial system is insisted upon, but in their exaltation of a judicature they do not stand alone; the more ancient Codes and the commentaries thereon give utterance to much the same class of sentiment.

Over and over again we are told that courts are a universal need, that a presiding judge is an essential of law and justice, that every one within the land is subject to them, and that there can be no adjudication without a judge, so much so that even if a suit were compromised, the compromise had to be made a judgement of court before the litigation could terminate.¹

¹ E. g. D. C. 614; G. C. 780; VII. 200, X. 328, 386, XI. 400, 428.

II

THE ECCLESIASTICAL COURTS

§ 1. THERE were two distinct classes of courts in Wales—the ecclesiastical and the secular.

It was characteristic of the Medieval Church that it demanded not only jurisdiction over its priests and others engaged in religious offices and avocations, but over all the people of the realm in matters which it considered partook of a religious character. It claimed, and succeeded in enforcing its claim in many countries, to exclusive jurisdiction in such matters as marriage, testaments, intestate succession, and the like, and, when it succeeded in establishing its exclusive jurisdiction, it used it to give to those matters what it considered to be a purely Christian complexion. It did its utmost to crush out of existence the old customary rules, which it regarded, rightly or wrongly, as pagan, and to mould all laws regarding them into an ecclesiastical and canonical form. Frequently it was forced to compromise, but it never lost sight of its ultimate aim.

§ 2. In doing so the Church did much for the advancement of legal science; it did much for the benefit of the people; it did something, perhaps, for morals; at the same time its operations were not an unmixed blessing, and it is impossible at times not to feel regret at the ruthlessness with which it struck at many excellent provisions of ancient custom.

§ 3. Few things are more striking in Welsh Law and history than the intensity of the struggle between the Prince and the Church for the control of the judicial machinery; not the least important of the factors which contributed to the last chapter in the tragedy of the last Llywelyn was his fight for the supremacy of the secular courts in matters of intestate succession and of the disposal of the goods of convicts, which brought into array against

him the whole force of the Church under Archbishop Peckham, who anathematized and excommunicated him, and, when he fell, prohibited his burial according to the rites of the Church to which the dead prince had been a faithful and a munificent son.

§ 4. In Wales the Church had not the same extensive jurisdiction that it had in England. Its jurisdiction was twofold, baronial and ecclesiastical.

§ 5. On the baronial side the Courts of the Abbot and the Bishop had jurisdiction in certain matters over laics holding land under the Abbot and Bishop. This jurisdiction was conferred upon the Church by Hywel Dda, as part and parcel of his scheme for granting or confirming jurisdiction to the local lords; it was conferred upon them not as being clerics, but as being territorial magnates, and they were bound, in exercising that jurisdiction, to administer the ordinary 'Cymric' common law.

It appears, further, that the King did not entrust to these clerical-baronial courts any jurisdiction in respect to the more serious forms of crime. He reserved for his own court jurisdiction in all homicide cases arising on Church-lands; he likewise reserved jurisdiction in all theft cases occurring on abbey-, bishop-, or hospital-land, where the offender was a laic; all offences punishable by 'dirwy' and 'camlwrw', which included practically every offence known to law, committed by a layman on abbey-land; all offences, by whomsoever committed, on highways passing through Church-lands; all cases of 'ymladd' on hospital-land, according to the Venedotian Code, and, according to the Dimetian Code, when committed by men under homage to an abbot or a bishop.

What was left, therefore, to the clerical-baronial courts was homage and suit from laics holding land under the Church, some minor criminal offences committed by laics on such land, and cases of a civil nature arising on such land, in which lay-tenants of the Church were concerned; but even in respect to matters of a civil nature the King reserved to himself the right to 'amobyr', 'ebediw', dues by way of military service, suit and homage for land held

by the Church, and questions of title to land which the Church or a cleric claimed to hold by grant from the Crown.

The ecclesiastical courts had no jurisdiction of any kind or description in respect to laymen not resident on or giving rise to a cause of action on Church-lands. They were not permitted, as in England, to appropriate to themselves exclusive or concurrent jurisdiction in matters which they claimed were of an ecclesiastical nature. One clerical authority, reciting the points in which the Church had exclusive jurisdiction, only lays claim to matters of tithe, offerings, funeral dues, communion charges, despoiling the altar or sacrilege, insult to a priest or violence to a cleric. That was the utmost he could claim under 'Cymric' Law; and it is not without interest that the only mention of the jurisdiction of the Church, in respect to the vexed question of marriage, is to be found in a transcript of the fifteenth century, where the word 'priodas' is substituted for communion fees.

Over lay tenants of the Church committing an offence outside Church-lands, the Church had no jurisdiction; nor had it any jurisdiction in a suit of a civil nature on the ground that one of the parties was a tenant of the Church.

All cases between a lay tenant of the Church and a layman of another lordship were dealt with by the court of the lordship where the defendant resided or where the cause of action arose.¹

§ 6. On the purely ecclesiastical side, abbots, bishops, and the hospital orders were empowered to deal with breaches of their own capitular regulations by members of their respective communities, provided that those capitular regulations were not in conflict with the King's laws. This jurisdiction was domestic, and was confined entirely to the members of a religious house infringing a regulation of the house or order.

In other matters the laws recognized the Synod of the Church, constituted according to the Church's own rules. The Venedotian Code confers no jurisdiction on the Church in respect to offences committed by clerics, but the fact that

¹ V. C. 170; D. C. 478, 550; IV. 8, 10, V. 84, IX. 232, X. 332, 364-6.

it enumerates offences, committed on Church-lands by laics, as being under the King's jurisdiction, implies that offences committed by clerics fell under the jurisdiction of the Church.

Other authorities, including the Dimetian Code, confer on ecclesiastical courts exclusive jurisdiction in regard to offences committed by clerics, and if a criminal complaint were instituted in a secular court against a cleric, his religious superior had the right to transfer it for disposal.

In a charge of theft one of the defences open to an accused person found in possession of stolen property was an assertion that he had obtained the property bona fide from a third person, who, thereupon, had to answer for it as an 'arwaesaf' or 'warrantor'. The naming of a cleric as a warrantor was prohibited as, if it were allowed, the cleric might thereby become subject to a charge of theft in a secular court.¹

§ 7. Notwithstanding, however, the conferment on the Church of jurisdiction over clerics, it appears that no cleric could be absolved from making reparation to a layman injured by him; the Church had to administer the ordinary common law, where amends were ordained as the ordinary remedy; but in place of secular punishment, where punishment was awardable in secular law, the Church could decree its own punishment.²

§ 8. Offences against the person of a cleric, including nuns, were generally triable by the Church courts. That was the case in all cases involving insult, injury, and other offences, except tongue wound; but if the offence resulted in the death of a cleric, the offender was punishable as any other person committing homicide was, viz. by payment of honour-price and of blood-fine, to which the Church might, if it willed, add spiritual penalties of its own. We may refer, as illustrative of this jurisdiction for offences against clerics, to an entry in the Index to the Llyfr Goch Asaph, where reference is made to the 'submissio Eignon ap Cadwgan Ddu Domino Episcopo et Howelo ap Hova clerico pro injuria dicto Howelo illata'.³

¹ V. C. 170; D. C. 478; V. 48, XI. 404.

³ V. C. 18, 52; D. C. 356, 476, 530; V. 48.

² IX. 216.

§ 9. In regard to civil actions between laymen and clerics, the Church courts had no special jurisdiction. Clerics, like other people, were subject to the ordinary courts with this modification, that no cleric holding land by grant from the King and no member of an abbey community could be sued in the 'Cymwd' Court. Such a suit must be instituted in the King's court, though one authority says a joint court was constituted where the dispute was between an abbot and a secular lord.

The reason why the first class of suit was heard in the King's supreme court was that the grant of the King was in question; the reason for the second was that the abbot was a territorial magnate, subject to the King's supreme court, and not to the 'Cymwd' Court. Inasmuch as professed religious men on submission to the abbot became civilly dead, and could neither sue nor be sued, nor incur any personal obligation, being merged into the person of the abbot by their submission to him, any claim against a monk must be made against the abbot.

Conversely, claims of a monk must be prosecuted by the abbot not in the 'Cymwd' Court, but in the King's court.¹

§ 10. If a layman sued a monk or abbey in the 'Cymwd' Court, and that court enforced attendance by process of attachment or gave judgement, its proceedings could be treated as a nullity, and the judge assuming jurisdiction could be punished by the King's court.

Subject to this, which only affected venue of trial, a dispute of a civil nature between a cleric or a layman of the Church was tried in the court to whose jurisdiction the defendant belonged, and should that court happen to be the court of the abbot or bishop, it sat as a baronial and not as an ecclesiastical court, administering the ordinary common law of the land.²

§ 11. In the Surveys and Records we have mention of two bishop's courts only. In the proceedings Quo Warranto of the reign of Edward III, we find the Bishop of Bangor claiming jurisdiction in the whole of his territories, but specially excepting Crown pleas in which Church tenants

¹ IV. 10, X. 318-20, XI. 396, 404-6.

² IV. 8, X. 366.

were concerned, and brought against others residing in episcopal territory.

In the Black Book of St. David's frequent reference is made to the High Court at Lawhaden for the disposal of difficult cases, but even there we find local popular courts functioning in ordinary cases.

The Abbot of Conway and the Priory of St. John of Jerusalem in Anglesea claimed the right, as of old, to hold courts, but the extent of the jurisdiction claimed by the latter was limited.

III

THE COURTS OF THE 'MAERDREF' AND THE 'CYMWD'

1. *Court of the 'Maerdref'.*

§ 1. The Court of the 'Maerdref' had a very limited scope. It had jurisdiction over the tenants of the King's 'maerdref' or personal demesne only.

§ 2. The 'maerdref' was under the control and management of the 'land-maer', a minor officer by 'custom and usage', who was always unfree, and whose principal duties were to regulate cultivation within the demesne, look after the palace jail, and be responsible for the ordinary daily supplies for the court.

§ 3. In addition to his executive duties he was the judge of the 'Maerdref' Court, and, as such, was empowered to entertain all complaints emanating from the tenants and to dispose of all cases summarily. His jurisdiction extended to suits relating to the 'tref-lands' and to cases of theft and fighting arising among the tenants. He was responsible to collect all fines imposed on the tenants, and was remunerated by a special fee of 2s. per cause heard.¹

2. *The Court of the 'Cymwd'.*

§ 1. The principal court of original jurisdiction was the Court of the 'Cymwd'. The laws distinctly say that these courts were established by Hywel Dda, but that does not mean there was no judiciary before his time. It merely means that he organized and systematized, or tried to organize and systematize, the whole of the judiciary in Wales.

§ 2. The exact constitution of the courts before his time was probably tribal and territorial, but what Hywel Dda did was to grant to the lords jurisdiction within their lordships, to be exercised through the 'Cymwd' Courts—

¹ E. g. V. C. 46, 60, 62, 64, 102, 192-4; D. C. 392; G. C. 668, 684.

reserving to the royal court jurisdiction over certain specified matters throughout the royal territories and jurisdiction over the royal 'cymwds' of which the King was lord—and to create a kind of appellate jurisdiction to the royal court from the Courts of the 'Cymwd'.¹

§ 3. It appears also that in some cases where a lordship extended over more than one 'cymwd', the local lord set up courts imitating the royal court, exercising similar jurisdiction to the royal court within his own territories. There is, consequently, at times a certain amount of confusion; but the principle was that the court of original jurisdiction was the Court of the 'Cymwd', exercising such jurisdiction in the name of the lord, and subject to the royal court, or, where the local lord had set up a similar court, to the lord's court, which was in practice independent of the royal court.

The situation was, in fact, very much like what it was in France and on the great feudal estates of the Marches.

§ 4. Traces of some of these courts of 'lords' are to be found in the proceedings *Quo Warranto* instituted in the reign of Edward III (Appendix XIII).

§ 5. The judiciary of the Courts of the 'Cymwd' was constituted on different lines in North Wales and South Wales.

In Gwynedd and Powys the judges were trained men, selected for the post by the King or lord, while in South Wales every owner of land, being an 'uchelwr', was a judge within his own 'cymwd' by virtue of his privilege of land.²

The latter represented, no doubt, the older system, when courts were tribal and territorial, and we have two interesting pieces of evidence showing how courts were constituted.

In the Privileges of Arfon, in the rules regarding the settlement of boundary suits, the adjudicators were landowners of 'trefs' in the 'cymwd', other than of the 'trefs' actually litigating. In the Black Book of St. David's reference is made to the courts at Ystrad Towi, where it is said that if there were a suit in any one of the five villatae

in Ystrad Towi, then it was decided by the landowners in the other four; but if all the villatae were involved in the suit it must go to Llanteulu or Llangadoc for disposal.

The principle, therefore, was that all the landholders of a 'cymwd' could sit in judgement except the landholders of the ville to which parties belonged.

§ 6. There were definite bars on the exercise of judicial functions in all courts. Persons who were deaf, blind, leprous, maimed, insane, or stammerers, or who had been convicted of theft, were excluded. No person interested in a case could adjudicate, and, if he were a suitor in a court of which he was official judge in North Wales, a specially appointed judge was deputed to hear the case.

In South Wales judges by privilege of land must hold ancestral land, and not land granted by the King or lord, out of his personal estate, or bond-land. Loss of privileged land entailed the loss of judicial functions. A cleric, owning privileged land, could sit on the bench, but could not pronounce judgement, as he was incapable of entering into a 'mutual pledge'.¹

§ 7. Every landowner in the 'cymwd' in South Wales had the right to sit on the bench. The opinion of a two-third majority prevailed, and that opinion was pronounced by one of their number appointed therefor by the bench. He alone was designated the 'judge', but the judgement which he pronounced was the judgement of the court.²

§ 8. We have, in this differentiation, evidence that in the time of Hywel Dda the judicial system was in a state of flux.

It would seem that in North Wales, Powys, and Gwynedd alike, where the royal power was greater than in the south, and where authority was always more respected, the popular or tribal courts had become definitely King's courts, but in South Wales the assumption of jurisdiction by the lords had not succeeded in ousting the tribal element. Hywel Dda appears in South Wales to have introduced a compromise, making the 'Cymwd' Court the court of the lord, in which

¹ IV. 8, X. 322, 332, 364.

² D. C. 404, 468, 478.

¹ D. C. 370, 478; X. 344, XI. 396-8, 406, 422.

² D. C. 470; VI. 126, XI. 414, 420.

judgement was given by the leading landholders of the countryside, and not by selected judges.

§ 9. One of the causes for the change which was taking place, and which Hywel Dda tried to stabilize, is indicated in the Welsh Laws, viz. the disinclination of the landed judges themselves to sit, while unwilling to surrender the privilege of sitting; for we find a provision made to the effect that if the judges by privilege of land did not attend court, their attendance could be enforced by writ, with sureties for appearance, or by a warrant of arrest. Failure to obey the writ was punishable with a 'camlwrw', and should judges in attendance decline to adjudicate, the King was empowered to detain them in custody till better counsels prevailed and they did adjudicate.¹

§ 10. The Courts of the 'Cymwd' had a regular staff: the 'maer' and 'canghellor', who summoned the court and received complaints, an usher and a priest, who acted as a kind of clerk of court.

The 'Cymwd' Court always sat within the limits of the 'cymwd', and, if possible, on the site where the cause of action arose.

It was presided over by the lord or his representative, the Rhaglaw, who did not, however, exercise any judicial functions.²

§ 11. The court had jurisdiction in all matters, civil and criminal, arising within the 'cymwd', e.g. suits for partition of land in the 'cymwd', which were not specially reserved for the King's court, and over all cases reserved for the King's court specially delegated to the 'Cymwd' Court for trial.

In criminal matters jurisdiction extended over all persons committing an offence within the 'cymwd', whether a native thereof or a stranger having property therein, no matter where arrested, if he could be extradited; should a stranger, however, have no property in the 'cymwd' wherein he committed an offence and be arrested in another 'cymwd', he was to be sent for trial to his 'cymwd' of origin, if extraditable thereto, and in every case fines levied

¹ D. C. 470; X. 362.

² D. C. 404.

on a stranger in a 'cymwd', where he had no property, were transmitted to the 'rhaglaw' of his native 'cymwd'.¹

§ 12. It must be remarked, however, that there was no law of extradition between lordship and lordship; a man was only extraditable from 'cymwd' to 'cymwd' in the same lordship, and, consequently, if a criminal escaped to another lordship, he could not be tried in that lordship or be extradited to his own.²

This, of course, was a common feature in all countries in medieval times, and the evil was not finally got rid of until local baronial courts were abolished, and the King's writ given currency throughout the whole realm.

The system in Wales was not free from defects, but it was no worse than in other countries at the time. Hywel Dda's scheme was an act of statesmanship. He maintained throughout Wales the tribal courts of the 'cymwd', making them finally and definitely King's courts in the north, and giving recognition to the territorial courts in the south by maintaining the local leaders as judges.

¹ V. C. 62; G. C. 648; V. 50-2, IX. 250, X. 372, XI. 428, 430, XIV. 580.

² VI. 112.

IV

THE ROYAL SUPREME COURT

§ 1. IN all the Codes we get frequent mention of the King's supreme court, but we are left very much in the dark on points of detail. We have to rely to a large extent on what the commentators say, and we cannot always be certain that the jurisdiction vested in the royal courts, in particular matters, was exercised by them as early as the tenth century.

§ 2. It appears that there were three distinct supreme courts of kings in Wales, one at Aberffraw, one at Dinefwr, and one at Mathrafal, corresponding with the three ancient divisions of Wales. The Dimetian Code omits Mathrafal.¹

In practice there was a supreme royal court wherever there was a king, and every lord, who was capable of doing so, set up his own quasi-royal court.

§ 3. But however many royal courts there might be at any particular moment, inasmuch as the King at Aberffraw had a theoretical supremacy over all Wales, so the royal 'llys' at Aberffraw had a theoretical supremacy over all others, the effective exercise of which varied according to the extent to which the King could enforce his political supremacy.

§ 4. In constitution the supreme courts or their baronial imitations, which were encroaching on the one hand on the 'Cymwd' Courts, and on the other on the royal court, were the same throughout Wales. There was the judge of the court, a specially trained lawyer with a subordinate staff identical with what existed in the 'Cymwd' Courts.

The landholders, who in the 'Cymwd' Courts of South Wales were judges, had no judicial functions in the royal courts.

§ 5. These courts had three separate jurisdictions: exclu-

sive jurisdiction over matters arising within the precincts of the palace; original jurisdiction throughout the royal territories in matters from which the 'Cymwd' Courts were precluded; and a kind of appellate jurisdiction from all subordinate courts.

§ 6. The presiding judicial officer was the Judge of the Court, one of the twenty-four principal officers of State.

He held his land free without 'ebediw', received free support and clothing, was provided with his equipage by the King, had a high place in the table of precedence, was entitled to access to the King when he willed, was invested with the insignia of a throw-board and gold ring by the King and Queen, and was remunerated by many perquisites and a fixed scale of fees for each case heard by him. In certain matters the court was strengthened by the inclusion of counsellors, with whom the judge consulted, and ultimately gave judgement in accordance with their views.

§ 7. On the domestic side the royal court adjudicated on all matters arising within the precincts of the court or palace, and on all disputes between court officers. Such cases were disposed of free of charge.

The judge also inducted officials into office, was responsible for the issue of summons and proclamations, and examined all candidates for judicial office.¹

§ 8. On the original side the court had jurisdiction throughout the whole of the King's dominions, and had, in theory, jurisdiction over all subordinate territorial lords.

It had exclusive jurisdiction in the following matters on the original side:

1. Complaints against territorial lords by subjects of such lords, but not complaints by lords against subjects, which were cognizable in the lord's own court.

2. Disputes relating to land between

- (i) different lordships, whether the lordships were the King's or held under him by lay or cleric barons;
- (ii) the Church and a territorial lord;
- (iii) different 'cymwds' or 'cantrefs';
- (iv) different clerical institutions in regard to boundaries.

¹ V. C. 28, 156; D. C. 372; G. C. 644-6, 762; X. 354.

¹ D. C. 468; X. 380.

In such cases the Court was strengthened by the inclusion of 'wise men' from all the canghellorships in the King's dominions summoned *ad hoc*.

3. Disputes regarding land, in which the claimant asserted that he or his ancestors had obtained the land by direct deed of grant from the King or lord, and that he had been dispossessed illegally; and all claims in which the claimant sued to recover land from which he alleged he had been dispossessed by another, under colour of a deed of grant by the King; i.e. all claims to land in which the validity of the King's grant was questioned.

4. All suits between lords holding under the same King.

5. All complaints in which defendants were resident in different lordships, the one court to which all parties were subject being the King's court; all complaints for land by 'ach ac edryf' by any one basing title on relationship beyond the fourth degree, and all claims for the reconciliation of blood-feuds.

6. Actions against the King's officials for oppression and corruption.

7. All cases where the 'Cymwd' Court could not be relied on to be fair, owing to the judge's interest in the case.¹

§ 9. On the appellate side the royal court entertained all cases in which there had been 'mutual pledging' between the judge and party in the lower court, the judge in such case giving judgement according to the 'books of the law'. Should there be conflicting views in the 'books of the law' on the point under appeal, the judge of the court was to have the assistance of specially summoned canonists, whose decision, based on canon law, was to be promulgated by the judge of the court.²

¹ X 366-8, 370-2, 382, XI 396, 402, 426, 430-2, XIV 552-4.

² D C 374, 474, 592; X. 358, 370, XI. 428.

V

THE RAI TH OF COUNTRY

§ 1. In the Triads of Dyfnwal Moel mud an elaborate account of what is there termed a 'raith of country' is given. They assert that wherever a person was oppressed by King or lord, he had the right to call on his 'pencenedl' to 'agitate the country' for a 'raith of country'; whereupon a body, consisting of 300 or 50 men, must be assembled together at the instance of the 'pencenedl', and their finding must be bowed to at once by the King.

This account has been used in describing the functions of the supposed nine-generation 'cenedl'.

Nowhere outside the Triads is this 'agitation' mentioned, and the whole procedure must be put down as a fiction.

§ 2. The term 'raith of country' is used, outside the Triads, in the Dimetian Code only on three occasions (pp. 400-2, 480).

An allied term, 'dedfryd wlad' or 'verdict of country', is to be found in the same Code,¹ and on some occasions in the Anomalous Laws.

The first-mentioned term is used simply in the sense of a jury of compurgators drawn from the neighbours rather than from kinsmen, as had been the more ancient system.

The second term is used in the sense of the decision of a bench of land-holding judges in a 'Cymwd' Court in certain suits: suits against 'arrogance', suits complaining of oppression by the local lord, and certain suits on loans and regarding land.

It is also applied in a generic sense, in some passages in the Anomalous Laws, to any decision of a court.

In the VIth, XIth, and XIVth Books reference is made to the right of a freeman to bring a 'plaint of oppression'

¹ D. C. 466, 480, 536, 588, 592

in the 'Cymwd' Court against his lord or his lord's official, and to his inherent right of protection by the court.

That right of suit for protection against oppression is sufficiently remarkable without importing into it the fancied 'agitation of country' by a 'pencenedl' portrayed in the Triads.¹

¹ VI. 126, X. 328, 334, 356, 392-8, XI. 404-8, 410, 426, 446, XIV. 654.

VI

COURTS IN EARLY ENGLISH LAW AND IN ROMAN LAW

§ 1. It would occupy far too large a space to consider, in anything like detail, the judicial system in early English Law and in Roman Law, and all that can be attempted here is the briefest of outlines, from which the main points of resemblance and difference in comparison with the Welsh Law can be gathered.

§ 2. Like Wales, England had two classes of courts, the ecclesiastical and the secular courts.

Not much is said in the early English Laws as to the scope of ecclesiastical jurisdiction. Such courts naturally grew up only when the land was Christianized, and they were extended in the time of the Confessor and the Conqueror.

In these later times, such courts had, as in Wales, exclusive jurisdiction over the lay tenants of the Church, at any rate in respect of disputes arising out of land. The Laws of the Confessor, c. 4, lay down the rule thus :

'Quicumque de ecclesia tenuerit vel in feudo ecclesiae manserit alicubi extra curiam ecclesiasticam non placitabit, si in aliquo forisfactum habuerit, donec quod absit in curia ecclesiastica de recto defecerit.'

They also had exclusive jurisdiction over all clerics charged with offences, and there was a constant tendency to extend this jurisdiction to include tenants of the Church.

The Church further claimed and exercised jurisdiction, to the exclusion of the secular courts, in matters which were regarded as of a religious nature, such as marriage, legitimacy, wills, and intestate succession ; matters which the Welsh Laws at no time left to the ecclesiastical courts.

England also possessed courts comparable to the courts of the 'maerdrefs' in the local manorial courts. The

English manors, like the Welsh 'maerdrefs', consisted mainly of serfs holding under a customary tenure, and all cases arising out of the conditions of tenure were cognizable by the manorial courts. There was this material difference, however, that whereas in England the manorial courts covered practically the whole of the country, the jurisdiction of the court of the 'maerdref' in Wales was limited in extent.

This was due to the fact that in England the majority of the cultivators of the soil were serfs, while in Wales the serf population formed but a small percentage.

In the matter of other jurisdictions England had also local territorial courts and supreme royal courts, while the baronial families in time established their own courts in imitation of the royal court, usurping, on the one hand, the functions of the popular courts and encroaching, on the other hand, upon the sphere of the royal court.

§ 3. Originally all Germanic peoples entrusted the administration of law to local popular assemblies having jurisdiction over a more or less defined area.

This court or popular assembly, arbitrating according to customary rules, was termed the 'gemôt' or 'methal' in England, the 'thing' in Scandinavian lands, and the 'mahl' among the Franks. It corresponded, in many particulars, to the 'Cymwd' Court of Wales, and, just as the latter had jurisdiction over a 'cymwd', so the former generally had jurisdiction over an area.

It was a tribal court with a territorial limit, becoming, or tending to become, exclusively territorial as the tribal idea waned. The area became in Anglo-Saxon Law identified with the Hundred, the latter area being apparently organized by Ælfred the Great, who amalgamated existing district courts into a regular series of hundred courts.

§ 4. In the earliest English Law there is very little reference to any courts. The Kentish Law of Æthelberht (A. D. 600) has no mention of any kind of judicial administration. Justice was then not of the King, but of the tribe enforcing arbitration. The only mention in the Laws of Hlothaire and Edric (c. A. D. 675) is in c. 8, which ordained

that, when a man sued, the defendant was to give surety and 'do him such right as the Kentish judges may prescribe', going on in the next section to state that, after sureties had been furnished, the parties were to seek an arbitrator to settle the case, indicating thereby that the 'gemôt' merely enforced attendance in order to compel parties to settle a dispute by reference to a selected arbitrator, who would apply custom to the matter in dispute, under the surveillance of the 'gemôt'.

The Laws of Wihtraed throw little light on the administration of justice, beyond letting us know that the local 'gemôt' was presided over by the King's reeve, showing that there was a beginning of a recognition that justice was a concern of the King.

The earliest laws of Wessex, those of Ine, c. 22, also afford us very little information, but we are told that a suit might be brought before a shireman or other judge.

The Laws of Ælfred show us the 'gemôt' presided over by the King's reeve, and as he appears to have organized the hundred court throughout England, we seem to have the conception established that justice emanated from the King, and was to be administered locally under the superintendence of his officers, not yet judicial but executive.

The Laws of Edward, c. 8, are of this much importance that, by the provision that the 'gemôt' must assemble every four weeks, we see that the securing of opportunities for justice had become definitely a function of the King.

We can see, therefore, albeit dimly, signs of a haphazard administration of justice by selected arbitrators, submission to whom was enforced by the will of the 'gemôt' or popular assembly, growing gradually into popular courts, forced to act by royal authority, presided over by the King's executive representative, and administering not only custom but royal laws. This continued to be the general feature of the judicial administration until the coming of the Normans.

§ 5. In addition, however, to the local courts there was a supreme royal court. The tenor of early English Law (see, e. g., Edgar's Secular Ordinance, c. 2, and Cnut's

Secular Law, c. 17) was to force the local tribunals to adjudicate. Resort to the royal court is constantly refused, and the people are forced back to the courts of the hundred for arbitration and compromise; and the idea that the administration of justice, apart from the establishment of facilities to obtain it, was a function of the King, hardly gained currency among the Germanic peoples or in England until Charlemagne and the Angevins respectively brought into being the idea of the King's equity as a mode of remedying injustice.

The position of the hundred court as a court of original jurisdiction, and the prohibition upon seeking justice from the King are sufficiently illustrated by Cnut's Laws and c. 43 of the Confessor's Laws: 'Nemo querelam ad regem deferat nisi ei ius defecerit in hundredo vel in comitatu.'

We find constantly in the fragments of English Law, whose value is enhanced by the fact that they are spread over a period of some 400 years, indications of conflicting considerations on the part of the King.

There was an intense disinclination to interfere with the administration of custom and law; as far as possible it was left in the hands of the 'gemôts', especially on the civil side. On the other hand, it is obvious that there was some disinclination on the part of the 'gemôts' to administer justice, and we find the King forcing them to do so. What the King seems to have been constantly striving at was the enforcement of peace and order; administration of civil justice by local popular tribunals with few changes in civil law; and the enforcement of a rigorous criminal law, especially in the matter of theft, through the popular courts, under the supervision of royal executive officers.

Exactly the same considerations operated in the Welsh Law, with the result that the King, to some extent against his will, was forced to centralize authority in the interests of order.

§ 6. The conflict, which we noticed between the popular and baronial courts in Wales, had its counterpart in Europe and England. As baronial power grew there was the same encroachment both on kingly and popular power. The

period was one of flux and indecision. The welter of confusion that ensued in the matter of jurisdiction makes the elucidation of anything like definite lines in Europe hopeless.

The earliest record on the Continent of the growth of baronial jurisdiction appears to be the case of Bishop Hinamar of Laon, who, in A. D. 868, set up, or tried to set up, his own court at the expense of the popular courts. His example was quickly followed, owing to the absence of any permanent central authority, until we find that, in the tenth and eleventh centuries and long afterwards, it is impossible to extricate the ancient tribal courts from the baronial ones. In fact, Europe was, for a time, devoid of any true judicial system. Courts existed; they administered a complex varying law, based partly on custom which it was impossible to flout, partly on the arbitrary will of the lord, with, in criminal law, the most rigorous penalties. The sole sanction behind the courts was the strong hand of him who controlled them.

Efforts were made from time to time to check this, but to no effect. The evil commenced early, and we find occasional prohibitions of resort to courts, which included voluntary arbitration, other than those presided over by the judices appointed by the supreme ruler.¹

In England the central authority was more fortunate than in Europe. It was gradually consolidating itself; and there are few signs of local baronial courts in England in the ninth to the eleventh century.

Under Æthelstan the Unready there was a hopeless collapse of the central authority, and something not far removed from social anarchy ensued. The period, however, of this disorganization was not long enough to permit of the growth of baronial courts to any wide extent, and England was saved from the anarchy that prevailed in Europe by foreign conquest, rapidly achieved. The new centralized authority of Sweyn and Cnut arrested the tendency towards confusion, and Cnut endeavoured to consolidate the system of Ælfred the Great.

§ 7. It was an entirely new factor which resulted in the growth of baronial jurisdiction in England.

¹ See, e. g., *Lex Alamman.*, XLI.

With the coming of the Norman there was a gradual elimination of the idea of popular justice. Law became, like the land, a royal prerogative; but the actual administration of justice was a matter in respect to which the Normans had little interest. It was removed, by a series of grants of private jurisdiction made to feudal supporters and the Church, from royal hands; the grants being made not by the Witan but by royal writ. The Normans and Angevins consolidated the grip of the King on the land, but they left justice to be administered according to the will of the feudal lord.

It would carry us too far to trace the struggle which ensued: the effort to introduce order and to lay down some general principles of justice in the Magna Carta, the attempt of Edward I to restore royal jurisdiction, especially by means of his land laws, the confusion of the Wars of the Roses, and the eventual establishment of order, and the real creation of the English judicial system under the Tudors.

§ 8. In Wales there was a somewhat similar tendency. In Gwynedd it is obvious that before Hywel's time the House of Cunedda had established kingly justice: in the south, popular courts maintained their independence more successfully, but in both the lords were creating their own courts. It was one of the merits of Hywel Dda's Laws that they recognized existing facts and attempted to stabilize those facts by a system of judicature, with the underlying principle that all courts were under the King and exercised jurisdiction by grant from him. The effort was a statesmanlike one. It is possible that it would have succeeded but for the fatal application of the law of division of landed estates to the kingly territory, thereby weakening the central authority, and for the long drawn-out struggle against the Normans, who in Wales, perhaps more than anywhere else, manifested their contempt for popular law.

From 1284 onwards the confusion in justice, the inextricable jumble of the courts of the Lords Marchers, the absence both of popular and royal courts, is a melancholy and striking contrast to the law of Hywel; and it was not until the Tudors ascended the throne that order and method was once more restored to the administration of justice in Wales.

§ 9. We have only to consider very briefly the Roman system of courts to show that Hywel's organization owed little to it.

As in all early societies, the XII Tables show us that, in Rome, the judicial system grew up from the submission of disputes to arbitration. We find in the XII Tables that the stage of voluntary submission had so far been passed that the magistrate could summon and enforce the appearance of parties before him. Parties were, however, not in the first instance bound to leave the dispute to be settled by the magistrate, and men could 'agree with their adversaries in the way', and it was only when they could not agree that the magistrate stepped in as an arbitrator, being guided in his arbitration by strict rule.

This primitive system, having points of contact with all early European systems, did not survive long. The period of 'legis actiones' was supplanted by the period of 'formularies'. The formular system recognized two State officials, the magistrate and the *judex*. The magistrate enforced appearance before himself and heard the pleadings. The pleadings he reduced to a statement of the facts in issue in the form of formulae. The formulae were submitted to the trained '*judex*', who was incapable of straying outside the formulae submitted to him. He gave his decision on the formulae, after reference to the opinions of permitted *jurisconsults*, and his decision was remitted to the magistrate, who pronounced judgement accordingly.

Eventually, with the third period of Roman Law, the magisterial and judicial functions were consolidated in the hands of one and the same person.

There were no ecclesiastical courts, and all courts were State courts presided over by a State official. There is no trace of popular tribal customary courts: the justice was the justice of the XII Tables, as expanded by the *jurisconsults*. There is no trace of kingly justice or baronial justice, and there was no conflict of jurisdictions. The law emanated from the XII Tables, and it was administered by State courts acting through an appointed judicial hierarchy, a totally different conception to that which was the basis of the systems of the Nordic peoples.

VII

THE TRAINING AND REMUNERATION OF JUDGES

§ 1. FEW things are more remarkable in the old Welsh Laws than the careful provisions made for the training of official judges, and the aphorisms regarding the conduct and character of judges.

The Codes contain a number of 'proof-books', or series of points in law, something of the nature of examination papers, and we have frequent references to the fact that judges should have a thorough knowledge of these proof-books, of the three columns of law, and of the law relating to wild and tame.

In the preface to the Venedotian Code, it is said that Hywel Dda and the wise men with him denounced their malediction on the judge who undertook a judicial function, and on the lord who invested him, without knowing the three columns of law and all pertaining to them necessary and customary in a community.

§ 2. The Code also provided for a systematic training of judicial aspirants. An aspirant was placed under a skilled teacher for training, at the end of which he was tested in his knowledge of the proof-books, and, if then found competent, he was recommended to the judge of the court. That official subjected him to a further examination, and, if he were satisfied, he could recommend him to the lord, who was then at liberty to invest the candidate with judicial functions. On admission to office he paid the judge of the court a fee of 2s.¹

In the Dimetian Code the method of training is dealt with in more detail. A candidate had to attend courts in session, listening to the judges, asking questions, and learning the laws, usages, and institutions of the land. He had

¹ V. C. 2, 216.

to listen to the statements of claims and replies and to be with the judges considering and giving their decisions. He was to continue in this for at least a year; and, when passed as competent, the king's chaplain dined him in the company of the twelve principal officers of the court. After dinner he was sworn never to deliver wrong judgement knowingly through entreaty, worth, love, or hatred. He was then taken to the King, who installed him in office, granting him also his insignia of office.

Without training, examination in the three columns of law, the worth of animals, the law of land and soil, of debtor and surety, lawful customs and the books of law, he could not be admitted to a judicial career.¹

§ 3. A judgeship was not an hereditary office, but could be acquired only by systematic training. This, of course, did not apply to judges in Dinefwr by privilege of land.²

A thousand years have not improved upon the ideas underlying this scheme of instruction.

§ 4. In the Triads there are many fine expositions of the duties of a judge, but these are of more recent origin. They do not stand alone, however.

'Whoever would be a judge, let him learn acutely, enquire humbly, listen fully, let him retain in memory, let him speak mildly, let him judge mercifully,'

is a theme repeated over and over again, and embodies the 'Cymric' conception of what a judge should be.

'Whoever knows not the law cannot practise it', says the Dimetian Code, but 'no one is a judge through learning' only, he needs more. 'Though a person may always learn, he will not be a judge, unless there be wisdom in his heart', and wisdom without learning was just as incomplete.

Love of justice and honesty were to be the keynotes of a judge's conduct:

'Love honesty and hate wrong, and that for the love and fear of God, and contempt of life.'

'Judgement is perverted by the fear of the powerful, the hatred of foes, the love of friends, and the lust of lucre.'

¹ D. C. 370; XI. 434.

* XIV. 730.

'An iniquitous judge reduces a country to poverty and a transgressing judge corrupts the world.'

'The fear of God and unconcern as to life'

were the only sure safeguards.

Patience in listening, the protection of the weak, and the giving of security to the suitor are all inculcated; and at times the laws rise to exalted poetry in discoursing on the functions of a judge.

'When the tongue shall be adjudging', says the XIth Book, 'the soul trembles', and the final exhortation in the Gwentian Code is one of the most striking and beautiful passages among the many in these old laws.

'Listen thou judge', it runs, 'listen thou judge, who givest judgements: let not the worth of a penny weigh more with thee than thy God; judge not wrongly for worth, but righteously for the sake of God. Little is it to be wondered at that there should be doubting in a temporal court, since they change like an elemental gale: whoever, notwithstanding, shall love security shall be safe from stumbling in the righteous service of the Lord Jesus Christ, which is the glory of the Father, the Son, and the Holy Spirit. Amen.'

To that conception and advice nothing can be added, and it stands as a fine memorial to what the ancient Welsh thought that law should be.¹

§ 5. We have noted that in South Wales the office of judgeship in the 'Cymwd' Courts depended on the judges being the free possessors of free land; they were accordingly not stipendiary. We have also noticed that the judge of the court was remunerated by the provision of free land and perquisites from the palace.

Accordingly, he was above the need of exaction, and the scale of what we may term court-fees is extremely moderate.

All cases, the subject-matter of which was less than 4 pence in value, were heard free of charge: for other cases, exceeding 4 pence, there was a maximum of 4 pence paid in fees, or, according to some authorities, there was an *ad valorem* fee of 10 per cent. This did not apply to land-suits, *re* which one authority says they were to be heard

¹ D. C. 372, 440, 486, 592, 614; G. C. 786, 790-6; VIII. 206, X. 346-8, XI. 418, XIV. 730, 732.

free, suits *re* boundaries, homicide, fighting, 'saraad', and theft, where the court-fees were fixed at a flat rate of 2s.

All cases where a lord claimed 'ebediw', or which involved a penalty of 'camlwrw' only, or contempt, were heard without charge.

The court-fees were payable to the judge or judges hearing the case, and under the law of Hywel it was the plaintiff who paid, but Bleddyn of Powys placed the liability on the shoulders of the unsuccessful litigant.

Security for the payment of fees was always taken before judgement was pronounced, and a person failing to give security was non-suited. The proper time for demanding security was after the recapitulation of pleadings.¹

¹ V. C. 62, 156; D. C. 368, 370, 468; G. C. 646-8; V. 70, VI. 108, VIII. 198, IX. 248, 304, X. 328, 334, 344, XIV. 580, 654, 732, 742.

VIII

THE CHALLENGE OF JUDGES

§ 1. IN order to secure the proper administration of justice, the law provided for the right of litigants to challenge the judge.

§ 2. The Vth and VIIth Books, with a few other occasional references, appear to provide for a challenge before judgement, in order to secure that there should be an independent and unbiassed judge in the case; the other authorities only for a challenge after judgement by the procedure of 'mutual pledging'.

Challenge before judgement is almost unknown in the earlier Codes, and, in some of the authorities allowing it, there are obvious signs of a confusion between it and the challenge by mutual pledge.

Challenge before judgement was permitted by the later authorities on three grounds:

- (i) That the judge had shown partiality either before the commencement of the suit or during the hearing.
- (ii) That the judge was interested in the subject-matter of the case, and
- (iii) That the judge had accepted a fee not allowed by law, or had appeared in some former proceeding in the suit as a pleader.

The judge could not, before judgement, be objected to on any other ground. The proper time for such an objection was prior to the arrangement of parties and departure of the judges to consider their judgement.

If the judge were challenged on the ground of partiality, the objection could be disposed of by the oath of the judge challenged. Challenge on any other ground could be supported by the production of proof.

It is also stated that any member of a bench could object to any other member thereof sitting in judgement on the ground of partiality. The judge so objected to could counter-assert that the judge challenging him was partial.

Where a judge was so challenged by a fellow-judge or by a party on any ground other than partiality, the question was submitted to the remaining members of the bench for decision; and, if they adjudicated that the challenge was justified, the judge challenged was removed from the judgement-seat in that cause, and, if they adjudicated it was not, he was allowed to sit and give his opinion.

If the challenge were not disposed of, and the challenged judge sat in judgement, or if the challenge were successful and the judge still took part in the judgement, the lord was bound to give relief against the judgement.¹

§ 3. The procedure of 'mutual pledging' is one which is found in many European systems of law; but nowhere is it explained in such detail as it is in the old Welsh Laws.

Before, however, considering its exact place in the development of judicial procedure and its linking on to appeal, it will be as well to describe when and how mutual pledges (*ymwystlaw*) were taken.

After judgement had been delivered in a case, it was open to a litigant to challenge its correctness by impugning the competency of the judge. This was done by entering into mutual pledge with the judge. If the court deciding the case contained both the judge of the court and the judge of the 'cymwd', the challenge was with the presiding judge; if it were a court of land-holding judges, the challenge was made with the pronouncer of the joint judgement.

Each side, i.e. the challenger and the judge, deposited pledges in the hand of the King or lord, the one denying the correctness of the judgement, the other supporting it; and in Wales the decision was referred to a specially constituted court, acting as a kind of court of appeal. The challenger or the judge, whoever was unsuccessful, was punished.

If there were no challenge, the judgement stood; and, even if it were manifestly wrong in law, a party claiming property was entitled to immediate possession and, if land, to investiture.

§ 4. Mutual pledging was confined strictly to judgements,

¹ D. C. 478; V. 70; VII. 144, 146, 148; IX. 212; X. 348, 354.

hence it was not permissible to challenge a judge making a statement as a ' tafodiog ' (*q. v.*) as to the nature of a judgement he had previously delivered, nor was it permissible to challenge a judge acting as an advocate, nor could there be mutual pledging before judgement. Any one challenging a judge by mutual pledge before judgement was fined 180 pence.

§ 5. The proper time for challenging was before the judge vacated the judgement-seat and before he began to hear another case.

Once the judge had risen, without his judgement being challenged, the suitor lost his right to challenge, unless the judge of his own accord thereafter consented to enter into a mutual pledge.

So too, where challenged, the rule was that the judge must accept the challenge immediately, and give his counter-pledge, and should he leave his seat without doing so, he could not repent subsequently, come back, and offer a pledge.

If he refused or omitted to give a counter-pledge, his judgement automatically fell to the ground, whether it were right or wrong, and he became liable to a ' camlwrw ' of three kine payable to the King; and if there were any hesitation on his part, the challenger was entitled to place his own pledge in the hand of the lord, as proof that he had offered a pledge, against which the judge would give no counter-pledge.

The Gwentian Code, instead of demanding an immediate counter-pledge, allowed the judge forty days within which to decide whether he would mutually pledge or rescind his judgement; and the Dimetian Code provided that, if there were no ' book of the law ' in court at the time of judgement, the judge might either give a counter-pledge, accept the challenge, or take time to reconsider. Should he accept the challenge or take time, he was liable to pay a ' camlwrw ' for having given a careless judgement, and the new judgement he might give, whether confirmatory of the old or not, was liable to challenge on delivery. These provisions are exceptional to the general rule that the judge must take up the challenge at once.

§ 6. The only exceptions to the rule that a challenge by a suitor must be immediate was where a ' void ' judgement was delivered, that is where judgement was given ' in absentia ', or out of hearing of parties, or before conclusion of hearing, or by a person not qualified as a judge, or by the presiding judge without concurrence of other judges, or where the judgement was induced through oppression of the King, the judge or men of the court, or through their preventing the party aggrieved from making a pledge, or where the lord refused to accept a pledge tendered.

If a judgement were given ' in absentia ', whether absence were due to contempt or not, the unsuccessful litigant had the right to challenge in a year and a day if he were resident within the jurisdiction of the court, and if he were not, within a year and a day from the date on which he entered that jurisdiction. In all other cases a challenge might be made within a year and a day next ensuing.

§ 7. If the decision were that of a bench of land-holding judges, the presiding judge, before entering into mutual pledge, was entitled to consult his colleagues as to whether to take up the challenge or not. The consultation and decision had to be prompt, and should the bench decide to withdraw from its judgement, the presiding judge was fined a ' camlwrw '.

§ 8. No one was permitted to challenge a judgement except an actual party to the case, and any one else doing so was liable to be fined a ' camlwrw '. The one exception to this rule was where a ' void ' judgement was given, in which case the heir of an aggrieved suitor stepped into his place, and could challenge in the same period of a year and a day as the deceased.

One authority in the Anomalous Laws also allows any member of a bench, disagreeing with the majority, to challenge the judgement pronounced by the presiding judge.

§ 9. There were certain persons also who were debarred from challenging. The King could not challenge, as he could be no party to a suit,¹ and clerics in orders or attached to a religious institution, and, as such, not liable to the

¹ He was represented by the steward.

jurisdiction of the 'cymwd' courts, could not. The remedy of the latter was to oppose the judgement in fifteen days by quoting better authority; and the procedure then followed was identical with what supervened upon the deposit of a mutual pledge, viz. the case was transferred to a special court.

§ 10. A judgement could be challenged either on the ground that the party aggrieved had appealed to the Law of Hywel and the judge had applied the Law of Bleddyn or vice versa, or on the broad general ground that the judgement was opposed to written authority and law.

The first is interesting, as it illustrates that, in Wales, parties were entitled to choose which custom they would follow, the Law of Hywel or the Law of Bleddyn, should there be a difference between them, though it may be remarked parenthetically that the Law of Bleddyn had nothing like the same sanctity attached to it as had the Law of Hywel.

§ 11. Whenever a judgement was challenged, it became a 'dubious' judgement, until reversed or confirmed, that is to say it could not be executed. In the interval, if the suit were for land and soil, the successful litigant was not entitled to investiture.

If the judgement were 'void', and execution had been taken out before the expiry of the year and a day within which the party aggrieved could challenge it, the judge was to restore the property to the challenger immediately. The latter then held the property in trust until the challenged decision was adjudicated upon. If he lost, he restored the property, if he won he retained it; and, if it had not been restored to him in the interval, the judge was bound to recover it for him from the person to whom he had adjudicated it.

§ 12. When a party challenged a judgement, he had not merely to maintain that the judgement was inaccurate in law: he had to assert that he was in a position to produce a better judgement than that delivered.

The law allowed this to be done in two ways, either by reference to written authority, in which the point in issue

had already been decided in a method different to that in which the judge in the case was deciding it, or, according to the Venedotian Code and some other authorities, by pointing out a judge who would give a better judgement in his favour.

No one could challenge without quoting the authority he intended to set up against the judge, 'for none can discredit the decision in opposition to the pledge of the judge unless he can provide a decision in written law more worthy of credit'.

The authorities, which assert that the challenger must base his challenge on written authority, provide that he had to name and recite his authority there and then, and those which state he was to mention a judge, similarly provide that the judge relied on was to be nominated forthwith.

We are not told what constituted 'written authority', but the term apparently meant the Codes, an entry in a proof book, or a commentary by a recognized jurisconsult of whose labours the Anomalous Laws are survivals.

§ 13. As soon as the pledges were placed in the hands of the lord, the latter called for the written or judicial authority relied on by the challenger. The written authority was read out, or the nominated judge gave his decision. The challenged judge replied, supporting his judgement, if he could, by reference to authority. The respective contentions were reduced to writing, the pledges were deposited with the judge of the supreme court, and a date, ordinarily within fifteen days, was fixed for a decision on the contentions.

The Dimetian Laws, which assert that the challenge must be supported by 'written authority', state that the case was submitted to a special court of experienced canonists, who decided on the written contentions without hearing parties; the Anomalous Laws, which allow a challenge by quoting a judge as authority, refer the case to the judge of the court or, in his absence, to a judge specially nominated by the lord or King; while one authority appears to allow a reference to a special judge, with a further appeal to

a court of canonists. Possibly all modes were in force in different places and at different times.

In every case the judgement given on the opposing contentions was final and binding, and was not liable to further challenge by mutual pledge.

§ 14. The law provides definite penalties for the loser, whether he were judge or challenger. The judge, if he lost, was liable to 'lose his tongue' for having pronounced a wrong judgement. This meant he was mulcted in the legal worth of his tongue, that is 120 kine and 120 pieces of silver in Gwynedd, or £42 in South Wales. He was also, if a judge by office, deprived of such office; but if he were a judge by privilege of land, he could not be deprived of his privilege of judgeship so long as he held his land.

If a wrong judgement were given by a bench, each member thereof contributed equally to the mulct.

If the challenger proved to be wrong, his challenge was an insult to the judge, to whom he had to pay honour-price without augmentation, and either a 'camlwrw' or the worth of his tongue to the King. If the challenger relied on another judge, whose counter-judgement was overruled, that other judge paid honour-price and 'camlwrw', and lost office, while a pleader pledging and losing was debarred from pleading in perpetuity.¹

§ 15. Allied with the procedure of mutual pledging is the provision that if a judge gave a wrong judgement, which passed unchallenged, and afterwards in a similar case gave a correct judgement, he was liable to pay a 'calmwrw' for his first wrong judgement—a very effective provision for the maintenance of the rule of 'stare decisis'.²

§ 16. It may be added that if a judge based his decision on a 'written authority', he was not to be blamed if he agreed on challenge that it was incorrect, provided he did not give his counter-pledge in support. He could withdraw at once, and the authority was thereafter held 'condemned'.

§ 17. The penalties for inaccurate judgements and in-

¹ V. C. 28, 218, 310; D. C. 368, 370, 372, 374, 400, 402, 458, 470, 472, 474, 476, 478, 504, 590; G. C. 644, 698; Anom. Laws, 36, 38, 122, 124, 198, 248, 250, 308, 320, 350, 352, 354, 358, 360, 372, 406, 410, 414, 416, 654, 656, 728, 730.

² D. C. 474.

correct challenges appear excessively severe. In fact many penalties in ancient law, e.g. the blood-fine payable, appear so extravagantly high as to be outside the possibility of payment by any one; but we must bear in mind that the penalties stated are simply the maximum liability to which a person in fault rendered himself liable, and that it was by no means compulsory that the maximum penalty should be imposed. In practice compensation was arrived at by compromise, and when a person became liable to a penalty he fell into 'misericordia' of the lord, who decreed what punishment within the maximum should be levied.

§ 18. The system of mutual pledging was not confined to Wales. In the *Senchus Mór*, I. 25, and the *Book of Aicill*, III. 305, it is said 'Cach breithemain a baegul', i. e. a Brehon was punishable for his neglect by a reduction of his honour-price and degradation from his office, and was liable to an eric-fine for a false judgement, wherein he was impugned. The fine varied according to whether the inaccurate award was malicious or inadvertent, and according to whether it was adhered to or not. In the *Heptads*¹ a false judgement is treated as a matter which caused calamities to a nation, and as bringing failure of harvest and producing diseases, while physical blemishes fell on the offending Brehon. Famine could be avoided if the Brehons guarded against giving false judgements, and all these evils resulted likewise wherever a 'Brehon dare not give a pledge in defence of his judgement'.

§ 19. We have references also to the system in the early English Laws, though such references are concerned more with the penalties imposed on an unfair judge than with the actual proffer of a gauge.

In the *Laws of Edgar*, II. 3, there is the following rule:

'Let the judge who judges wrong to another pay to the King 120s. as bôt, unless he dare to prove on oath that he knew not more rightly, and let him forfeit for ever his thaneship.'

Similar is the provision in *Cnut's Secular Law*, c. 15,

¹ V. 351.

which shows the practice was common among both Danes and Saxons.

The same law is indicated in the Laws of the Conqueror, c. 39, which practically reproduced the provisions of Edgar's Laws :

' Qui vero falsum iudicium fecerit, vel iniustitiam foverit, odio vel amore vel pecunia, sit in regis forisfacto de XL solid., nisi purgare se possit quod melius iudicare nescivit et insuper libertatem si habuit amittat illam nisi a rege eam redemerit.'

§ 20. We have traces of the same law in the Germanic Codes. In the provisions De Rachineburgiis, the Lex Salica (Cod. I, Tit. LVII) provided that a suitor could demand judgement, and if it were refused the judges were fined. On delivery of judgement the party aggrieved could challenge it, and if he proved the judgement were against law, the judge was fined 15s. : the other Codices provide the corollary that if the challenge failed the unsuccessful objector was himself fined 15s.

The same rule, with varying fines, occurs also in the Lex Alamman., Tit. XLI, in Pippin's Capitulare (' Incerti Anni '), c. 7, in the Lex Baiuor., Tit. II, c. 17, and in the Lex Burgund., Tit. XC.

IX

ADVOCACY

§ 1. ADVOCACY was a recognized profession in the early Welsh Laws. An advocate could and must be employed in most cases, and there are some regulations with reference to the conduct of counsel which show that the bar of that day differed but little from the bar of to-day.

§ 2. No advocate was needed in a case whose valuation was less than 5s. or whose subject-matter was an animal. Some authorities add land-suits, but they apparently mean cases where the land in suit was worth less than 5s. The general rule was that advocates must be employed where the value of the suit was 5s. or over, or where land or status was in dispute.

In criminal cases two authorities say that no advocate could appear if the person charged was in danger of life, body, or limb. These authorities are alone in ascribing this peculiarity of English Law to Welsh Law. The arrangement of the court provides for an advocate in all cases; and it is expressly said that advocates can appear in homicide and theft cases, and the only bar, under the Dimetian Code, to the employment of counsel was where a defendant produced a warrantor to take over the responsibility for answering.

No judge, being a party to a case, could plead in his own behalf or engage counsel. Should a judge be a party to a case, the lord appointed an advocate for him.

§ 3. The functions of an advocate ended with the delivery of judgement, and he could not enter into mutual pledge with the judge. That right was confined to the party aggrieved.

§ 4. A provision in advance of the English Law, which adopted the practice quite recently, was that which authorized the lord to appoint an advocate for women, stammerers, mutes, or persons ignorant of Welsh. An

advocate nominated for this purpose could not refuse to act.

§ 5. Ordinarily speaking, an advocate only appeared with his client, and could not represent an absent client. To this there were exceptions. He could appear if his client were on pilgrimage to Rome or the Sacred Sepulchre, or were bedridden and unable to attend court, or was in prison or absent in the King's army or service: but in these cases proceedings were suspended until the incapacity ended, and the advocate seems only to have appeared to obtain the legal postponement.

§ 6. Another marked provision was that nothing said by a party to his detriment could be used against him unless ratified by his counsel.

§ 7. The legal profession was closed to clerics, lepers, and deaf persons, otherwise it was open to all. A party could object to the appearance of a particular advocate on the opposite side, if he had already undertaken not to oppose in the cause, but there was no other valid ground for objection.

§ 8. Counsel, having once appeared, could not leave the court until the close of the case, under penalty of losing the case.

He must appear at each and every hearing, and be in his place when the judge took his seat. Should he die between two hearings, a new one could be appointed.

An advocate could approach the judges during the hearing, but could not address the Court without permission of the judge.

§ 9. An advocate was required to speak clearly, and the advice given in the XIVth Book is as applicable to-day as it was then:

'Three things which a pleader or an advocate should do: to speak in a moderate tone, so that he be not too loud, nor too low, lest he offend; . . . it is not right for any one, in seeking his errand, to offend the person of whom the errand is to be obtained, nor his judge; for he who is to listen will not be pleased with what shall be spoken to him adverse to his feeling; . . . the second thing which he ought to study is, that he be not passionate overmuch, nor too conceited,

and that he be not overbearing, nor too loquacious, nor over serious, nor over merry, nor too frowning, nor too much given to laugh. . . .'

Unfortunately, the third piece of advice, which may have been as refreshing, is irrevocably lost.¹

§ 10. In the Germanic and English Laws nothing is said about advocacy as a profession. In the Irish Laws every one taking out distress must be accompanied by an advocate, if only to avoid the pitfalls that the intricate law on the subject provided. The profession was closed to strangers, bondmen, and landless men, and no one of the lower classes could plead on his own behalf against one of superior rank: he must be represented by an advocate equal in rank to the defendant, and no person could take distress unless 'he be skilled in every department of legal science'.²

¹ V. C. 166; D. C. 446, 482; G. C. 786; IV. 4; V. 70, 72, 86; VI. 98; IX. 212, 214, 250; X. 388; XI. 420; XIV. 614, 646, 724, 732, 734.

² Senchus Mór, II. 85, 87, 89.

PART VIII
PRE-CURIAL SURVIVALS

THE LAW OF DISTRESS IN IRELAND

§ 1. WE have already stated that in Ireland there was no system of judicature: the Irish Laws preserved more or less intact the more ancient method of adjudication by reference to selected arbitrators, which was the first mode of settling disputes supervening upon the period in the history of mankind, when he who had been wronged must seek his remedy by the use of his own strong hand.

What happened was that the growing social sense of men forced disputants to settle their disputes by reference to unbiased arbitrators. The reference, though in fact imposed upon disputants by public opinion, was in form voluntary, and its voluntary form left traces in all judicial systems long after judicatures were established.

The power to arbitrate developed in some lands into a perquisite of a separate legal caste, sometimes claiming religious origin, like the Levites of Israel, the Brahmins of India, and the Brehons of Ireland: in others it was left in the hands of members of a popular assembly like the 'gemôts' of the Saxons, which, as time went on, developed into courts, as we know them, by the King or other centralized authority becoming the source of law and using them as instruments to maintain peace and order.

§ 2. The system of settlement of disputes before courts arose left its traces, effective traces, in Wales; but, before we can properly understand the provisions there are in the Welsh Laws preserving these traces, we must sketch briefly the mode of procedure in Ireland, where the old system was maintained for generations after it had been relegated into the background in other countries.

§ 3. The Irish Laws disclose to us an hereditary skilled caste of lawyers, the Brehons, who acted, not as judges in any sense of the word, but as arbitrators. They gave their

award on a subject in dispute submitted to them, not according to any general equitable ideas, but according to a strict customary law which they themselves expounded and were the repositories of.

§ 4. We have seen that early custom placed on everything a legal value, and that that legal value was the measure of compensation payable by a person infringing a right or doing a wrong to the person or persons injured by his act. The legal value was a debt due by the injurer to the injured.

When persons were injured or had any other claim for a debt they brought the defendant, by the method to be described, before a Brehon of the countryside. He heard parties and assessed the damage according to the legal value which custom ordained attached to it, and directed that that damage should be paid.

§ 5. The greater part of the Irish Laws is taken up in considering what was the measure of damage, and how the measure was to be calculated, in all sorts of conceivable cases, many of which had no practical application and were merely employed as illustrative.

The Brehon, in assessing damages, heard not only the claim, but counter-claims and 'exemptions', such, for instance, as the effect of contributory negligence or other matter urged in reduction of damages. He made up an account and struck a balance between parties, and that balance was the amount which was due to the claimant.

§ 6. The Brehon had no authority to command the appearance of parties before him, nor to cause his award to be executed; he had, in fact, no executive arm.

Appearance before him and satisfaction of his award were enforced by what is known as the 'law of distress'. The law of distress could be put into operation, without resorting to a Brehon at all, by the claimant distraining and having the claim satisfied by the defendant; but once it was put into operation, either the claim must be satisfied or reference must be made to a Brehon to determine what, if any, amount was due; and, when the award was made, the amount must be paid, or, if it were not, the claimant could resort to the law of distress to recover it.

§ 7. The law of distress was a substitute for the law of vengeance, and operated to secure, not only satisfaction of claims, but an adjudication upon disputed claims.

Behind the law of distress there was no 'sanction' other than the fear of spiritual penalties or the reprobation of public opinion, but the effectiveness of the 'sanction' was sufficient to allow the law to operate through many centuries. It only broke down, as any other law would break down, by persons ignoring or defying the 'sanction' behind it.

§ 8. What was this law in Ireland, and how did it operate?

If a person had a claim against another, whether for injury received or other debt due, he proceeded to give notice of his claim to the opposite side, and, if it were a debt secured by a surety, to the surety. Notice was given orally if the debtor were a man of ordinary status, but, if he were of high status, the creditor proceeded to his house, sat down in front of it, and announced his intention of fasting until the claim was satisfied, with the intention of bringing down, upon the person fasted on, spiritual penalties in case the faster died.¹

The latter method was identical with the Hindu practice of sitting 'dharna'.

The claimant stated what his claim was, and the debtor must at once take action in one of the methods appropriate in law. He could, in the first place, satisfy the claim there and then, in which case the matter was settled at once. He could undertake to pay the claim in a fixed time, in which case he either gave a surety, who would not evade payment, or a pledge in the form of some property of his own, ensuring payment. He might repudiate the claim either in part or 'in toto', in which case the claimant was entitled to distrain at once in the presence of an advocate; that is, he could seize by force some property of the defendant as a pledge out of which he could recoup himself, or, if the distress were effected before an award, the defendant, while repudiating the claim, might give a pledge (*gell*) to the claimant that he would, within a fixed period, 'try the right to distress

¹ Senchus Mór, I. 113, 117, 119.

by law', that is, submit the whole dispute to the arbitration of the local Brehon.

The *Senchus Mór*, I. 119, is most insistent on the duty of a person fasted upon to give a pledge

'The just rule', it says, 'of stopping each fasting with the Fieni is to give the security of a good surety or a pledge of the pledges in the house of the person who is fasted upon.'

§ 9. The Irish Laws divide pledges into two classes, according to the nature of the debt or claim made—pledges liable to a stay (*anadh*) and pledges which were 'immediate'.

The period of 'anadh' varied from a day upwards, but every pledge given to 'try the right to distress' became 'immediate' if resort was not had to law.

A pledge with a stay upon it was, after being formally seized or delivered to the creditor, immediately restored to the debtor, who held it during the period of stay, subject to the lien of the creditor upon it for his claim, the debtor furnishing a surety for the safe keeping of the pledge.

Within the period of stay, the debtor could redeem his pledge by paying the claim or resort to law 'to try the right to distress' in cases where no award had already been made. If he did neither, the creditor was entitled, at the end of such period, to demand delivery of the pledge or to seize it by force and remove it to a 'green' or pound, which might be the precincts of his own house or a regular pound (of which there were many kinds), established by the local chieftain, notice being given to the debtor as to the locality of the pound in which the pledge was placed.

In cases where the pledge was 'immediate', the creditor removed it at once to the 'green' or pound.

To use the words of the law, from the time the pledge was placed in pound onwards, 'the condition of the distress arises upon the pledge; expense of feeding, tending, and forfeiture shall accumulate upon it'; that is to say, the cost of feeding and tending, calculated according to a fixed scale, was added to the amount of the claim, and the pledge entered on a period of forfeiture by incremental stages.

If the debtor had given a pledge 'to try the right to distress', and did not do so, the period of forfeiture com-

menced at once; otherwise, if he did resort to law, the period of forfeiture did not begin to run until the award was given.

In some cases the pledge was forfeited immediately and entirely on the expiry of a fixed time, in others the property in it passed bit by bit in fractional shares to the creditor; and once the period of forfeiture had expired, whether as affecting the whole or part of the pledge, the right of the debtor to redeem the pledge or its forfeited part was exhausted.

It was, it may be remarked, a remedy enforceable only by or against freemen, and could not be resorted to by or against a labourer, 'fuidhir' tenant, or other person under a superior.

In their case action had to be taken through the superior, who, if the inferior were a debtor, was entitled to give a pledge for payment. Similarly, foreigners, at any rate under *Urradhus* Law, could only proceed or be proceeded against through a 'native'.

We might also add that, in the Irish Law, the tribal bond was so close that a kinsman could be proceeded against for a debt exactly as he could for contribution to a levy for tort.

In this, Irish Law differed from all other laws as they survived. Other laws confine kin-liability to murder, or, in a few cases, to other crimes; the Irish Law, subject to certain regulations, made the kin liable for all debts arising out of contract or tort, and accordingly permitted distress on a kinsman for a contract-debt. This law, the law of 'kin cogus', was entirely absent from the Welsh Laws of *Hywel Dda*.¹

§ 10. The above is but a brief outline of the law of distress in Ireland. It was complicated in the Brehon Laws by intricate provisions as to the pounds to which particular pledges could be taken; priority of claims or 'limitations' upon the debtor, e.g. the right to free quarters of third persons or the right of user of third persons in the pledge; exemption of certain cattle (*nimhe*) and goods from being pledged; penalties attached to accidents occurring to cattle

¹ *Senchus Mór*, I. 79, 85-7, 97, 103, 105, 107, 209; II 11.

distrained on ; penalties for neglect and irregularities and innumerable other matters, each one of which could be taken into account in order to diminish or increase the debt or to extend or limit the period of forfeiture.¹

With these complications this is not the place to deal ; they were preserved in Irish Law long after all traces of them had disappeared in other laws.

§ II. There is one subject, however, which must be noticed briefly, that is, the value of a pledge which could be seized, for we have comparable provisions thereto in the Welsh Laws.

A pledge might equal the debt, plus increments attaching to it, or it might be in deficiency or excess of it.

If the pledge equalled the debts and increments, then, with its entire forfeiture to the creditor, the whole liability was wiped out ; if its value were less, the creditor, on its forfeiture, was entitled to put the law of distress into operation once more to recover the balance ; if it exceeded the debt, plus increments, the value by which it was in excess must be restored to the debtor, 'unless the act of God shall have overtaken the pledge'.

Then, if no surety had been given for its restoration, the debtor suffered the loss ; if surety had been given the creditor made good the loss or paid one-half the value of the pledge.

We may now turn to the survivals in Welsh Law of a similar law of distress.

¹ *Senchus Mór*, II. 3, 15, 39, 49, 87, &c.

II

THE LAW OF DISTRESS IN WALES

§ I. THE Welsh Laws, although providing for courts and for an elaborate procedure in trials, preserved, in more cases than one, effective traces of pre-*curial* procedure, in origin of the same nature as the Irish Law of Distress.

It is significant that the enforcement of rights without the intervention of courts left traces in the three most important branches of the law, homicide, theft, and suretyship.

§ 2. The procedure in homicide was a simple one, which we have already traced : it was the simple law of vengeance, where the strong hand killed him who had killed.

§ 3. In theft, the pre-*curial* procedure which survived was an advance on the law of vengeance ; he from whom things had been stolen could not steal in return, but he could seek his remedy without troubling the courts, if he so desired.

That remedy is known as the law of the absolver's oath, the '*llw gweilydd*'¹.

It is perhaps significant that the remedy is not mentioned in the *Venedotian Code*, and only incidentally in the *Triads* attached to the other Codes, while there are frequent references to it in the *Anomalous Laws*. That fact appears to point to the conclusion that the codifiers attempted to abolish the system, but custom was too strong, and it maintained its existence for centuries.

Briefly put, the procedure was for the owner of stolen property to go to the suspected thief with a cross in his hand, which he stuck in the ground in front of the suspect, and, with sacred relics, to demand of him an oath that he was not concerned with the theft.

The oath could not be demanded from a bishop, a lord, one who was deaf and dumb, one who spoke a foreign tongue, or a pregnant woman, nor could it be demanded at

¹ Such is Mr. Owen's translation, the primary meaning of '*gweilydd*' (now obsolete) is, however, 'freeman'.

the door of the church or the churchyard gate, or, to use the picturesque language of the laws, while the suspect was crossing 'a bridge made of one tree'. Otherwise, if the oath were demanded, the person challenged was bound to take it immediately, if theft were involved. The form of the oath taken was that he

'had caused neither loss nor want to the claimant, that he had not travelled by day or by night with the property, and had received neither part nor share in it, and that he was innocent both of the crime and of being an accessory to it.'

The suspect was absolutely free if he took the oath, and no proceeding could thereafter be instituted against him.

If he admitted the challenge was true, provided he delivered over the property, no further action was taken.

If he did not admit the charge and refused to take the oath, he was bound to make compensation for the property stolen, and when this procedure was joined on, in later days, to a regular court procedure, the refusal to take the oath was sufficient ground on which to found a charge of theft and to secure the conviction of the suspect.

The use of the absolver's oath was not confined to theft; we find occasional references to it in the case of debt, a debtor absolving himself from liability if he swore he had not the wherewithal to pay, and in the case of an allegation that the suspect had killed a bondman or an animal belonging to the challenger.¹

In debt cases the procedure was a preliminary to taking action against the surety; in the case of killing a bondman or an animal the refusal was sufficient ground on which to sue.

§ 4. In dealing with the law of surety and debtor we have seen that, when two persons entered into a bargain, the vendor gave a surety guaranteeing title and soundness, and the vendee a surety for payment. In demanding and enforcing payment the law maintained the old pre-curial procedure, which must be exhausted before the help of the courts could be invoked.

It was the duty of the creditor to demand payment in

¹ D. C. 400-2; G. C. 784; IV. 4, IX. 226, 266, X. 302-8, XIV. 602-4, 664, 680, 712, 716, 718.

the first instance from the debtor on due date, and he had no right to seek payment from the surety unless the debtor failed to pay when demand was made. If the debtor failed or refused to pay, the creditor was entitled to turn to the surety and demand that he should compel the debtor to pay or pay himself.

It was the duty of the surety then to go to the debtor on three separate occasions and demand satisfaction at intervals of 15, 30, and 50 days in the case of 'dead' property, and 15, 10, and 5 in the case of 'live' property, after which the surety was entitled to and must enforce payment. If he could not or would not he must pay himself.¹

§ 5. The laws give us, at different times, three methods employed by the surety to enforce payment, (a) the use of a quasi-moral suasion, (b) the use of physical force, and (c) the employment of the procedure of the cross.

The use of the ancient quasi-moral or superstitious suasion has not left many traces in the Welsh Laws. The practice of 'sitting dharna' in front of the debtor's house, which we have already mentioned, has left one trace in the Venedotian Code, p. 130. That law says:

'If a surety and a debtor meet on a bridge of one tree, the latter must not refuse doing one of three things, either to pay, or give a pledge, or go to law. He is not to move his foot until he do one of those things.'

Here we have a quasi-moral suasion applied; the surety sat down in front of the debtor, and the debtor could not pass him unless and until he made satisfaction.

It is expressed in another form in another passage of the Code, p. 112:

'If a person give surety to another for anything, it is right for him (the debtor) to release the surety by one of the three means which release a surety, either by paying for him, or by giving a pledge, or by denying surety (i. e. by legal defence in suit).'

We have here the three modes of enforcing payment in terms of the duty of the debtor.

The use of physical force in enforcement of payment is

¹ V. C. 116, 122; D. C. 426; VIII. 184, X. 342.

expressed most vigorously in the Xth Book, p. 344. It was a rule of Welsh Law—what we may call the Welsh Law of insolvency—that a man was capable of paying his debts if he had more than one garment. That was all he could keep back from those to whom he owed money, and the Xth Book says :

‘ If a surety shall meet the debtor (after triple demand), let him despoil the debtor of his clothes, with the exception of the garment next his skin, and let him continue to do so, until he shall get payment of the whole from him.’

That expresses the duty of the surety in figurative language, to strip the clothes off the back of the debtor till he did pay. It is expressed in the XIVth Book, p. 714, in other terms in a passage which shows that, as time went on, the use of physical force was supplemented by the interdict of the cross.

‘ In the law of Hywel Dda a surety was to urge his suretyship by force, and no one could be a surety except such as enforced it willingly or unwillingly, and that was difficult, for some could not do that. So it was enacted afterwards that a surety and everybody should enforce it by a cross and punishment for it, if broken, which is 180 pence.’

In this latter procedure the surety went with a wooden cross, taken from the lord, and planted it in front of the debtor’s house. That cross the debtor must obey or be mulcted in a penalty if he failed to do so.

§ 6. The enforcement of a debt by force introduces us to the law of pledge (*gwystl*), for it was by obtaining or seizing a pledge that a surety took effective steps towards obtaining payment without resort to Court.

The exaction of a pledge was a duty and privilege of the surety and not of the creditor, whose rights to enforce were limited to a demand upon the surety. If he exacted a pledge from the defendant, the surety was free from all further responsibility, and the creditor was fined three kine. The reason why it was left to the surety was that it was within his option to demand a pledge or pay himself.

The surety could, if he liked, give a pledge out of his own property, and, if he did, the creditor must accept it ; but the former would naturally prefer to obtain property of the

debtor as a pledge. In order to do so he had to make a triple demand, and then, if the debtor refused or failed and the creditor insisted on action, the surety could and must take forcible action, either in the presence of the debtor or otherwise.

The forcible seizure of the debtor’s property against his will might result in trouble. Nevertheless, the surety must take the risk. He must seize some property or other of the debtor’s, and hand it over as security for the debt, and

‘ if there be obstruction to giving a pledge, the surety must accompany the pledge when seized, together with the creditor, to a place of safety, and he himself is to receive the first (or first three) stick blow : if he do not do this, let him pay the debt himself.’

He was not required to be aggressive ; but he must protect the property seized, and if assaulted, he had the right to demand compensation for insult and injury.

The law also gave the surety the right to pursue the debtor even into sanctuary. Sanctuary would protect no debtor, and he could be dragged out of it by force and made to pay.

No doubt a power of this sort was open to abuse, unless guarded against. By the time of Hywel Dda it is obvious that, if the debtor denied the debt absolutely, the forcible action of the surety was suspended ; the creditor must then seek his remedy by suit, and the attachment was postponed until judgement was obtained ; but even before that time there were regulations as to what could be seized and what was to be done with property when seized. We can see particularly the limitations placed by custom upon forcible seizure by comparing the rules regulating property so seized and property given in pledge voluntarily.¹

§ 7. The rules relating to what could be seized are very minute and exact. They may be stated briefly thus :

1. The pledge, whether seized or given voluntarily, must be a ‘ legal ’ pledge, that is, must be worth one-third more than the demand, and ordinarily should not exceed that value.

¹ V. C. 118, 120-2, 138 ; D. C. 426-8 ; V. 66, VI. 110, VIII. 184, X. 332, XIV. 632, 660.

2. The pledge was ordinarily to be movable property. The laws speak of the three 'gwanas' or supports of a pledge, the hand, the arm, and the shoulder, or sometimes the hand, the shoulder, and its final place of deposit; signifying that the property must be of such a nature as to be easily lifted and carried.
3. The pledge, whether it were the surety's or debtor's property, must be property belonging solely to the pledgor: that is joint property could not be pledged.
4. Certain specified property could not be pledged.
5. If, on the occasion of the first attachment, property of less value than a legal pledge were obtained, the surety must go day by day and exact more until the full legal pledge was made up.¹

It must not be supposed that in the laws, as we have them, either the codifiers or the commentators enunciated broad propositions. We imagine that, if they had had to state rules in that form at all, they would have been horrified at the idea of enunciating more than three. Their minds ran constantly in the direction of forcing everything they possibly could into Triadic form, but nevertheless these rules are to be found in the laws. The laws give us a series of pictures, showing how they worked in practice, and what the limitations on each rule were.

§ 8. To take the first, that the pledge must be worth one-third more than the demand, and ordinarily should not exceed that amount.

Suppose, for instance, the pledge seized and given to the creditor exceeded the legal value. Was the creditor to refuse it, and, if it were lost while in his possession, was he to restore the difference?

Certainly not: he was at full liberty to accept it; but the remedy of the debtor, if it were lost, depended entirely on whether he had been a willing and consenting party to the particular pledge being taken or not.

The Venedotian Code, p. 120, tells us, in a series of illustrations, what happened.

If the debtor permitted the surety to give in pledge property worth £1 for a debt of a penny, and the pledge were lost before it was redeemed, all the creditor was responsible

¹ V. C. 118; V. 68, VI. 110-12, VIII. 198, X. 332, XVI. 632.

for was to restore a halfpenny, which was in law the one-third of a legal penny. The creditor was bound to preserve the property till maturity of the pledge; if he lost it, his debt was considered to be paid, and he had to restore one-third of the legal value, which was the measure by which the legal pledge had to exceed the value of the debt. If the debtor were foolish enough to permit the surety to seize something worth more than one-third in excess of the debt, he accepted the risk of losing the difference if the pledge were lost.

The very same principle applied where the pledge was not redeemed at maturity. The pledge lapsed to the creditor if not redeemed, the one-third in excess of the debt going to him. So, if in the specific case mentioned, the pledge, really worth £1, lapsed, the debtor, because he had agreed to its being pledged, could not claim the difference between £1 and one and one-third pence. He had himself 'debased the privilege of his pledge', and by consenting to the pledge had fixed its value at one and one-third pence.

If, however, the surety seized property against the debtor's will and gave it in pledge, the creditor was still entitled to accept it. 'It is lawful', says the Code, 'for the creditor to receive what is given him, whatever its amount, in pledge'—but, if he lost it, his debt was wiped out and he restored to the surety one-third the amount of the debt, that is the amount of the difference between the value of the 'legal pledge', which should have been seized, and the debt, but the surety had to make good to the debtor the difference in value between the debt and the real value of the pledge, because he had seized a pledge exceeding in value what he was entitled to seize.

But suppose the surety came down on the debtor and found he had no property worth one and one-third times the value of the debt, but had property worth, say, twenty or one hundred times its value, which the debtor was not prepared to give in pledge.

The surety could hardly seize it, as he ran the risk of having to indemnify the debtor if it were lost or forfeited, and yet he could not refuse to find a pledge because he

was bound to give the creditor one. He might, of course, give property of his own in pledge, but he would prefer to get something from the debtor.

Now one of the characteristics of the Welsh Laws is that they do try to find some means of meeting most ordinary contingencies without violating the basic principle of the law.

This was too obvious a contingency to be overlooked, and the Venedotian Code tells us what was to be done in those circumstances by employing another illustration.

It says that if there were a surety for 12 pence, and the time for payment fell due, and the debtor had only a horse worth £1 or £10, and the debtor refused to pay on demand or give the horse in pledge, the surety was not to seize the horse. He was to proceed at once, with the creditor, to the lord and explain to him how matters stood. The lord was thereupon to authorize the surety to seize the horse, 'to give a great pledge in lieu of a small matter, lest the creditor suffer loss'. When the horse was seized and given in pledge in these circumstances, its value, while it remained in pledge, was one and one-third times the debt due only.

§ 9. Let us turn now to the second rule that property must ordinarily be easily movable.

This rule was subject to two limitations. The first was that the creditor could waive the right and accept in pledge property which was not easily movable.

The second limitation was that if the debt were of such magnitude that the debtor or surety could not find a small article one and one-third times the value of the debt, they could proffer an immovable pledge; the test of immobility being not whether it were land or anything falling under the present-day English definition of immovable property, but whether it was a thing which the creditor could carry on his shoulder and move in whatever direction he wished to move it.¹

§ 10. The third rule that property pledged should not be joint property, was also subject to two limitations.

In the law relating to women we saw property of a husband

¹ IV. 6, X. 332.

and wife was joint. The law, however, provided that if a husband or wife gave away any of their joint property in pledge, neither could nullify the pledge.

The other limitation was that if a surety came down on the debtor and found he had only joint property, he was entitled to claim partition through the lord, whose order directing partition was absolute.¹

§ 11. We cannot fully explain the fourth rule, that certain property could not be pledged, without going a little further and considering what power a creditor had in respect to a pledge in his possession, how long he was to keep it, and what happened to the property at the expiry of the period during which he must keep it. We get only fragmentary indications in the Codes: to some extent they seem contradictory, and the exact significance of terms used are not explained.

We have already referred to the three 'supports' of a pledge, the last of which was that a creditor was to deposit the pledge in a place of safe keeping, and, if the pledge were lost, his debt was wiped out and he had to refund one-third the value of the debt.

Now we find in the laws definite, though apparently contradictory, rules fixing a period during which a creditor must keep the pledge in his custody, providing for lapse, and prohibiting the use of the pledge by the creditor. What, however, is beyond doubt can be reduced to the following rules:

(i) The pledge was to be kept by the creditor for some period or other, during which the property in it continued to be the debtor's.

This period is stated to be ordinarily nine days, but the period might be fixed by contract, and the Anomalous Laws, in one passage, fix a period of one year and one day if the property were the surety's, unless there was a contract reducing the period, and, in another, abolish all periods of retention if the surety gave a pledge of his own and declined to take action against the debtor.

For some articles a period of one year and one day was

¹ V. C. 332; V. 68.

immutably fixed, viz. gold, vessels of gold, a lorica, and a cuirass. A harp, a yew pail, and a plume taken from the debtor against his will need not be kept for more than nine days, but, as the debtor could always demand their restoration or an equivalent from the surety within one year and a day, they were to all intents and purposes excluded from seizure.

A pledge given for satisfaction of damages to corn had to be kept till the calends of winter, to enable the person responsible to make the damage good out of his own corn. Certain articles had also to be kept indefinitely, viz. a fuel-axe, a coulter, and a cauldron, a provision which also made these articles in practice unattachable.¹

(ii) The creditor was not allowed to use the article pledged during the currency of such period, lest it should deteriorate.

If he did use it he lost all rights in the pledge and could not recover his debt. An exception was made in the case of a milch-cow, a harp, and a chess-board, as they did not deteriorate with use.²

(iii) The debtor was entitled, at any time during the currency of the period of pledge, to redeem it by paying the legal pledge value, i. e. one and one-third times the amount of the debt.³

(iv) If he failed to redeem the pledge in that period the property in it lapsed to the creditor, if the creditor offered it on due date to the debtor and the latter refused to redeem it.⁴

(v) Certain articles could not lapse, and were, therefore, not fit subjects for a pledge.

These were ecclesiastical paraphernalia, a milch-cow, if pledged for silver by any one other than a surety, a harp, a yew-pail, a plume to the extent noted, a coulter, a cauldron, a fuel-axe, and oxen engaged in co-tillage.⁵

The property mentioned as non-lapseable, and, therefore in practice, non-pledgeable, forms a miscellaneous collection; but because of the light thrown on social conditions

¹ V. C. 128, 330; G. C. 726; VIII. 198, X. 340, XIV. 632, 640.

² VIII. 198, IX. 304, XIV. 640.

³ VIII. 198, XIV. 590.

⁴ XIV. 634, 702.

⁵ V. C. 320; G. C. 726, VIII. 198, X. 340, XIV. 632.

it is worth while pausing a moment to consider why this heterogeneous list was exempt from attachment for debt.

We can understand quite easily why ecclesiastical paraphernalia, which were dedicated to divine services, could not be forfeited for a secular debt; we can also understand why oxen engaged in co-tillage could not be diverted from the joint enterprise so as to delay or endanger the ploughing, but what were the reasons underlying the other exemptions?

The reason given for not pledging a milch-cow is that Hywel Dda provided that it could not lapse, but that does not answer the question why it could not lapse. Cattle formed the principal article of wealth among the ancient Welsh, and it seems that the reason for exemption was that milch-cattle were necessary for the sustenance of the tribesmen who lived largely on cheese, milk, and butter.

The harp and the cauldron were exempt, as they were the hall-marks of freedom, the indispensables of the freeman.

The yew-pail (*bayol*) is a misreading for fuel-axe (*bwyall*), and there is no difficulty in understanding why a fuel-axe was exempt in a country of forests. The coulter, the indispensable part of a plough, was exempt for obvious reasons.

The plume (*fflw*) appears to be a misreading for the domestic milking-can (*ffiol*), which was exempted because it was an indispensable article for dairy people.

§ 12. The fifth rule, viz. that a surety must find pledges for the full value of the debt, there was no limitation to. The surety was liable, subject to the modifications considered in the law of suretyship, for the whole debt, and must secure a pledge to cover it.

§ 13. We have merely to consider one more point connected with pledges, seized forcibly or given voluntarily, viz. whether a pledge, when handed over to a creditor, had to be secured by a further surety guaranteeing title.

There was nothing to prevent such security being given, but it was not essential.

The Venedotian Code says a pledge handed over by a surety without security for title was a good one, and, in case of default, lapsed to the creditor. The lord secured the title, and, moreover, the surety could not deny giving, and

could not give an insecure pledge for the simple reason that he might have to find another.

Suretyship, however, could be demanded from an owner of a pledge giving it voluntarily.

§ 14. One passage in the Venedotian Code is of very great interest as showing the transition from the period of pre-curial distress to the period when distress was to be resorted to only after permission of the Court was obtained.

It provides that where the debt was denied, or the debtor refused to go to law to determine whether the creditor could distrain, or the alleged surety denied he was surety and refused to distrain, the creditor must go to law. If he refused to do so, the surety was *ipso facto* freed from the claim.

This indicates that the codifiers introduced a rule that the pre-curial distress was not to be put into operation until decree was obtained. In other words the extra-judicial law of distress was converted into a law of execution by the simple process of suspending the right to distrain until permission of the Court was obtained.¹

¹ V. C. 120-8; X. 332.

III

THE LAW OF DISTRESS IN THE GERMANIC AND OTHER CODES

§ 1. THIS system of distress before judgement prevailed in other systems of law as well.

§ 2. In Roman Law one of the principal actions was the 'pignoris capio'—the seizure of a pledge, an action of identical origin.

§ 3. In English Law the same system prevailed under the title of 'taking nams', i.e. the impounding of cattle belonging to the debtor, forcing the latter to an action of replevin for recovery of the goods seized. The procedure upon taking 'nams' was so complicated and had to be so strictly observed that it became dangerous to resort to it.

Blackstone says :

'The many particulars which attend the taking of a distress used formerly to make it a hazardous kind of proceeding, for if any one irregularity were committed, it vitiated the whole.'

In a modified form the taking of 'nams' before judgement existed till recent days in English Law, for the whole of the English Law of 'distress for rent' is 'extra-judicial' and pre-curial in origin.

§ 4. The early Scots Law retained very definite traces of distress for debt before decree. The procedure for seizing 'nams' for debt is regulated in the *Leges Quatuor Burgorum*, cc. 32, 33, 34, and in the Assize of King William, c. 27; and it was not definitely abolished as a right until the reign of Alexander II, under whose Statute, c. 7, a penalty was imposed on persons attaching before judgement, the goods attached being also restored to the owner. That the prohibition was not completely effectual appears from the fact that it was renewed in the Act Parl. Robert I, c. 8.

§ 5. In the Germanic Codes the older system has left many traces.

A very full account, similar in many points to the Welsh rules, occurs in the *Lex Burgund.*, Tit. XIX, under which the debtor was to be thrice warned to pay, and if he did not, the surety was either to pay one-third over the debt, or compel payment by force, seize a pledge and accompany it home.

In the *Lex Salica*, Codex I, Tit. LXXIII, we find a rule prohibiting distress before decree :

'Si quis debitorem suum per ignorantiam sine iudice pignoraverit antequam eum "nesti canthe chigio" hoc est accusante, et debitum perdat et insuper si male pignoraverit cum lege conponat, hoc est capitale reddat et solidos XV. culp. jud.'

Titles L and LI show also that, in actions on suretyship and for return of goods, a demand had first to be made at the debtor's house, and it was only on refusal (which added to the sum claimable) that resort could be had to court ; but if resort were not had to court and the creditor proceeded to distrain before judgement, he was mulcted in a fine.

The *Lex Alamman.*, Tit. LXXXIX, also the *Lex Frision.* (*Additio Sapientum*), Tit. VIII, prohibited the seizing of a slave as a pledge, and if a slave were seized and caused damage, he was not responsible therefor. If given voluntarily, he was. This seems to point to a permission to seize other kinds of pledges.

The *Lex Baiuor.*, Tit. XIII, prohibited all seizures under penalty of double value and restoration except under judicial order, and similar prohibitions occur in the *Lex Saxon.*, c. 25.

The *Lex Langobard.*¹ shows unmistakably that distress before judgement prevailed among the Lombards at the time of the redaction. It was provided that a creditor must summon his debtor to pay three times, and he was then, if not paid, entitled to distrain on certain property :

'Si quis debitorem habens appellet eum semel, bis et usque tertio, et si debitum non reddederit aut non composuerit,

¹ Ed Roth., cc 245-51, and Ed. Luit, c 15.

tunc debeat pignerare in his rebus, quibus pignerare licitum est.'

Distrain without thrice calling for payment involved a loss of claim ; and it was impermissible to attach horses, pigs, cows, or oxen without the King's order. That order was obtained, as a matter of course, without resort to court, if the attaching creditor complained to the 'sculdahis' that the debtor had no other property.

§ 6. We see, therefore, that all early laws were based on the same principle, and that in those countries where courts were established the right to distrain, from being a private right of vindication, became a law of execution, carried out after sanction obtained from court.

In Ireland it remained a private right always ; in Wales we see the right surviving and put into force except where the debtor or surety denied liability, in which case the courts were resorted to, and it was only much later in the history of the European peoples that all attachments before judgement were prohibited, even when the debtor did not deny liability.

IV

THE LAW OF BOUNDARIES

§ 1. THE law of distress, which became a law of execution in Wales by postponing the right of the person aggrieved to resort to distress until he had obtained the permission of the court after adjudication, applied to the recovery of movable property or of compensation for breach of contract, tort, or the like.

It did not, and could not, apply to land in its entirety. We have, however, three survivals of a pre-curial procedure regarding claims to land in the old Welsh Laws, that relating to 'dadanhudd', which by the time of Hywel Dda had been amalgamated with judicial procedure, that relating to 'lawful disturbances', and that relating to the settlement of boundaries.

The first two subjects are dealt with elsewhere, but we may deal with the settlement of boundary disputes here.

§ 2. The law of adjusting boundary disputes was anterior to the existence of courts; but by the time the laws were redacted, it had been brought partly into line with the fact that a judiciary existed, by arranging, not for an adjudication on boundaries by the court, but by providing that the old machinery should be put into operation only in the presence of the court.

Side by side with the retention of the old method of delimiting boundaries under the supervision of the courts, the courts extended their jurisdiction by the imposition of penalties for infractions of boundaries.

§ 3. This chapter in the Welsh Laws is of great interest. In dealing with the social organization of Wales we saw how tribes and 'gwelys' occupied territories or areas, and, by a system of continued occupation, acquired exclusive occupancy or 'priodolder' rights.

Now it is obvious that some system of boundary demarca-

tion was necessary when different units might at any time claim the same area belonged to them.

The Gwentian Code, p. 764, has an artificial system of fixing a kind of neutral zone between occupied areas. It says that between 'erws' belonging to different people there must be two furrows unoccupied, between two 'randirs' 4 feet, between 'trefs' $1\frac{1}{2}$ fathoms. The IXth Book, p. 268, alters the last two to 3 and 5 feet respectively, and adds 7 and 9 feet as the neutral zone between 'cantrefs' and 'cymwds'.

These are no doubt artificial and imaginary; but the prevalence of boundary marks appears from the frequent references to boundary stones, crosses, and the like.

§ 4. In the law, as redacted, breaches of boundaries became offences punishable by a fine, by the payment of their legal worth, and by the liability to remove them.

The breach of boundaries between 'trefs' was punished with a severe penalty. If a boundary of that sort were breached by ploughmen, the oxen, the plough, and everything belonging to it were forfeited to the King. The driver was mulcted in the worth of his left hand, the ploughman in that of his right foot, and they had to restore the boundary jointly.¹

Giraldus Cambrensis remarks on the frequency of encroaching on boundaries prevalent in Wales, but his strictures are rather overdrawn when we remember that the conception of private property in land was foreign to Celtic legal ideas. Occupation, developing later into a right to exclusive occupation by prescription, did exist; but private property in that which was free to all, if unoccupied, was one of the keynotes of the land system of Wales, which a half-Norman like Giraldus could not understand.

§ 5. The penal provisions we have mentioned, enforced by the courts, were later and of a different character from the demarcation of boundaries of areas subject to occupation (*gwarchadu*), in which the old pre-curial procedure continued long after courts were established.

§ 6. There were, in Welsh Law, what were called 'stays

¹ V. C. 196; D. C. 554; G. C. 764; IX. 268.

of boundaries' (*argae terfyn*), and no one could, under colour of claiming demarcation and adjustment of boundaries, claim possession of land which extended beyond these stays. If any one did so, he lost his claim altogether, and where areas were in dispute extending beyond such stays, they had to be dealt with, not as boundary disputes, but as claims for the recovery of land.

The most important 'stay' was the 'stay' of a 'randir'.

The meaning of this was that no one could claim a demarcation of boundary which, if successful, would involve the transfer to the claimant of a whole 'randir' claimed to be in the possession of the other side.

Another 'stay' was a river. Large and impetuous rivers were invariably boundaries, and no one could claim, under colour of demarcation, to extend his occupation beyond a river.

It is here, perhaps, interesting to note an introduction into the Welsh Laws attempted by two of the commentators, who, dealing with alluvion, a matter on which the Codes are silent, assert that an island in a river belongs to the owner of the nearest bank, and if it be equidistant from both banks, it is shared equally by the two riparian owners, except where one 'occupation' has preceded another, in which case title goes by priority of occupation.

The matter is of interest as showing how the commentators sought to harmonize the provisions of Roman Law with indigenous Celtic principles.

A third stay was a building, a kiln or a barn, and though a building might in part have been erected on land encroached upon, a claim to demarcate boundaries was not the appropriate means to employ in order to get rid of it. The reason will be obvious as we proceed.¹

§ 7. The word 'stay', however, in respect to boundaries is used in another sense as well, to describe not merely the points beyond which a boundary could not be carried by demarcation, but to indicate who was not entitled to point out a boundary which he claimed was his. In this sense

¹ D. C. 536; G. C. 762, 774; V. 52, 76; VII. 148; IX. 296; X. 336; XI. 402; XIV. 740.

the three stays of boundaries are frequently asserted to be status, occupation, and priodolder right.

This brings us to the ancient method of demarcation which survived intact into the time of Hywel Dda.

§ 8. What happened when any one desired to have his boundaries fixed was this. The person aggrieved applied to the lord for demarcation. Notice was issued to the other side, and an order made for the boundaries to be demarcated. The parties assembled on the ground in dispute with the judge of the court in attendance.

The boundary was then indicated, not by any judge or officer of the court, nor even by proof of witnesses, nor ordinarily by any independent person, but by one or other of the parties and by him alone. That party indicated the boundary who had the preferential right to do so, and if neither had any preferential right superior to the other, there was a special method of demarcating in which both participated. The court had nothing to do with it, and the judge was only there to see some formalities were observed.

With one exception, it was the invariable rule that that one of the parties who had the highest status was entitled to point out what the boundary was. The solitary exception was in Arfon, where the freemen preserved their own boundaries, and, in dispute with their neighbours of adjoining 'cantrefs', it was the right of the men of Arfon to indicate where the boundary line lay, and, where two 'maenols' in Arfon were at issue between themselves, men appointed from the other seven demarcated the boundary without outside intervention and without even the presence of the judge.

A dispute regarding boundaries might arise between the King and the Church, between the Church and a territorial lord, between two different Church foundations, between the King or lord and a free 'maenol', between a free official and one without office, between 'cantrefs', 'cymwds', and 'trefs', between a 'priodawr' and a 'non-priodawr', and between free and unfree men. In every case the man or party who had the highest status laid down the boundary line, and what he laid down could not be disputed by the other.

In the Vth Book we are told that the status of the Church in this matter was superior to all others. This was a pious aspiration of a clerical commentator, which no one else agreed with.

Other authorities gave the superior status to the King. A bishop or abbot, possessed of a crozier and a gospel, came next to the King and before any territorial lord.

Of course it might and frequently did happen that the contesting parties had equal status. The preferential right to demarcate was then accorded to the party who had the longest occupation of land abutting on the disputed boundary.

The man on whose abutting land there was a building, such as a house, a kiln, or a barn, or who had land under cultivation, was deemed to have a longer 'occupation' than a man who did not possess a building on his side or who had not ploughed his land.

Between churches of equal status the head of the institution first inducted had the longest 'occupation'.

In demarcating, the person entitled to demarcate, whether by superior status or longer occupation, entered upon the land in the presence of the other party, the 'gwrdas' of the country and the judge of the court, carrying relics with him. He stood first at one end, where the two lands met, and swore on the relics that that was the point of junction. He then traversed the whole of the line which he asserted was the boundary, stopping at the end of every nine paces to repeat the oath, finally swearing to the accuracy of the whole line at the other end.

That was the universal method adopted whenever one party had the preferential right to demarcate, and his demarcation was final and binding between the parties.

Wherever the King was a party to the dispute, he did not appear himself. It was the duty of the 'maer' and 'canghellor' to maintain his boundaries and to swear to them in his place. If an abbot or a bishop were a party, he was represented by a habited monk.

If parties were co-equal in status and occupation, the ordinary rule was that the oldest men belonging to the two parties, one taken from each side, demarcated. Each

indicated what was the boundary according to his contention, swearing in the same way as if he had the preferential and sole right to demarcate, and whatever land might lie between the two lines so indicated was shared equally between them.

Three passages, however, say that before persons equal in status and occupation could demarcate, the elders, twenty-four of the 'cantref', denominated 'dadferwyr' or restorers, were to indicate the boundary, if they could; and it was only when they expressed their inability to do so that the parties were allowed to demarcate. One late authority says the elders were to decide which was the right boundary, after the parties had shown their demarcations, and if they failed, then and then only was there to be equal sharing.

These provisions probably represent some local variations on the general rule.

If the dispute, however, were between two 'cymwds', both the Southern Codes say that the 'maer', 'canghellor', and 'ringyll' of the King, and not the oldest men from each side, demarked.

Likewise, where two ecclesiastical communities, equal in status and occupation, were at issue, a monk from each swore to the line, and any area lying between the lines so shown was divided equally.

If, in cases of equal status and occupation, only one side were prepared to swear on the relics, then the line to which the other swore was accepted, and if neither side would swear to the line, the King stepped in and took the land in dispute as a part of his waste.¹

In all this the judge had no function. He was there simply to record the result and to decide any point of law, extraneous to the demarcation, which might arise. He received 2s. for his duties, and 10s. were paid to the King.

We have to add that the King could at any time have the boundaries between two 'trefs' demarcated for his own information. The procedure then adopted was the same.

§ 9. We see in this procedure an old method of decision

¹ V. C. 106, 196; D. C. 368, 454, 536, 538; G. C. 762, 764, 774; V. 40, 76, 82; VI. 112; VII. 148, 150; VIII. 206, 208; IX. 294, 296; X. 366; XI. 400, 402; XIV. 630, 740-2.

surviving, dating from before the introduction of courts, and we can see also how the courts first crept in in such disputes, laying thereby the foundations for a future assumption of jurisdiction in the decision of boundary disputes.

§ 10. In other contemporary systems there appears to be little mention of the settlement of boundary disputes by any special procedure, and only two references have been found.

The Lex Alamman. (Hlothair's Constitutions), Tit. LXXXVIII, contains a provision comparable in some ways to the Welsh system. That law provided that if there were a dispute about boundaries between two families or tribes (*inter duas genealogias*), each side was required to indicate the boundary line relied upon by it. Thereupon a champion from each side was chosen, and the two representatives fought for the mastery within the area in dispute. The contention was submitted to ordeal by battle, and the family whose champion won was accorded the land, the possession of which was secured to them by heavy fines in case of subsequent breach.

The Lex Baiuor., Tit. XII, made a breach of boundaries, if committed by a freeman, a tort to be satisfied by 'conpositio', and if by a slave, a crime, punishable by flogging.

It contains an interesting provision for settlement of boundary disputes, recalling the Welsh Law of boundary marks.

'Quotiescumque de terminis fuerit orta contentio signa quae antiquitus constituta sunt, oportet inquirere id est agere terrae, quem propter fines fundorum antiqui tunc apparuerint fuisset ingestum lapides etiam quas propter iudicium terminorum notis evidentibus sculptis vel constituerint esse defixos. Si haec signa defuerint tunc in arboribus notis, quas decorvos vocant convenit observare, si illas quae antiquitus probant incisae.'

It proceeds that if the boundaries are unknown, the old boundaries are to be inspected, and against them long possession is not to avail, and concludes with a provision identical with that contained in the Lex Alammanorum.

We have, therefore, clear proof that the Welsh system was also in use among some, at any rate, of the Germanic tribes, and that it was not entirely confined to Wales.

PART IX

THE LAW OF PROCEDURE

THE ENFORCEMENT OF JURISDICTION

IN describing the procedure in trials before courts we have, first of all, to state the law on what appears, at first sight, to be a number of miscellaneous and unconnected points, but which are really interconnected as part of a law securing the presence of parties in court for submission to adjudication. There are, in this procedure, many survivals of a pre-curial period, which have been embodied in the law of courts.

1. *Limitation.*

§ 1. The fixing of a period of limitation for the assertion of rights is generally regarded as incidental to an advanced legal system, and as one not found in ancient systems. It is interesting, therefore, to find in Wales a complete law of limitation, together with some rules permitting of an extension of the regular period.

§ 2. In a few cases a plaint had to be filed 'immediately'. This was the rule in cases of insult and fighting, and, according to the Dimetian Code, in surety cases. The laws do not clearly define what is meant by 'immediate', except in surety cases, where it meant nine days after refusal to pay; but it apparently implied that the claim must be filed during the existing session of the courts, and could not be filed in the session next following the date of the cause of action.

§ 3. We have also seen that where a judgement was challenged by mutual pledge, the challenge had to be 'immediate', in which case the term meant 'before the rising of the Court', and that an extension of the period was allowed to a year and a day wherever the judgement had been given 'in absentia', or where the suitor had been prevented from challenging by oppression on the part of the lord or court officials.

§ 4. The majority of cases was governed by the rule of 'a year and a day'. This rule applied to all other criminal actions, to all civil actions not based on suretyship and involving a claim to recover money, cattle, or movables; and to some land suits.

It applied not merely to the institution of suits, but to executions, defences, and prosecutions after institution; so that a person, who had been granted relief or possession, must take steps to execute within a year and a day, otherwise his relief lapsed; a defendant must reply to a claim made in the same period, otherwise his defence was barred; and a person suing must not sit idle after instituting, for, if he allowed a year and a day to pass by while he sat on his plaint, he was ousted from relief.

One authority appears to indicate that there was no limitation until a plaint had been filed, and that the law only applied to the prosecution of plaints filed, but this is clearly opposed to the generality of authorities.

§ 5. To the general rule that a case must be instituted within a year and a day of the cause of action there were exceptions.

Where a lord refused justice for land and soil or other property, limitation did not run. The person aggrieved could sue at any time within a year and a day after the refusal to permit justice to be sought had been withdrawn. So, too, where a man sought relief against 'oppression' there was no limitation.

Limitation did not run while plaintiff or defendant was on military service, or was a hostage; in fact no plaint could be filed against a defendant during such period. Nor could a case be filed against a defendant on pilgrimage, seeking absolution for an offence, until he had been away for a year and a day, in which time it was presumed he had had time to return; and no time ran against a man summoned as defendant, who failed to appear and put in his defence, if he were bedridden and unable to attend.

The existence of war also operated to suspend limitation, and a suit could be filed in a year and a day after the declaration of peace. It is doubtful, though, if this affected anybody

who was not engaged in war, provided the courts were not closed owing to the exigencies of war.

§ 6. The laws regarding land suits appear at first sight extremely complicated, but it is possible to reduce the system to a series of simple rules.

Limitation depended in fact on a number of factors: (a) whether the land was ancestral, (b) whether the defendant was resident within or outside the jurisdiction of the court, and (c) whether there had been acquiescence in the dispossession complained of.

If the land were not ancestral, then, provided the plaintiff had been in the jurisdiction of the court and had acquiesced in dispossession for a year and a day, his claim to recover was permanently barred. If he had been outside the court's jurisdiction when possession was taken by the defendant, time did not begin to run against him until he had returned to the country and had acquiesced in dispossession for a year and a day after his return. If in either case, during the running of the year and a day, he manifested his non-acquiescence by an act of 'lawful disturbance', limitation ceased running against him and could not begin to run again.

Limitation only began to run against the last immediate possessor of ancestral land and did not affect his heirs. This was subject to one exception, viz. if the whole 'welygord' were dispossessed by decree of court the decree was final against all, but if such decree were given 'in absentia' of some of the 'welygord', those absent could have the case reopened within a year and a day of their return, but not afterwards.

If ancestral property were lost, it was open to any of the heirs, in all other cases, to sue for possession within three ages of ancestors (variously computed at 100 or 180 years), if such heirs had been continuously resident in the same 'cantref' or 'cymwd' without 'lawful disturbance', or within nine ages of ancestors, the plaintiff himself being the ninth, where the heirs had been continuously absent. The amount of property which a plaintiff could in such a case recover was not necessarily the whole: it might be

only a portion, if the occupants in possession had acquired a right of 'priodolder'.

Should any person between the fourth and ninth generation return, limitation began to run against him upon his return, and terminated on the expiry of a year and a day after return, unless he committed 'lawful disturbance', in which case, as before, limitation automatically ceased to run, and when the ninth man returned, he claimed by means of 'uttering a cry over the abyss'. If he did not claim, time ran against him for a year and a day from the date of return, provided also that he could cause limitation to cease running by a 'lawful disturbance'; but an act of 'lawful disturbance' by the ninth man did not enure for the benefit of his heir, as the right of the tenth generation to recover land was never conceded.

One passage in the XIth Book may be read to allow the tenth man to claim the benefit of a 'lawful disturbance', but this is opposed to all other indications.

§ 7. The provisions as to 'lawful disturbances' are very peculiar. There were three different kinds of 'lawful disturbance' (*thrywyf cyfreithawl*), viz. killing a person on the land, burning a house on the land, and breaking a plough on the land, that is to say, a person out of possession could come on the land and commit one of these acts by way of assertion of his right, and immediately stop limitation running against him.

The Codes do not mention 'killing a person' as a 'lawful disturbance', but the Anomalous Laws have many references to it.

There is some confusion in the laws as to whether 'lawful disturbance' could be committed with impunity: some passages appear to suggest that there was no punishment for a lawful disturbance, committed by a person entitled to possession, against a person not so entitled and refusing possession; but the real effect of this drastic method of asserting rights seems to have been to force the person injured thereby to seek reparation in court. If he did not, the 'lawful disturbance' operated as a recovery of possession by the disturber: if he did, the offender or his descen-

dant could plead, not that he had committed an offence in assertion of his right, but that he had been punished for an offence committed in such assertion, the assertion of right then acquiring the same status as a plaint instituted; that is to say, the disturber could say that his assertion of right had never been adjudicated upon, and that his claim, made by such assertion, was still *sub judice*, and that limitation could not run while the claim was *sub judice*.

That appears to be the meaning assigned in later law to 'lawful disturbance', a procedure which seems to have existed as a mode of distress before courts were open for the adjudication of claims.

Lawful disturbance, it should be added, could only be operative where the claim was for land.

§ 8. Limitation is practically absent as a rule of law from the Germanic Codes, but in the Irish Laws there are occasional references to it.

In the *Senchus Mór*, I. 67, for example, it is said that the life of three kings is reckoned as the period of limitation, but such references as there are deal not with limitation, within which a suit to assert a right might be brought, or rather distress might be taken to enforce a claim, but with the prescription at the expiry of the period of which occupation or enjoyment created title.

The existence, therefore, in the Welsh Laws of a law of limitation, so frequently insisted upon, is remarkable when we consider its comparative absence in other laws; and so far as can be judged, it appears to have been an entirely indigenous growth.¹

2. *The injunction of the cross.*

§ 1. The Welsh Laws contain a very detailed and interesting procedure relative to injunctions or interdicts in regard to property in dispute. It is not mentioned in the Venetian Code; and it was possibly a procedure which grew up in South Wales as a means of preventing persons from taking the law into their own hands and forcing them to submit to curial jurisdiction.

¹ V. C. 178; D. C. 398, 426, 548; G. C. 756; IV. 30; V. 60, 72, 74, 76, 90; VI. 116, 124; VII. 136; IX. 250, 252, 276, 288, 300, 304; X. 308, 350, 354, 374, 376, 378, 384, 388, 390; XI. 410, 416, 424, 434, 448; XIV. 580, 690, 692.

§ 2. Wherever any property or rights in property were in dispute, the claimant, or the person protecting property in his possession, was entitled to place a wooden cross on it, and, thereafter, the existence of the cross on or against the property operated as a bar against an assertion of right therein, except by suit instituted by the opposing side.

§ 3. Where rights in property were threatened, it was the duty of the person seeking protection to resort to the lord, and demand that a cross should be given him and placed on the property to protect it. No one could place a cross on property unless he procured it from his lord, except that where a 'priodawr' was threatened with loss of his 'tref tadawc', either by being dispossessed by a claimant out of possession, or, if he were out of possession himself, his right to recover were threatened by lapse of time and he had no time to resort to the lord, he could erect a cross himself, and then go to law for protection, or for redress, if the cross were broken.

Crosses could also be placed on land by the lord, without application by parties, when there was a suit relative to such land. In that case the proper person to place the cross on the land was the 'canghellor'.

§ 4. Where a cross was erected by a person claiming or defending property, the person erecting it, having received it from the lord in the presence of witnesses, proceeded to the site.

He laid formal claim to the property in presence of witnesses, handing over to the other side a relic on which the latter was to swear to his title. The cross was then either delivered into the hand of the opposing side or planted on the property, where it was left until the claim between parties was decided.

If the property in suit were land, it was placed on the land; if it were other property, over against the property or at the usual place of abode of the party from whom there was danger of infringement of right. It was of no avail if placed elsewhere.

§ 5. Crosses as interdicts could be used practically in every claim, not only in regard to land, but in claims based

on 'briduw' or 'machni'; and they were used also to enforce such matters as the levy of the spear penny in homicide cases or to exact the oath of an absolver from a person suspected of theft.

They could not, however, be used so as to prevent a 'priodawr' in possession of 'tref tadawc' from utilizing it, nor placed on grass-lands between the 9th of February and 9th of May, nor between 9th of August and 9th of December. Nor could they be planted during the blank days of court.

§ 6. A cross was of no avail against an animal, who, of course, could not understand its import, nor could it be erected to close a customary pathway, nor on any timber so as to prevent the possessor from working on it, nor on crops so as to prevent reaping, nor on pannage so as to prevent the resort of swine to the open woods.

§ 7. A cross put up secretly was inoperative: it must be put up, if possible, in the presence of the opposing party; but, if the latter could not be found, it might be erected in the presence of witnesses.

No cross was effective, so as to cause a breach of it to be punishable, against an idiot, a youth under fourteen, or a foreigner, or other person acting under the dominion of another, and no married woman could employ a cross.

§ 8. A cross disobeyed entailed definite penalties. They were not exacted if the cross were erected by a 'priodawr', protecting his 'tref tadawc', without his having got the cross from the lord, unless he made formal complaint.

If a man erected a building on land, in defiance of a cross placed on the land, he forfeited the building to the lord, even if the land were eventually found to be his. He was also fined either a 'camlwrw' or a 'dirwy'.

If a person used land in defiance of a cross he was fined a 'camlwrw', even if he eventually won the case, but in that contingency the person placing the cross was also fined. Ploughing in defiance of a cross was punished as a breach of boundary, the fine being equivalent to the legal worth of the ploughman's right foot and the driver's left hand, and the oxen were all forfeited.

§ 9. A cross was effective only until the litigation ended

or for a year or during the life of the lord from whom it was obtained.

Contempt of a citation to reply to a charge of breach of cross or continued defiance of a cross was punishable by banishment or imprisonment without term.¹

3. Oaths.

§ 1. When we come to consider trials we shall find constant references to the taking of oaths and counter-oaths by the plaintiff, the defendant, the witnesses, the compurgators, and even by the judge himself.

The whole conduct of trials from beginning to end depended upon the taking of oaths, and some preliminary account is here necessary as to the methods of taking and forms of oaths.

§ 2. The ordinary form of swearing was upon sacred relics. The relics had to be produced by the person challenging the other to take an oath, and once they were produced in court, they were, after pleading, common to both sides.

A person requiring another to take an oath had to come to court with the relics in his hand; and, if he omitted to do so, he was entitled to no adjournment in order to obtain them, but the judge could await their production, provided, in the interval, he did not vacate his judgement-seat.

No oath upon a relic could be taken by a man with arms in hand; all arms were removed and placed in safe custody.

Relics which were the property of a church or furnishings of a church could only be used for swearing by members of the community owning them, and, if an oath were taken in a church or churchyard, no relics were needed, as those places were themselves sacred relics. Frequently oaths taken in church were administered on the altar.

§ 3. The XIVth Book considers oaths not merely according to the formulary or object sworn by, but according to the purport of the oath. It is said that there were three kinds of oath, the complete oath (*cwbl llw*), the loose oath (*gwallaw llw*), and the futile oath (*ofer llw*).

A complete oath consisted in swearing to the truth of

¹ D. C. 550, 600, 604; G. C. 674, 764; V. 38, 84, 86; IX. 254; X. 336; XIV. 712, 714, 716, 718.

a thing or in denying a thing without reservation, or in swearing to a doubtful matter to the best of a man's belief and conscience, when it was not known for certain whether a particular fact were true or false.

A complete oath must be taken by an owner of property claiming it, or by a defendant denying a claim or charge, or by an agent of either plaintiff or defendant, and also by a person taking the oath of an absolver, by an 'eyewitness', by a counter-witness, and by a 'tyst'.

Swearing to a doubtful matter to the best of a man's belief or conscience was appropriate when a judge was asked to swear to a judgement given by him, and he demanded time to recollect what judgement he had given; when a surety was asked to state what was the extent of the suretyship he had given; when a lord was asked to swear to a point in dispute between two of his men and he needed time to remember; when a priest was required to swear as a 'tafodiog'; and generally speaking by compurgators.

Such oaths were termed doubtful, because the person swearing had either no personal knowledge, and could only swear on the basis of reputation or probability, or because he was not clear as to his recollection, but, if he swore that such and such was the case 'to the best of his belief and recollection', the oath was accepted as equal to any other complete oath.

A loose oath was not an oath which was loose in character or unreliable. Oaths were denominated 'loose' when the person taking an oath was not sworn on the relics, either by virtue of express provision of law, or because the other side did not 'push him to the extremity', i. e. force him to swear on the relics. The oath was loose because there was no religious sanction behind the oath.

A loose oath by provision of law could be taken by certain 'tafodogion' only, and then only, according to some authorities, in cases where a father swore to a dispute between two of his sons, where the swearing was by a convicted thief, or where a woman in extremity swore paternity.

A futile oath was any other kind of oath, it being called futile because it had no effect.

§ 4. Oaths could not be administered to a lord, a pleader, a blind, deaf, or dumb person, or a child under the age of seven.

Oaths were, according to the circumstances, taken once or thrice, e.g. in appraisalment, prosecution for murder or theft on plaint or 'dognfanag'; and alternate oaths were administered to both sides, e.g. in surety cases, contract, and 'briduw' cases.

The forms of oath are mentioned in their appropriate places.

§ 5. English procedure was identical in the fact that oaths were required by law from the beginning to the end of a case. The forms employed in the Welsh Laws are almost the same as those given in the early English 'Fragment on Oaths', a document of the late tenth or early eleventh century, which likewise provides that all oaths were to be taken on the relics.

This latter provision is emphasized in c. 2 of Ethelred's Wantage Law:

'Let every one go to the witness of that which he dare swear on the relic that is given into his hand.'

There is one striking difference, however, between the English and Welsh system; for, whereas the oath of every man, competent to take an oath, had in Welsh Law the same value as the oath of another, that was not the rule in English Law, under which the value of a man's oath was assessed according to his status, e.g. the oath of a twelve-hynde man was worth the oath of six ceorls. In English Law the number of oaths required was regulated, not by the number of persons taking the oath, but by the sum-total of the value of the social status of those swearing.

This peculiarity of English Law is especially apparent in the Laws of Wihtraed, which regulated the exculpatory oaths.

A king's or bishop's word was incontrovertible without oath; a priest or deacon cleared himself by his own oath, 'Veritatem dico in Christo, non mentior', taken in the presence of the altar, and other clerics required the assistance of four fellows, and so on.

Oaths are frequently measured in English Law by the number of 'hides' of land held by the swearers.

§ 6. The Germanic system was identical, and in the *Lex Frision.*, Tit. XI, XIV, we have a series of forms of swearing comparable to the English and Welsh oaths.¹

4. *Terms for institution and hearing.*

§ 1. Safety to attend court was secured to every one entitled to move the courts, and the right to sue was one which could be refused to no free or unfree man. If by any chance a lord were so unjust as to close the court to any one, the right of such person could never be extinguished by lapse of time: it survived to him and to his heirs to all eternity.

Provided a man claimed 'loss and gain', he must be listened to, and justice accorded without delay, but in order to prevent frivolous or unjust claims, a man who lost his cause, whether on the ground of 'res judicata' or the merits, was fined a 'camlwrw'; while a man falsely accusing another was liable to the same penalties as the accused would have been if found guilty of the offence charged against him.

§ 2. For the institution and hearing of suits in respect to land, there were two terms and two vacations, each term being preceded by nine days for the reception of plaints.

The dates for the reception of plaints were the 1st to 9th of May, and the 1st to 9th of December, and terms were open until the 9th of August and the 9th of February respectively.

At other times the courts were closed for land suits, so as to avoid interfering with ploughing and harvesting, unless the subject-matter were church land, demarcation of boundaries, or the suit were one by a 'priodawr' against a 'non-priodawr'.

For all other assertions of right, civil or criminal, including the excepted land suits, the courts were always open, except on Sundays, Mondays, and certain high festivals of the Church. Similar 'blank' days were prevalent in early

¹ V. C. 200, 204; D. C. 400, 614; IV. 34, 36; V. 44, 46, 66; VI. 98; XIV. 576, 622, 662, 664, 666, 676.

English Law, and by c. 17 of Cnut's Ecclesiastical Laws the courts were closed on all festival days, ember days, Easter days, regular fast days, for eight days after Advent, for fifteen days after Easter, on St. Edward's Day (April 15), and St. Dunstan's Day (June 14).

§ 3. Suits must be instituted and commenced before mid-day. Filing a suit on a closed or blank day did not involve a loss of the claim, unless in his plaint the plaintiff stipulated for 'loss and gain'. If he did that and filed on a blank day, he lost his claim entirely. Similarly, a man who filed a suit for land during the closed periods, lost his right to sue subsequently. He was asking for that which the law was not in a position to grant him.

Otherwise, the effect of filing a suit out of the fixed times was merely to postpone the fixing of a date for hearing.

§ 4. Likewise, if a man filed a suit prematurely, before the cause of action had ripened, he did not necessarily lose his right to sue. For example, if a man sued on a contract before the expiry of the period within which the contract might be performed, the result was that the hearing of the case was postponed until a period had expired, after the date for performance, equivalent in duration to that within which the claim had been made prematurely. Here again, if the plaintiff stipulated for 'loss and gain', he lost his claim as he was asking for that which the law could not give.

The proper procedure for the officers of the court to adopt when a man sued at the wrong time was to inform him that law could not be prosecuted then, and the suitor was relegated to bring his suit at the proper time.

One authority implies that a land suit instituted at the wrong time was barred in perpetuity; but the proper law seems to have been that the plaint was simply not received, and the plaintiff had to bring his suit when the courts were open.

§ 5. Sundays and Mondays were, generally speaking, closed not merely for the reception of plaints, but also for the hearing of suits. A suit, however, filed before midday on a Friday, could be put down for hearing on Sunday or

Monday, provided it was not a case in which the ownership of property had to be sworn to.

§ 6. Special rules are given as to the time within which a suit for blood-fine was to be instituted. If the kinsmen of the murderer and the murdered man were of different countries, that is 'cantrefs', the prosecution was to be commenced on the first day of the week next following the date of the murder; if they were of the same 'cantref' or 'cymwd', on the third day following, and the kinsmen of the alleged murderer were to reply in fourteen, nine, or six days, according to their place of residence.

The Venedotian Code fixes no period within which a prosecution must be instituted, but it fixes a period within which blood-fine must be paid 'after being summoned', while the Gwentian Code combines the Venedotian and Dimetian Codes, fixing the same periods for institution and reply.¹

5. *Times in cases.*

§ 1. In addition to fixing dates on which plaints were presentable, the Welsh Laws attempted to regulate the times to be allotted for each step in proceedings from the date on which parties appeared up to the date of judgement.

The intent of the law was to secure as early a decision as possible, and the fixing of periods for the respective stages of litigation was considered indispensable for the proper administration of justice.

§ 2. The law appears to recognize four stages after the institution of the suit: (a) a date for appearance, obtaining aid, and the giving of sureties; (b) a date for pleadings; (c) a date for evidence or compurgation, whichever was appropriate to the particular case; and (d) a date for judgement.

It might of course happen that all the four stages were completed in one or two days, or it might equally happen that adjournments were necessary before a particular stage was completed, e.g. though the first stage was for appear-

¹ V. C. 130, 140, 166, 172, 174, 228; D. C. 440, 452, 540, 542, 588; G. C. 702, 756, 758, 772, 776, 794; IV. 26, 32; V. 56, 70, 74, 76, 88; VI. 106, 114, 142; IX. 272, 276, 284; X. 344, 364, 376; XI. 434, 448; XIV. 648, 690.

ance, aid, and sureties, time could be demanded for procuring aid or sureties, and it was the common practice for judgement to be delivered on the same day as the date for evidences, which was commonly called the day for 'loss and gain' or final disposal.

§ 3. Surety cases were treated as urgent and, subject to such causes as operated to delay any suit, must be entertained and decided without delay.

The law laid down the general rule that, in land suits, pleadings should be completed in three days after the date for appearance, and judgement delivered on the ninth day; and in boundary cases and cases between a 'priodawr' and a 'non-priodawr' judgement could be delivered before the ninth day arrived.

But, though this was the aim of the law, it is obvious that it was only a high-water mark aimed at; for we find it provided that, should it happen that a plaint for land were not disposed of before the expiry of the term in which it was instituted, the plaintiff was to renew his plaint in the reception days of the next term, and his suit then secured preference; and, for its disposal, the courts must remain open even during harvest and ploughing, except on the universal blank days of Sundays and Mondays, and a week from Christmas Eve, Easter Eve, and Whit-Sunday.

§ 4. The regular practice in all cases was that when parties appeared on the date fixed for appearance, the defendant, if he were not in possession of a statement of claim, could demand one from the plaintiff. The claim was then recited in court. Defendant could either reply to the claim at once, or demand an adjournment in order to obtain 'aid', that is to procure an advocate and consider his defence. He had to be careful to avoid saying he was not to be called upon to answer suddenly, as that was not a legal plea; he must say that he was entitled in law to time for 'aid', or that he had a special privilege exempting him from replying on that particular day. He had also to specify the period to which he was entitled, otherwise he could be called upon to appear with 'aid' on the following day.

No time could be claimed for 'aid' in a case of surety

and debtor, nor in a suit which was being prosecuted in the supreme court, nor if the defendant appeared with his advocate, but, in the latter case, he could be given time on the day to consult with his advocate before replying.

Plaintiff was at no time entitled to obtain time for aid, as he was supposed to be ready to prosecute his claim to the end from the moment he filed it.

The period allowed for aid is put in some authorities at three, five, or nine days, in others at three, nine, and fourteen days, according to whether parties resided in the same 'cymwd', 'cantref', or a different 'cymwd', the intervention of floods between defendant and his home extending the period to the maximum, and at nine days in all cases where the dispute was between the Church and a layman.

§ 5. The step next succeeding the procuring of aid was the furnishing of sureties to abide law.

This might be done on the very first day as soon as aid was obtained. Defendant, but not plaintiff, was entitled to time to find sureties, and he could always decline to provide them until he had received a full statement of the claim made against him.

The periods of adjournment which might be granted for producing sureties were of the same duration as for obtaining aid.

§ 6. It appears that as soon as aid was procured and sureties furnished, parties at once entered upon pleadings. They might be extremely complicated, but there seems to have been no interval between the furnishing of sureties and pleadings.

As soon as the pleadings were finished, then, if a decision could not be given on the pleadings, time was given for the production of 'evidences' or compurgation, according to whichever was appropriate—the day for 'loss and gain', identical with the Anglo-Saxon 'andage'.

The same periods for the production of proof were given as for obtaining aid and sureties, except that the Dimetian Code and the XIth Book say, in isolated passages, that a year and a day might be granted if there were a 'warrantor' or a 'protector' absent beyond the seas.

§ 7. Ordinarily, no further adjournment, even if the fixed day were a blank day, was allowed. Absence of a party entailed a determination of the suit in favour of the party present; but, if any one of them died between the pleadings and the day for 'loss and gain', substitution was allowed, though one authority says that the suit abated.

It must be remembered, though, that the time given for loss or gain was given to produce proof on the matter in issue on the pleadings. It might happen that the proof given would raise a new issue, e.g. if in a theft case the accused undertook to produce a 'warrantor' and did so, and the 'warrantor' sought to free himself from responsibility by casting the burden on another 'warrantor', there was an entirely new issue, so time was allowed to produce a new 'warrantor', provided the process could not be carried on beyond the third hand.

We are here using the word 'proof' in a wide sense to cover 'protectors', 'eyewitnesses', or what not.

§ 8. For the production of 'compurgators' the law lays down no period applicable to all cases. In theft cases it is said the compurgators were to be produced within a week from the next following Sunday, on which day they were sworn in the parish church or churchyard, but it would appear that the court had power to fix any date of general convenience.

§ 9. As regards the last stage, judgement was generally delivered at once, but the judges were entitled to a period, not exceeding nine days, within which to deliver judgement.

§ 10. Except where the law gave the parties a right to time, they could demand no adjournment, and no agreement between parties to adjourn a case was given effect to.

Apart altogether from a desire to dispense judgement with celerity, there was an important reason why the law should provide for rapid disposal.

We have noted that justice was regarded as proceeding from the lord. The effect of this upon cases was that, where a wrong or illegality was committed, amounting to a breach of the lord's peace, the action terminated with the death of the lord whose peace had been broken. There was in

fact a sort of amnesty for all crime with the death of the lord in whose time crime had been committed. A man could not be prosecuted by a lord for an offence committed in the lifetime of his predecessor: it was not his peace that had been broken, but the peace of one no longer alive to vindicate it.

This did not prevent an individual wronged in honour, limb, or property from recovering compensation, but the criminal penalty, where there was one, was not enforceable.

As already pointed out, a wrong committed had a twofold aspect: it might be a wrong or injury entailing damages, it might be a crime requiring punishment. The right to recover property or damages subsisted, but the power to punish lapsed. Nevertheless, though the lord could not award punishment for offences committed in his predecessor's time, he could give effect to a punishment awarded.

§ 11. Notwithstanding the fact that rights to damages did not lapse with the lord's death, the right to continue an action pending in his court did; and consequently in all important cases, like affiliation, land cases, claims for blood-fine or injury, it was essential to complete them in the life of the lord, and, if that were not done, the suit had apparently to be reinstated and decided *de novo*.

We can appreciate, therefore, the urgent need for celerity in disposals.

§ 12. We have elsewhere noticed that all suits in which more than one person was interested had to be prosecuted in the name of one person. It followed that there could never be any joinder of claimants or of different causes of action. We might also add that there could be no set-off in a claim. There was an axiomatic principle that no person could be subjected to two actions at one and the same time. He must be left free to answer one claim at a time. Hence we have provided definite rules of priority.

§ 13. The general rule was that the suit first instituted must be heard and disposed of before the other was entered upon.

But to this rule there were two important modifications. The first was that, if a claim of oppression against the

lord were made, all other pending cases had to be suspended until it was disposed of. The suitor was entitled to a verdict of country on his allegation, and till that was obtained the courts were closed to others.

The second rule was that 'innate' claims against an individual had precedence over personal claims. An innate claim was one in which the plaintiff sued on the basis of inherited right or status, e. g. a claim to recover land by virtue of 'ach ac edryf', or 'dadanhudd', and a personal claim was one in which plaintiff's cause of action was acquired by himself and not derived by descent.

§ 14. The rule of priority and the rule against joinder of claimants operated to prevent a man accused of several thefts being tried for all of them together. There were separate suits by each owner heard in the order of priority of suing.

If the accused were acquitted on the first charge, the next in order was heard; if he were convicted, it is said by one authority that the second charge could not be taken up, as the thief was dead in law, but another authority states he must answer both claims, and if he were convicted of theft present, he was sentenced to death for the first, and his property to the extent of £7 was forfeited for the second.

§ 15. From what we have stated above, it is obvious that some rule of 'lis pendens' became necessary, and we find a simple, straightforward doctrine as to what constituted 'lis pendens', to which nothing can be added.

To use modern phraseology, a suit became 'pending' as soon as the plaintiff was presented, and any transfer of right in property by a defendant in possession, after the presentation of a plaintiff, was invalid and inoperative.

§ 16. The attempt to secure early disposal of litigation had its counterpart in early English Law.

The most striking provision is in the law of Hlothaire and Edric, c. 10 :

'If one man make plaintiff against another, after he has given him borh (surety), let them seek for themselves an arbitrator within three days, unless a longer period be required.'

We have here undoubtedly traces of the old rule prevalent before courts were established, but we find references of a similar nature prevalent when courts of the 'gemôt' were in full operation.

A similar rule existed among the Bavarians,¹ directing the conclusion of suits in fifteen days, and in the *Lex Langobard.*, Ed. Luit., c. 25.

The Scots *Leges Quatuor Burgorum*, c. 82, also has a rule of priority, confined, however, to cases of assault :

'Gif ony man strykis another quhar thruch he is mayd blaa and blody, he that is made blaa and blody sal fyrst be herde quhethir he cumys furst to plenge or nocht. And gif that bathe be blaa and blody, he that fyrst plengeis hym sal fyrst be herde.'²

6. *Institution.*

§ 1. Cases were ordinarily instituted, at any rate in later times, on written plaintiffs, and many model plaintiffs are given in the *Anomalous Laws*. Plaints, however, were not needed in cases of suretyship, impounding of cattle for trespass, and disputes *re* the soundness of animals and co-tillage of land. In such cases the judge was empowered to dispose of the cases summarily; but, if they were instituted on plaintiff, they were tried by the procedure applicable to suits instituted on plaintiff.

§ 2. In the courts of the 'maerdrefs' the proper person to receive plaintiffs was the 'land-maer', who disposed of all cases from such 'trefs', and apparently the porter or usher could receive plaintiffs for such 'trefs'. In disposing of cases the 'land-maer' appears invariably to have exercised summary powers.

§ 3. Plaints for trial in the 'cymwd' and 'cantref' courts were received by the 'maer' and 'canghellor', but free access to the lord was secured for litigants demanding justice. It was the duty of the 'maer' and 'canghellor' to summon the court, and place before it the plaintiffs on which adjudication was sought.

¹ *Lex Baiuor.*, Tit. II, c. 14.

² V. C. 130, 142, 144, 150, 164, 166, 250; D. C. 426, 540, 542, 544, 546, 556, 588; G. C. 756, 758, 794; V. 78, 80; VI. 106, 112, 118; VII. 126, 128, 130; IX. 216, 230, 232, 242, 248, 272, 274; XI. 400, 406, 410, 420, 424; XIV. 598, 640, 656, 668, 676, 728, 732.

§ 4. No suit relating to property or personal injury, whether the action were of a civil or criminal nature, or against a principal or accessory, could be instituted, as a general rule, except by the person entitled to relief, if he were competent and able to appear himself, inasmuch as he would be required to swear in stating his case or in reply to the defence.

In a case of fighting the lord could take action for 'bloodying the earth', and the steward if the fight were between two officers of court; but these are not really exceptions, for bloodying the earth was an insult to the King, and fighting among officers was a matter in which the steward was entitled to a portion of the fine.

Should any one else lodge a plaint on another's behalf, the real plaintiff must appear, and if he did not then ratify the plaint, the person filing it was fined 180 pence.

§ 5. In early English Law the rule was the same. Proceedings opened with the 'for-ath' of the plaintiff, but in Cnut's Law, c. 22, a 'thane' was allowed to prosecute either on his own 'for-ath' or that of a 'true man' of his.

§ 6. Certain persons were not competent to sue at all. A minor under 7 (or according to some authorities 14, if a male, and 12, if a female) could not sue, but a 'faithful fosterer', given him by his lord after his father's death, could sue for him as his 'guardian ad litem'; married women were not competent to sue except for their own honour-price, their own property stolen, or for land owned by them in their own right; dumb persons, being unable to plead and to swear, were also incompetent, but they could sue through an advocate allowed by the King.

Insane persons were subject to the same disability.

Foreigners and bondmen, of course, could not sue, as they were outside the common law, but that does not mean that they had no remedy; they sued through the Cymro to whom they were commended, held land, or were bound, the Cymro demanding justice for himself as injured through his man.

Likewise, these persons could not be sued except through their guardian or superior.

In the Irish Law of distraint we have similar provisions. According to the *Senchus Mór*, I. 87, 103, 107, strangers, infants, idiots, and bondmen could not distraint.

§ 7. In the law of theft, the procedure in which governed a considerable part of the criminal law, the rule is frequently insisted on that the owner of the stolen property, and he alone, could sue. The rule applied to actions for violence and surreption, and the lord could not prosecute without the owner's complaint.

Though one authority refers to the rebuttal of a charge of being an accessory by the sole oath of accused, when charged by a person who was not owner, the same rule applied to all such charges; and the lord could take no action against an accessory on his own account. To this extent criminal law was still a matter of private and not State concern.

§ 8. An interesting discussion is entered into in the *Anomalous Laws* in regard to the application of the rule to the case of a deposit stolen from the custody of the bailee, where the stolen property was discovered. As the person prosecuting for theft had to swear (*a*) that the property was his, and (*b*) that it was stolen from him, the form of the oath appeared to debar the bailee from suing, as the property was not his, and also the true owner, because it was not taken from his possession. The commentator does not get over the difficulty satisfactorily; but concludes that, though some judges would not allow an action for theft by the owner, the law allowed an owner to swear to his property wherever it might be, but he avoids asserting he could maintain an action for theft, and confines him to an action for recovery of the property.

§ 9. To the general rule that an action must be maintained by the owner, there were two marked exceptions, both applicable to theft absent, i. e. where the stolen property was not forthcoming.

The first of these cases is known as 'dognfanag', that is a case where there was 'competent information' (from 'dogn' = enough, 'mynegi' = to inform).

It is referred to in the *Venedotian* and *Dimetian Codes*,

and it was obviously not a recent importation into the laws.

In the Venedotian Code it is said that the loser of stolen property or other informant could, if he desired, go to the lord and say that a person, whom he dare not mention either on account of his rank or property, had committed a theft.

The lord was then to summon the parish priest and tell him what had been imparted to him. The informant was then sent with the priest to the church door, where he was solemnly warned to beware of perjury. He was then thrice sworn, at the church door, in the chancel, and at the altar. The priest returned to the lord and communicated what the informant had sworn to, and the lord thereupon became seised of the power to prosecute on the information received, swearing to being possessed of information.

The Dimetian Code refers to the instance in somewhat similar words, saying, however, that when the accused was brought up for trial, the priest had to confirm the information orally three times and once by oath.

Briefer references are also found to the method of prosecution in the Anomalous Laws; and in one authority the information is limited to the case of 'lliw', that is an allegation by the informer that he had seen the thief in possession of the stolen property in open daylight. We appear to have a similar rule in early English Law, as the Fragment on Oaths, c. 4, provides for the oath of a prosecutor acting on 'information'.

The second case, in which the intervention of the owner was not necessary, was where a thief, already convicted and under sentence of death, gave information at the foot of the scaffold as to his confederates. A thief so informing was a 'tafodiog', that is to say his statement was conclusive and could not be denied.

This statement need not be on oath; but to prevent all possibility of the informant expecting mercy as the price of his information, it was provided that the statement must be made at the foot of the scaffold, after the halter had been placed round the informant's neck, and that the

execution was not to be delayed because of the information. The sole sanction behind the statement was the desire of the convict to ease his conscience and make his peace.

In one passage the Dimetian Code certainly says that a thief could come to a priest and confess who his confederates were, and swear thereto as in the case of 'dognfanag', provided he cared nothing what happened to himself; but it is not the information of the thief that was used thereafter, but the statement of the priest as to the information he had received, that is to say it was really a case of 'dognfanag'.

It may be added that, contrary to the general rule that a woman could not testify against a man, a woman thief under sentence of death could be a 'tafodiog' at the foot of the gallows, as she was acting not on her privilege or status as a woman, but on her status as a convicted thief.

§ 10. In homicide cases, except where the person killed was a youth under 14, the right to sue belonged to the relations of 'galanas-kin', but in the case of a boy being killed, to the father. This was the universal rule, and the lord himself could not prosecute unless the person killed were an idiot under his protection. The same rule applied in respect to accessaries to murder.

§ 11. We have to notice briefly the law applicable where there was a number of persons interested either in the prosecution or defence of a case. The law recognized only one plaintiff and one defendant. Consequently, the persons interested appointed one of their number to sue or swear on their behalf, the remainder being bound by his acts.

The procedure is specially mentioned in the law of theft, 'mamwys', and the recovery of property. It was the rule also in land suits, and particularly in cases of 'dadanhudd'.

A peculiar case was where twins were interested. They, it is said, sued as one man, with the corollary that, in cases of sharing, twins took not two shares, but one share only.¹

¹ V. C. 110, 188, 242, 246; D. C. 418, 424, 434, 462, 464; IV. 2; V. 40, 72, 78; VI. 98, 118; VIII. 210; IX. 226, 250, 252, 258, 260, 262, 300; X. 392; XI. 406, 436, 438; XIV. 576, 592, 598, 618, 620, 654, 664, 666, 670, 672, 680, 682, 700, 706, 708, 710, 728, 734, 738.

7. *The place and form of sitting.*

§ 1. The Codes are very insistent upon the proper place and form of holding court.

Custom insisted that the venue of the court must be well known and open, and that every person should have free access to the court during its session.

The court had also to be sufficiently extensive to admit of any person being present who so desired; the laws provide that the area of a court must be at least an 'erw' in extent. It follows that it must be in the open air.

§ 2. The rule was that, so far as possible, the court should sit on the site where the cause of action arose. In land cases this was the invariable rule; and, if, on the day fixed for hearing, the court were sitting elsewhere than on the land in suit, it was open to the defendant, at any time before he replied to the claim, to protest and demand an adjournment of the court to the land.

The adjournment granted was until the next day, not being a Sunday or Monday, but we are also told that the judge could extend the period of adjournment up to fifteen days.

If there were no protest against the venue, the court could continue its hearing, but it was exceptional for the court to sit elsewhere than on the land in dispute.

§ 3. On assembling, the court was presided over by the King, or lord or his representative, the 'penteulu' of the royal household, 'canghellor', or steward.

The King or his representative sat with his back to the sun, lest the glare of it should incommode him, and the order of sitting was as follows:

| | | | | |
|----------------------|-----------------------|-------|-----------------|------------|
| Gwrdas. | Elder. | KING. | Elder. | Gwrdas. |
| Priest. | Judge of Cymwd | | Judge of Court. | Priest. |
| v | v | | v | v |
| ^ | ^ | | ^ | ^ |
| Guider (kanllaw). | Defendant. | | Pleaser. | Plaintiff. |
| | Pleaser (keghaus). | | | Guider. |
| | Usher. | | Usher. | |

This arrangement applied to the King's supreme court on circuit in the 'cymwds', but 'mutatis mutandis' it applied also to the ordinary 'cymwd' courts.

The 'gwrdas' and elders had no functions in the court, and they were there simply as representatives of the community.

Once the court was arranged, the lord was not to vacate the throne until the judges went out to consider their judgement, and the judges were not allowed to eat, drink, or separate without obtaining the permission of the lord.

Parties had to remain standing throughout the proceedings and were likewise not to leave court during the sitting.

§ 4. As soon as the court was arranged in this formal order, the parties were asked who their pleaders and guiders were, and if they would abide law; and, if they said they would, the judge asked the lord to 'place law between them', again signifying that justice was the King's. When the presiding lord had declared that law had been placed between the parties, the conduct of the case thereafter was left entirely in the hands of the judge, and the presiding lord became a figurehead, remaining silent throughout the proceedings.

On every subsequent sitting of the court the same arrangement of parties was observed.

§ 5. Throughout the session order was maintained in court by the usher, and if, after he had proclaimed silence in the field, any one was guilty of breaking it, except when called upon in due order, the offender was fined 180 pence, and nothing he said could be made use of by the party, in whose interests the interruption had been made, or by his pleader.¹

8. *Summoning of defendant.*

§ 1. After the presentation of the plaint, if the case were a land case involving proof of kin and descent, the lord called upon the elders to inquire into and give a finding upon the plaintiff's assertion that he was of kin and descent as alleged. The finding they gave on this point was final and conclusive; if it were adverse to the plaintiff, his suit

¹ V. C. 142, 144, 146; D. C. 440; G. C. 674; IV. 26, 28; V. 56, 70; VI. 128, 130; VIII. 200, 202; IX. 212, 214, 250; X. 360, 386; XIV. 578, 630, 732.

was dismissed 'in limine', without calling on the defendant; if it were in his favour, summons was issued on the defendant to answer the claim.

In all other cases summons was issued immediately after presentation of the plaint.

§ 2. The summons was issued on all defendants, mentioning the date and place of hearing.

If a whole family, however, were defendants, it was not necessary to summon those members of it who were resident in a distant country, as that would delay justice, and moreover, there was no means of service in a foreign country. But, if a case proceeded while some were absent, and adjudication were given against the family to which they belonged, they had the right to demand the reopening of the case within a year and a day after their return.

§ 3. The summons was served by the usher and by him alone. He could only serve within the court's jurisdiction, for no court had power to issue process outside its jurisdiction. In the exercise of his duty he could trespass on any land.

The usher had to proceed to the residence of the defendant with witnesses. He struck the doorpost of his house three times, calling on him to appear. Service alleged to have been made in the presence of witnesses could not be denied, except by objecting to the witnesses in the same way as witnesses in a suit could be objected to; service made without witnesses could be denied by the oath of the person summoned, supported by the oaths of two men equal in status to himself.

The Dimetian Code allowed summons by taking sureties for appearance or by distraint on property.

In the XIVth Book it is said that the law required that a summons must be served personally, but custom allowed citation in the parish church, on the land, or at the defendant's house. It is probable that the striking of the doorpost three times was the original method, and that, as time went on, any effective mode of giving notice was permitted.

§ 4. There was no period fixed for summons which must elapse before hearing; a summons served on the day for

appearance was good, but the defendant, if served, had, as we have seen, ample time afforded him to prepare his defence.

§ 5. Refusal to appear when summoned or leaving the field of judgement was a contempt of court for which definite penalties were prescribed. Contempt of the first summons entailed a 'camlwrw'; contempt of a second, issued with surety, was likewise punishable; and contempt of the third entailed, not merely a fine, but an *ex-parte* decision if the case were a civil one.

Plaintiff was put into possession of the property claimed forthwith; but defendant might have the case reopened, if he appeared in a year and a day and gave security that he would abide law. If he failed to do so, plaintiff's possession ripened into full title.

If the contempt were committed in a criminal action, the lord pronounced a sentence of food-forbiddance. Any one who then saw the person in contempt was entitled to seize him and bring him to judgement, any one who gave him food was punishable with 'camlwrw', and, so long as the order of food-forbiddance subsisted, the absconder's property was liable to attachment. A person accused of a crime could purge his contempt by submission to law and could recover his property if he had a valid excuse for non-appearance.

§ 6. No final order, either in a civil or criminal case, could be passed without the issue of three summons. Nor could any judgement be given where defendant had not been properly served.

§ 7. There were several lawful excuses for non-appearance, and these excuses operated also to give either party an adjournment after the case had once started. The excuses recognized by law were the intervention of flood and ebb from mountain to between the party and court 'without bridge or ford', imprisonment of the party, bedridden old age, disease or wound certified to by a physician, death of party, pestilence in the land, contrary winds if the party had to come by sea, the incursion of invaders, necessary military service of the lord, being a hostage, inaccessibility to the court for any reason outside the party's control, and

absence up to a year and a day on a pilgrimage to Rome to secure absolution for a crime.

Though these causes operated not only in the case of the first appearance and subsequent hearings, they were no excuse for non-appearance on the date fixed for final hearing.

For that date—the day of loss or gain—the party had contracted to establish his case, and, as he failed to do so, he was entitled to put forward no excuse.

Custom, however, it is said, permitted an excuse for non-appearance on the date fixed for loss and gain.

§ 8. The Statute of Rhuddlan maintained the principles of this law. Under it a defendant was twice summoned after the first default, and on the third failure judgement was given *ex parte*, and for each default 'a penalty shall be incurred to our lord the King according to the law and customs of Wales'.

§ 9. The early English Laws show the system was the same in England in its main features.

In the Laws of Hlothaire and Edric refusal to appear involved a fine of 12s. to the King; the Laws of Athelstan, c. 20, ordain that refusal to appear, when thrice summoned, resulted in defendant being arrested, fined, and put in 'borh'; and in William the Conqueror's Carta, c. 14, the procedure recalls that prevalent in Wales. On the first default defendant was again summoned, if he again defaulted he was fined an ox, on the next default another ox, and on the next he paid the 'ceapgild' or amount of claim and the whole of his property was forfeited to the King.

In the so-called Laws of Henry I, 51, c. 2, the period for appearance was fixed at seven days, and failure to appear entitled plaintiff to an *ex-parte* decree on his triple oath. A contumacious defendant became 'tyht-bysig', that is, he was seized by force and his property confiscated under the Laws of Ælfred, Athelstan, Edgar, and Canute.

As in the Welsh Laws there were statutory excuses for non-appearance, which are enumerated in the *Leges Hen. I* as 'infirmetas, domini necessitas, exercitus, cause suorum hostium, et justicie regis'.

§ 10. Similar rules, though nothing like so complete,

appear in the Germanic Codes. The main principles were the same. The duty of summoning lay on the plaintiff, who had to warn the party summoned beforehand; non-attendance was punishable with a heavy fine, and persons engaged in the service of the lord were exempt.¹

9. *Suretias to abide law.*

§ 1. In practically every system of early law one of the first acts performed by parties on their appearance in court was the furnishing of sureties 'to abide law', symbolical of their submission to jurisdiction, which, though in fact compulsory, was a survival of the consensual origin of jurisdiction.

In the early Welsh Laws the provisions on the subject are fuller than are to be found in any other system.

§ 2. As soon as parties were arranged, they produced their sureties to abide law. In ordinary cases it would seem that the sureties might be pledgors of goods, but in land suits the pledges must be living personages—two in number—and they were kept in custody by the King or lord until judgement was pronounced.

Plaintiff had to produce his sureties with him, but the defendant was allowed the same time for production as he was for 'aids'.

If living pledges were required, they had to be of the same status as their party, and, should they break custody, no sanctuary of Church could afford them shelter.

§ 3. Sureties, it is said, were demanded in land suits, 'lest a homeless pauper should come to claim land and tire the party and session, and when he willeth withdraw from the country without rendering compensation and again do the same thing'.

§ 4. The Court was not seized of jurisdiction until sureties had been demanded and given or refused: the mere fact

¹ See, *inter alia*, *Lex Sal.*, Cod. I, II, III, IV, XLIX, LVI, CVI; *Lex Rip.*, Tit. XXXII; *Lex Chamin.*, 40, 43; *Sapt. Claus.* II, i. 2; *Cap. Lud.* I; *Waitz*, 154, 191; *Sohm Proc.*, 126; *Id. Riu. Gar.*, 114, 139; *Lex Alamman.*, Tit. XXXVI, cc. 3, 4; *Lex Baiuor.*, Tit. II, cc. 13, 14; and *Leges Burgund.*, VIII, c. 3.

References in Laws:—V. C. 142; D. C. 394, 396, 546, 610; G. C. 676, 756, 758, 774, 790; IV. 24; V. 60; VI. 106, 114; IX. 272, 302; X. 326, 350, 360, 384; XI. 402, 418; XIV. 598, 614, 616, 620, 652, 720, 722.

that parties had spoken of litigation in the presence of the judge, without binding themselves in law, gave the court no power to adjudicate, but if any one called upon to give sureties refused to do so, he had all his property confiscated.

§ 5. The surety in a case could not defend it for his principal, nor could he obtain an adjournment on his account. His functions were to produce the party and to undertake he would abide by law; but as time went on his duties tended gradually to be limited to the production of his party, so that it became law that if a defendant were resident in a 'border-country' and, after giving security, fell into contempt by non-appearance, the surety was responsible to satisfy the judgement, but if the defendant were resident in the jurisdiction of the court and fell into contempt, the surety was fined a 'camlrw' for not producing him, and on payment of the fine he was freed, the defendant being ressumoned to appear.

We have reached in this provision practically to modern ideas of furnishing security for appearance, a long advance upon providing a 'sacramentum' out of which the practice originated.

§ 6. The procedure was maintained in Welsh Law for many centuries under the provisions of the Statute of Rhuddlan, at least in civil cases. The third chapter of the Statute provides :

'When any one shall have complained to the Sheriff of any trespass, taking and wrongful detaining of cattle, unjust taking, debt or other contract unfulfilled, the Sheriff is to take pledges to prosecute the claim.'

§ 7. The taking of sureties to abide law was a part of the procedure of Roman Law under the provisions of the XII Tables.

Under that law, on the appearance of parties before the magistrate, a fixed amount by way of 'wager' was deposited by parties. The procedure was invariably employed in the 'actio sacramenti'. Parties started with a claim and denial, seizing the article in dispute as symbolical of strife.

The magistrate then interfered to stop the quarrel, and

each party gave a 'sacramentum' or wager, the loser of the case forfeiting the same to the Treasury.

The procedure was symbolical of the ancient mode of settling a dispute, namely, by force, parties consenting to lay aside the appeal to force by a consensual submission to arbitration.

The procedure was modified in later times in the substituted 'condictio'; but even in 'condictio' definite trace was retained of wager or surety to abide law.

§ 8. The same symbolical procedure existed in the early Anglo-Saxon Law. It is mentioned as early as the Laws of Hlothaire and Edric (A.D. 675), c. 8 :

'If any man make plaint against another and meet him at the methal or thing, let defendant always give securities and do him such right as the Kentish judges prescribe to him.'

Refusal to give security involved the defendant in a fine of 12s. (c. 9), and apparently the case could then proceed *ex parte*.

It is likewise mentioned in the Wessex Laws of Ine, c. 8, the penalty there for refusal being 30s.

We find it also in the Laws of Ethelred,¹ where the actual value of the security required was laid down according to the court in which the litigation was being conducted :

'And in a King's suit let every man deposit a "wed" of six half-marks, and in an earl's and a bishop's 12 ores, in every thane's, 6 ores.'

In the Laws of the Confessor, c. 36, there is a full provision applicable to theft cases :

'De Latronibus interfectis pro latrocinio.

'Si post justiciam factam fecerit aliquis clamorem ad justiciarum quod injuste interfectus sit et quod injuste jacet inter latrones, et si dixerit quod velit hoc diracionare, det vadimonium et plegios. Et detur ei terminus unius mensis, ut habeat parentes interfecti ex utraque parte generis sui, scilicet ex parte patris XII et ex parte matris VI',

a similar suretyship being required from the accuser.

§ 9. In Ireland the rule was the same when arbitration was submitted to, but we need only refer to one reference in the Heptads, V. 353, where we find a Brehon forbidden

¹ Wantage Law, c. 12.

to give judgement without a 'fonaidhm-bond' to abide by it.

§ 10. Procedure is not very fully dealt with in the Germanic Laws, but that this branch of it was essentially the same as in Wales is clear.

We need only quote the *Lex Alamman.*, Tit. XXXVI, c. 2 :

'Si quis alium mallare vult de quaecumque causa, in ipso mallo puplico debet mallare ante iudice suo ut ille iudex eum dstringat secundum legem, et cum iusticia respondeat vicino suo aut qualiscumque persona eum mallare voluerit. In uno enim placito mallet causam suam, in secundo si vult jurare juret secundum constitam legem.

'Et in primo mallo spondeat sacramentales et fidejussores praebeat sicut lex habet, et wadium suum donet ad misso comiti vel ad illo centenario, qui praecet ut in constituto die aut legitime juret.'¹

Practically the same provision occurs in the *Lex Baiuor.*, Tit. II, c. 14, and the *Lex Langobard.* (Ed. Roth.), c. 361.²

¹ Here, as elsewhere, the spelling, grammar, and orthography of the original is retained.

² V. C. 144, 150, 154; D. C. 554; IV. 26; V. 70; VI. 104; VII. 130; VIII. 202; IX. 274; X. 322, 324; XI. 400; XIV. 660, 702.

II

THE LAW OF PROOF. RAITH AND EVIDENCE

1. *Introductory.*

§ 1. To understand the law of proof in early Wales we have to capitulate briefly the broad lines of procedure.

The assertion and establishment of a right had in early societies to be made according to a definite rigorous form, and the most minute attention had to be paid to external observances, failure to follow which might result in a loss of claim altogether.

§ 2. When parties were arranged in court and were bound in law, proceedings commenced with pleadings, then came the proof, then came the judgement. The pleadings had to be made according to strict undeviating rules until an issue was arrived at. When the issue was arrived at and stated in the form of a quasi-judgement, the onus or rather the privilege of proof was determined by the form of issue. The form of issue likewise determined the nature of proof required to establish the issue, and proof could only be given in the affirmative on that issue—there could be no rebuttal. The proof proffered had to satisfy certain tests, and what the advocate for the opposite side had to do was not to cross-examine and shake the evidence given, for that he could not do, nor to produce evidence in rebuttal, for that, too, he could not do, except in certain land suits where a rule of division applied. He had to show that the proof offered did not subscribe to the tests laid down by law. If he failed to do so, the evidence stood; if he succeeded, the evidence failed, and the issue was established or not established accordingly. Judgement followed, the free judgement of the court being limited within the boundaries set by the form of pleadings and the form of proof.

§ 3. When plaintiff appeared in court and declared his claim in set terms, defendant appeared and answered. There was an elaborate system of replication and re-replication, each party manœuvring to get the advantage of producing proof. When it was determined what the point in issue was, the privilege of producing proof was automatically regulated by the law. Rules were laid down as to how the proof was to be given, how it could be challenged, and the court directed that proof of the issue should be given in the particular form prescribed by law. The proof was then tendered; the other side did its utmost to secure its rejection by objection or contravention;¹ and, if the proof was in accordance with the form required and withstood the attacks made upon it, it was held that that proof was complete; if it did not, it was incomplete, and judgement was given not on the merits of the case, after hearing the evidence of both sides on the issues, but according as to whether the evidence given by the party entitled to produce it was complete or not.

§ 4. Judgement, when given, could be challenged only on the grounds that the court had disregarded the proper form of procedure, had given one party the privilege of proof when it ought to have given it to the other, had held proof was complete when it was not, or had given a relief which was not the relief that followed in law from the facts established.

Such in broad outline was the form of procedure. At present we are concerned simply with that part of the procedure which related to proof.

§ 5. Ancient Welsh Law contemplated two modes of trial, or rather of proof, proof by 'evidences' and proof by 'raith' or oath of compurgation, each system being mutually exclusive of the other; that is, it determined that certain cases were to be disposed of by compurgators, others by 'evidences'.

It is essential to explain how these different modes functioned before we can consider the law of pleadings, and we must here assume that an issue had been arrived at for the proof of which either compurgators or 'evidences' had been demanded by the court.

¹ 'Contravention' does not mean 'rebuttal' or counter-evidence. For meaning vide *infra*.

2. Proof by compurgation.

§ 1. The institution of compurgation is said in the Anomalous Laws to have been introduced by Hywel Dda to take the place of trial by ordeal, a practice to which we find in the laws only one other reference, namely in the VIIIth Book, where it is asserted that no one under 21 or over 63 was to be adjudged to the ordeal. Of ordeal we have no trace elsewhere in Welsh Law, and there seems to be no question that it never prevailed among the Welsh people.¹

The institution of compurgation bears in itself proof of a more remote antiquity than the days of Hywel Dda, and it prevailed among all early Nordic peoples.

§ 2. In all cases in which, under the law, compurgation was adjudicated, it was adjudicated after the plaintiff had sworn to his claim and after the defendant had counter-sworn denying the claim, and, if such oath were needed, after a further counter-swearing by the plaintiff reiterating his claim. The issue that was left to the compurgators to determine was, in civil cases, whether defendant's denial of the claim was true, and, in criminal cases, whether the accused's asseveration of innocence was true. Compurgators compurgated from a claim and did not prove a claim, which was sufficiently established if there were no compurgation.²

§ 3. The composition of the compurgators varied according to the nature of the claim or charge. It varied both in quantity and quality.

In South Wales we find frequent references to a 'raith or country' or 'raith of wood and field', which consisted of fifty free landholders, not necessarily related to the defendant or accused, which was a development from the 'compurgators' elsewhere spoken of.

In the MS. Titus D. II of the Venedotian Code, after a statement showing the varying composition of compurgators for theft, we are told that 'at present', i. e. sometime subsequent to Hywel Dda's redaction, it was customary to demand twelve men to compurgate in all theft

¹ VIII. 210; XIV. 622.

² e.g. D. C. 418; X. 388; XI. 416; XIV. 626.

cases. This may be due to the copying of the English rule, and it, at any rate, appears to indicate some attempt at standardization.

Ordinarily, however, the compurgators varied in numbers from three to even 600 (though it is hard to believe that the latter figure ever prevailed), according to the nature of the case, or the offence, or the 'supporting facts' (not evidences) available in support of the claim or charge.

Generally speaking, though not invariably, the compurgators were related in 'galanas' degrees to the defendant, and two-thirds had to be drawn from the paternal relatives, one-third from the maternal relatives of accused.

§ 4. In addition, there were certain definite qualifications. In some cases half must consist of 'nod-men', in others they might be exclusively men who were not 'nod-men'.

The phrase 'nod-men' is used in the Codes in two diametrically opposed senses, but the reason is clear when we remember its etymological origin. The word 'nod' is the Welsh form of the Latin 'notus', something known or marked.

The phrase is used twice in the Venedotian Code and once in the VIth Book as equivalent to a marked or branded man, i.e. a bondman, who could never be a compurgator. Elsewhere, where it is said that a 'nod-man' must be included among the compurgators, the word indicates a man of mark or distinction, some one whose oath of compurgation had an extra value by virtue of the social position of the man taking it.

Again, in some compurgators there had to be included men who were under the three vows of abstinence from women, horses, and fine linen.¹

§ 5. No woman could be a compurgator for theft, murder, or suretyship, and even where a woman was adjudicated compurgation, her compurgators, except in rare cases, must be men.²

§ 6. The primary qualification of all compurgators must be Cymric birth, free or unfree, and consequently no foreigner was entitled to be a compurgator, nor could a foreigner,

¹ V. C. 92, 240; G. C. 688; VI. 100; XIV. 638.

² V. C. 102.

accused of an offence, demand the adjudication of compurgators, inasmuch as he had no right to call upon relatives to aid him.

This bar on a foreigner producing compurgators, was removed from a foreign family when it became 'adscriptus glebae', and, in acquiring unfree status, it acquired the right of demanding aid from relatives.¹

§ 7. Where a man was the son of a Cymric father and a foreign mother, he had no maternal kin on whom he could call. Hence, where he had to produce compurgators of mixed kin, he could supply the deficiency of mother-kin by swearing his own oath as many times as was necessary to make up the number he would have produced from his mother-kin had he possessed one.²

§ 8. The case of a son of a Welshwoman given in marriage to a foreigner is not mentioned; but as he was, until he got 'mamwys', a foreigner, the reason is obvious, and when he acquired 'mamwys', his maternal kin was both father-kin and mother-kin to him.

§ 9. Where a man accused or sued was a foreigner, he must be sued or accused through his lord, who compurgated or released him, or, according to one passage, the foreigner could compurgate himself by swearing the number of oaths which compurgators adjudicated upon a Cymro would have sworn.³

§ 10. In civil cases based on 'machni', 'amod', and 'briduw', the compurgators were invariably seven in number, the person denying together with four men of paternal-kin and two of mother-kin, related to him in 'galanas' degrees. When a lord denied the suretyship of a dead surety, the compurgators were drawn from his own and not the surety's kin, and where a son denied the suretyship of his deceased father, the mother-kin, responsible for providing some of the compurgators, was the mother-kin of the father and not of the son.

If, however, in surety cases part were acknowledged, it sufficed for the denier to deny the unacknowledged portion with his own oath, provided the suretyship had not been

¹ D. C. 512; V. 94, VI. 114.

² VI. 114.

³ D. C. 512.

entered into in the presence of the court, in which case the presiding officer was associated with the denier in his oath.

In a case of breach of cross, that is, disobedience to an injunction, the compurgators were three in number, including the denier.¹

§ 11. In criminal cases the number is variously stated.

The ordinary rule in South Wales was that all crime was compurgated by the oath of fifty landowners. We find that number prescribed for murder, arson, theft, accessories of theft and arson (with the addition that if any one were burnt, three must be under vows of abstinence), robbery, rape, maiming, violence, stealthily killing an animal, 'cyrch cyhoeddog', rescuing a prisoner, cutting wood without permission, and adultery (when if the person charged were a woman, the compurgators were women).

The same figure is fixed in the Venedotian Code for adultery and rape, but not for other cases.

At the same time we have in the Southern Codes and the Anomalous Laws mention, on several occasions, of the numbers varying according to the offence, following the Venedotian Code in this respect.

We have, e.g., compurgators for homicide put as low as 10, elsewhere at 50 to 300, sometimes doubled for way-laying or secret murder, sometimes trebled for stealthy murder. Sometimes we are told that among them there must be men under vows.

For murder of a bondman, which was treated as theft of the master's property in him, the number was 24.

The rule as to compurgators required to deny being accessory to murder has been misinterpreted. The true law was that if a person admitted being accessory to murder, then, if he denied being the actual murderer, the number of compurgators was increased to 100, 200, or 300, according to whether the accessory act admitted fell into the first, second, or third grade of accessory acts. It is true that the phraseology of some authorities lends colour to the interpretation that these enhanced numbers applied to the

¹ V. C. 114-16, 124-6; D. C. 396-8, 430-2; G. C. 788; IX. 254, X. 308, XI. 444, XIV. 712.

denial of the accessory acts themselves, but a collation of all the references leaves little room for doubt that that was not the case; the ordinary number for a man denying an accessory act was the same as for murder, and the number was increased when the accused admitted being an accessory, but denied actual murder.¹

§ 12. In theft cases the numbers varied according to the value of the property stolen.

Property was generally divided into four classes: (a) a small amount or a load which could be carried on the back, (b) a horse load or an ox or goods of the value of 5s. or 10s. upwards, (c) goods of the value of £1, and (d) goods of the value of over £1.

These divisions and the numbers of compurgators are not uniform; the latter generally consist of 5, 7 or 10, 12 or 24 men, in an ascending scale, according to value.

Where a charge of theft was based upon 'lliw' (sight of an informer), the number was raised to 24 or 33.

The number for accessories to theft is generally fixed at 50, though on one occasion in the Venedotian Code as low as 5; and in the case of prosecution for possession of stolen property under the law of 'the hundredth hand', a hundred oaths are sometimes prescribed. In the case of violence absent, it was invariably 50, and of 'ffyrnigrwydd', 100.²

§ 13. In regard to arson little is said. The usual number was 50 landholders for arson and its accessory acts. The Venedotian Code fixes it on one occasion at 12 in a case where damages for fire were sought.

For treason, compurgators were double those for homicide. For fighting, in which injury resulted, 3, 6, and 9, or 3, 4, and 5, according to the nature of the injury, were required; and for insult without bodily injury, the alleged offender's oath sufficed to clear him.

For domestic offences, short of adultery, a married woman alleged to have suffered herself to be caressed or kissed, and

¹ V. C. 86, 90, 92, 96, 100-2, 218, 220-8, 230, 254; D. C. 396, 400, 406, 408, 412, 414, 416, 520, 522, 524, 570, 592-4, 614; G. C. 688, 690-2, 748, 750, 778, &c.

² V. C. 240-2, 254-6; D. C. 488, 594, 614; G. C. 690-2; V. 54, 60, VI. 100, IX. 224, 232, X. 308, 310, XIV. 678, 680-2, 706-8, 726.

the man alleged to have offended, cleared themselves with compurgators of 14 and 7, the woman's including her mother, father, brother, and sister; and a virgin wife denying unchastity before marriage, cleared herself by 7 similarly constituted compurgators.

§ 14. The details of the compurgators could be continued indefinitely, but enough has been said to show that there was no uniform rule. The number probably varied, not only from place to place, but from time to time, as it did in England, until it became standardized at 12.

§ 15. The effect of compurgation was universally the same; if the compurgators stood by the accused or defendant, the verdict was in his favour; if they did not, it was against him.¹

§ 16. The duty of producing compurgators was always placed upon the person who was to be compurgated or whose statement was to be supported.

The time to produce was ordinarily the next following Sunday but one, and they were produced and sworn in the producer's parish church, the oath being taken before the Bendicamus and the distribution of the 'mass-bread'. The appearance and swearing of compurgators could be enforced by the lord levying distress, and, if between calling and appearance, a nodman died, another could be substituted in his place.²

§ 17. No compurgator could be 'objected to', except on the ground of want of relationship to the party calling him (an objection not applicable to the South Wales' compurgators of neighbours), minority, or being a religious devotee, and, therefore, dead to the world; and a challenge on the ground of want of relationship was sufficiently met by the compurgator swearing to his relationship.

The oath taken by a compurgator was 'to verify the statement of the party calling him' in civil cases, and 'that that which was sworn by the criminal was most likely to be true' in a criminal case; a nodman's oath, however, being that he 'considered the accused's oath to be true'.

¹ E. g. V. C. 114; D. C. 480, 592.

² V. C. 114, 134; D. C. 480; V. 90, IX. 234, 254, XIV. 678

If nodmen were needed, the failure of one nodman to support the party calling him, vitiated the compurgation; but, when nodmen were not needed, the opinion of a two-third majority prevailed in favour of the party calling.

Compurgators were always personal to the accused, so if the latter died before they assembled, the son of the deceased could not ask that they should be sworn. The effect of the death of a person charged, before the compurgators were sworn, was that the lord could demand £7 out of his property, but if he left no property, nothing could be demanded of the children. In England the rule was different, as a dead man could there be sworn off theft by his kin.¹

§ 18. The procedure of compurgation was not confined to Wales. It suffices to mention, so far as Scandinavian peoples are concerned, the reference in Eric's Kopnhagen Law, c. 89, where it is said:

'Then shall the man who is accused defend himself with an oath of denial as the old custom is.'

§ 19. In the early English Laws there are frequent references to the system.

It is found in the Laws of Wihtraed, the Laws of Ine, cc. 14, 46, 54, the Laws of Edward, c. 5, the Laws of Athelstan and the Ordinance of Woodstock, to say nothing of the Laws of Cnut, cc. 22, 41, and those of the Confessor and Conqueror.

The provision in Edward the Confessor's Law, c. 14, is worth quoting:

'Si quis appellatur de furto, et sit liber homo, si bone fame hucusque fuerit, et testimonium bonum habuerit, purgabit se per juramentum suum. Quod si ante culpatus fuit purgabit se duodecima manu et eligentur XIII legales homines ex nomine qui juramentum hoc faciant.'

the ordeal following, if they would not swear.

There are many points of resemblance between the systems.

The form of oath sworn on the sacred altar (Laws of Wihtraed) was, according to the Fragment on Oaths, c. 6, similar to that prevalent in Wales, 'I swear that the accused's

¹ V. C. 136, 162-4; D. C. 610, V. 90, VI. 134, IX. 254, XIV. 636.

oath is clean and unperjured', and, as in Wales, the amount of the jury constantly varied, at least in the earliest times.

In early days the minimum jury consisted of so many 'hides', that is to say where an oath of 100 hides was required, it had to consist of men holding 2, 6, or 12 hides of land each, the total of whose hidage amounted to 100. The hidage required of a jury was generally equivalent to the number of shillings which the law provided as the 'bôt' or compensation to be paid.

Later, however, the usual compurgation oath was made by twelve men of the same status as the accused.

After the time of Edward, a man once convicted could never be adjudged a compurgation; he was, under the English Law, forced to the ordeal, and, after the Ordinance of Woodstock, there was a gradual substitution of a jury of countrymen for a jury of kinsmen, culminating in the Confessor's institution of the 'tenmann-tale', and the Conqueror's compurgation by twelve men of the neighbourhood.

Unlike, however, the Welsh Laws, the system of ordeal was growing up as a parallel, see e.g. Cnut's Secular Laws, cc. 22 and 30, and there was a gradual extension of 'lad' (compurgation) to include not only 'lad' proper but the ordeal of iron, water, and 'corsnaad'.

Another resemblance was that, according to the Ordinance of Wantage, c. 13, the oath of a two-third majority of the jury of twelve sufficed to compurgate a man, and care was taken in English Law to secure unanimity by fining the dissentient minority three marks each. With this may be compared the Danish Law, Priv. Civ. Pupensis, A. D. 1296:

'Sed si illi XII in unum convenire non poterint, major pars praevalerebit, et quicquid juramento suo decreverit.'

§ 20. Identically the same procedure existed in the Scotch burghs, and was applied to civil and criminal actions.

In the *Leges Quatuor Burgorum* it was provided:

C. 26. 'Gif a burges be chalangyt be ane uplandis man of any thyft fundyn with hyn in his hous or in his sesyn . . . and says . . . at he it lachfully bocht . . . he sall clenge hym with the athe of XII men of his nychtburis.'

and

C. 28. 'A burgis may thruch his anarys voyce put hym till athe at nytis hym his dett quahat man sumevir he be.'

It is true, of course, that a charge of theft present would be met, in Welsh and English Law, not compurgation, but by avouchment to warranty. The Scots Burghs used compurgation where the Welsh and English preferred the alternative method of shields. There are numerous other references in the Scots Law which need not be mentioned.

§ 21. In the Germanic Laws the system prevailed everywhere, the juries varying in numbers according to offence. It will be sufficient to indicate the widespread character of the system by merely mentioning a few references:

Lex Alamman., Tit. XXIV, XXVII, XXVIII, XXX, XCII; *Lex Baiuor.*, Tit. I, c. 24, IX. cc. 2, 3; *Lex Burgund.*, Tit. VIII; *Lex Frision.*, Tit. I, II, III, XI, XIV, XX; *Lex Langobard.* (Ed. Roth.), cc. 1, 166, 198, 359, 361, 362; *Lex Saxon.*, Tit. II, 29, and *Lex Angl. et Werin.*, cc. 1, 4, 45, 48.

3. *Trial by evidences*

In order to understand the Welsh system of evidence, we have to disregard completely all modern ideas on the subject. We are face to face with a totally different conception of proof and of evidence.

The system was not peculiar in any way to Wales; it was a common heritage of Celtic and Teutonic peoples, and it did not disappear from these islands until long after the Norman Conquest.

The value of the Welsh Laws is that they furnish exceptionally full details of the operation of the ancient system.

(i) *Oral evidence in Welsh Law.*

Welsh Law recognized four kinds of 'witnesses', (a) 'tafodiog', (b) 'ceidwad', (c) 'gwybyddiad', and (d) 'tyst', each having its own functions, and found no place for documentary evidence until the latter was introduced by the Church.

(a) The 'tafodiog' witness

§ 1. The 'tafodiog' was a special class of 'gwybyddiad'.

The word literally means 'tongue-man', and it is sometimes used also as the equivalent of 'advocate'.

The real 'tafodogion' or 'tongue-men' were testifiers whose sole statement, sometimes on oath, sometimes not, was absolutely conclusive on the particular point on which they were competent, according to law, to make a conclusive statement.

The Codes require an oath from every 'tongue-man', but the Anomalous Laws dispense with it in some cases where the 'tongue-man' was a lord, a judge, or a father.

Oaths were administered on the relics, and nine days were allowed within which the oath might be taken, except in the case of a priest or a convicted thief, in both of which cases the statement was to be made at once.

§ 2. Three lists of 'tongue-men' are given in the Laws, in the Venedotian and Dimetian Codes, and the IXth Book, while scattered references to individual 'tongue-men' are frequent elsewhere.

According to the Laws there were nine 'tongue-men', and the three lists agree in the main. The order, however, is not always the same; the points on which the conclusive testimony could be given vary in some cases, and though seven of the 'tongue-men' are universal, for the remaining two places five different persons are mentioned.

§ 3. The first 'tongue-man' was a lord in a dispute between two servants or men of his.

The Venedotian Code says that, where there was a dispute between two servants or men of a lord, either party could appeal to the lord for his statement on the matter; and thereupon both parties were bound by the conclusive statement of the lord.

The Dimetian Code elaborates the provision and determines that a lord was competent only if he were not interested in the suit or its subject-matter, and confines his testimony to one point only, viz. where it was agreed between parties that the subject-matter had been under litigation already before the lord, and the point in issue between them was the manner in which the cause had been before the lord, then one party must assert on oath and

the other deny that the cause had been before the lord in a particular manner, the lord's statement on the point whether it had been so or not being conclusive.

The IXth Book merely limits the lord's conclusive statement to a case where the men were 'near' to him, and the XIVth Book says they must be connected with him, and asserts that the point referred to him was the extent of the claim previously made.

The IXth Book exempts the lord from an oath, so does the XIVth Book, unless one party were more nearly connected with him than the other.

It seems, therefore, that the lord's statement was conclusive only as regard the form or extent of a claim previously made in his court between two men of his.

§ 4. The second 'tongue-man' was 'a father between his two sons'.

Here, again, the Venedotian Code compelled submission to the father's statement if any one of his two sons appealed to him; and it and the Dimetian Code give no indication as to the point on which a father could give a conclusive statement.

The Dimetian Code required an oath on the head of the son against whose contention he gave testimony. The IXth Book dispensed with an oath, but provided that the two sons must be of the same mother; the XIVth Book dispensed with an oath if they were full brothers, and required one if they had different mothers.

In the absence of any limitation of the matter on which a father could make a 'tongue-man's' statement, it would appear that his statement on any point in issue between his two sons was conclusive.

§ 5. The third tongue-man was a judge.

Wherever parties had litigated and a judgement had been given them, if any dispute arose as to the nature of the judgement given, the fact of judgement being admitted, the judge was competent to make a conclusive statement as to the nature of his judgement.

The instance is frequently mentioned in the Laws. The IXth and XIVth Books alone dispense with an oath, but

demand one if the judge availed himself of nine days to recollect. A judge's tongue-man statement was not a judgement, and so could not be challenged by mutual pledge.

Should the judge declare he had given no judgement, he was not to be credited, for both parties agreed he had given one, and then other proof could be given both of the fact and the nature of the judgement.

§ 6. The fourth tongue-man was a man who had stood surety in a bargain.

Where it was admitted that he had stood a surety by both creditor and debtor, and the sole question in issue was the extent of the bargain entered into, the surety's statement was conclusive on the issue. If it were denied that the alleged surety had ever been a surety at all, he could not be appealed to as a tongue-man.

The surety, if he could not recollect whether he had been a surety or not, was allowed three days to recall the fact in, and a further nine days to recall the extent of the bargain, and he must be sworn on the relics if either party desired it.

There was not much probability of the surety forgetting, as in the law of surety and debtor a defective memory was a dangerous thing for a surety to be burdened with: he became liable himself for the claim.

One passage in the XIVth Book appears to imply that a surety was, like other witnesses, subject to contravention.

§ 7. The fifth tongue-man was 'a maid as to her maidenhood', but there is considerable divergence as to what this actually connoted.

The Venedotian Code states that if a maid were taken without gift of kin, and she asked her abductor what 'agweddi' he intended to give her, her statement as to the amount agreed upon was conclusive because she had been taken to a place 'where there were no wedding guests'.

The Dimetian Code in one passage gives exactly the same version; but in the list of tongue-men it says that where a woman was given in marriage by gift of kin as a maid, and her husband contested her virginity, her own statement was conclusive on the question if she were in her twelfth year, and further that a woman, complaining of

violation and asserting she was a maid at the time, could give conclusive evidence on the point. The IXth Book, on the other hand, gives a maid, who obviously had been violated, the right to make a conclusive statement as to the identity of the person guilty of the act, and both the Southern Codes make the same provisions in some passages, but take away the force of the assertion by prescribing compurgation immediately after.

The Venedotian Code does not recognize the tongue-man statement of a twelve-year-old wife, but required at all ages compurgation to establish maidenhood, when doubted.

It is clear, therefore, that there was much divergence as to the application of the rule. Probably the original rule was that a woman's oath as to whether she were a maid or not was conclusive, but, as time went on, modifications were introduced as to the circumstances in which the general rule was applicable.

§ 8. The sixth 'tafodiog' was the herdsman of the hamlet. All authorities agree that if an animal in a herd killed another in the herdsman's presence, the herdsman's statement as to which animal was the killer was conclusive.

The IXth Book adds that the herdsman was only to be credited if he had no animal of his own in the herd, and the XIVth Book only allows the herdsman's statement to be conclusive if no other witness to the killing were available, and adds that no herdsman could be a tongue-man against a man killing an animal.

§ 9. The seventh tongue-man was a 'thief at the gallows'.

All authorities say that a thief at the time of execution could not be gainsaid when he announced who his accessory or co-thief was. The IXth Book agrees with the Codes.

§ 10. For the last two places in the list of tongue-men there is divergence.

The Venedotian Code gives a place to an abbot between his two monks, implying that where there was a dispute between two monks (who being civilly dead could not sue or be sued in a civil court), the abbot's decision was conclusive.

The Dimetian Code also gives a place to this instance.

The Venedotian Code also mentions a donor respecting his gift, that is where a man made a gift and two persons claimed each to be the donee, the donor's statement as to which was the donee was conclusive. The Dimetian Code also mentions this case with special reference to the gift of a woman in marriage, and the IXth Book repeats in substance what the Venedotian Code says.

In the Dimetian Code it is said that a priest was a tongue-man between his two parishioners 'in respect to what they had previously testified to him'. Referring to this, which is accepted by the IXth Book, the latter says, in one passage, that the priest was a tongue-man where there was a dispute as to which party was to benefit under a bequest made through a priest—really a variation of the donor tongue-man—and, in another, that he was a tongue-man where he saw a thief in open daylight with the stolen property in his possession, accused and accuser being of his parish—a variant of the combined rule of 'dogfnag' and 'lliw'.

The Dimetian Code adds that an 'amodwr' or 'contract man' was a tongue-man as to the terms of a contract where it was admitted he was such. This is only a variant of the surety-tongue-man, the contract-man being in many particulars similar to a surety, without, however, all the latter's liabilities. The XIVth Book mentions the case, but places the contract man on the same footing as a surety, whom it allows to be contraverted.

Though not mentioned in any of the lists, it is stated, on two occasions in the Anomalous Laws, that the mother of twin sons was a tongue-man on the question which of the two was the elder, when it had to be decided which was to succeed to the homestead.

It is impossible to decide which of these competitors are entitled to the vacant places in the list of nine; but, in all probability, more than nine statements were admitted as conclusive, and that it was only the desire to round them off, on the general analogy of 'nines of law', that led different authorities to exclude some admitted by others.¹

¹ V. C. 86-8, 108, 110; D. C. 374, 422, 424, 458, 462, 518, 520; G. C. 744-8, 750; V. 64, VII. 148, VIII. 174, IX. 226, 254-6, 262, X. 346, XI. 420, XIV. 602, 634, 660, 692, 728.

(b) The 'ceidwad'.

§ 1. The second class of witnesses was that of 'ceidwad' or 'protector'.

The function of a 'ceidwad' was to keep (*cadw*). He was a special kind of witness, and could only swear to protect a title to property or status. A protector did not give evidence in opposition to anybody; he simply supported the party who called him in defence of status or title, and the fact that he could not cause loss to any one is insisted on more than once in the Laws.

§ 2. The circumstances in which a 'protector' could be called are enumerated as follows: in support of title to land, in support of the three special defences in 'theft', viz. custody before loss, birth and rearing, and guestship (*q.v.*), in support of a man's status, in support of a Cymro claiming a person as his commended foreigner, and, according to the IXth Book, in support of the vendor of an animal in regard to the soundness of such animal when sold.

§ 3. The primary qualifications of a 'protector' were that he was a freeman and a landowner; he had to be 'respectable', i.e. worthy of respect, and no foreigner could be a 'protector'.

When a 'protector' was called to support title to land, some authorities insist on his being a 'land-borderer', i.e. one owning land abutting on the land, the title to which he was supporting; others demand merely ownership in an adjoining 'tref', others ownership in the same 'cymwd'.

Protectors in support of any other matter need only be 'respectable' landowners, and even the ownership of land is not invariably insisted upon.

§ 4. The oath taken by the 'protector' was 'to the extent the advocate shall instruct him to say, swearing that every point is true'; in other words, what happened was that counsel repeated what his client had sworn to as to title and status, and the protector swore that each word of that allegation was true, or, as it is put in the Anomalous Laws, 'Protectors are to swear that the property belongs to the person calling him, and that he never parted with the ownership thereof'.

§ 5. Contrary to the rule relative to 'gwybyddiaid' and 'tystion', no protector could be objected to on the ground of suspected partiality, because the essence of his evidence was that he could not, in the eyes of the law, be hostile, as he was merely protecting one side without causing loss to the other. The sole ground for objection was want of respectability, though the IXth and XIVth Books speak of objections on the ground of his being a married priest, an arrant coward, a false witness guilty of breach of faith, a minor, a wife, a blind person; but except where these facts went to the root of a person's capacity to swear at all (e.g. minority), it is questionable if these grounds of challenge were not simply applicable to other classes of witnesses.

§ 6. As regards quantity, two protectors sufficed, but the more there were procurable the better.

Two protectors were essential to support a defence of birth and rearing and custody before loss in theft cases, and they must be of equal status with defendant, or else one must be superior in status and one inferior. They must also be neighbours, and so conversant with the facts they were deposing to.¹

(c) The 'gwybyddiad'.

§ 1. The third class of witness is termed 'gwybyddiad', that is, 'men who know'. They approximate to what we would call 'witnesses to fact' or 'eyewitnesses' in the present day, but with material differences in the method of handling their testimony.

In employing the English term, 'eyewitness', the essential differences must be remembered.

One of the cardinal rules of the Welsh Law of proof was that there could be no testimony except to a word or a deed, that is testimony to a thought or an unperformed act was not permissible, though evidence as to the non-existence of a fact, that non-existence being itself a fact, was allowed.

§ 2. Eyewitnesses testified to words, acts, or deeds said

¹ V. C. 162, 250; D. C. 438, 608, 610-12; G. C. 762, 774; VII. 132-4, IX. 216-18, 230, 274, 282, 296-8, XIV. 634, 694, 738, 740.

or done in their presence and to their knowledge outside court, when such act, deed, or word was in issue. The material part of their oath was that they swore to 'knowing and seeing' the fact which they deposed to, e.g. that they had seen a boundary line being broken, or that they had seen gold and silver being counted out in their presence, when the question of payment was in issue.

Their functions were exactly the same as those of the witnesses referred to in the Senchus Mór, I. 85: 'No one with the Fieni witnesses a thing of which he was not an eyewitness.'

§ 3. In English Law their oath was identical in substance with the Welsh one (Fragment on Oaths, c. 8):

'In the name of God, as I here for N. in true witness stand, unbidden and unbought, so I with my eyes oversaw, and with my ears overheard that which I with him say.'

This class of witness is also referred to in Cnut's Secular Law, c. 23, which, dealing with vouching to warranty, provides that the witness' oath shall be 'that he is a true witness to him as he saw with his eye and heard with his ears that he rightfully obtained it', and in the passing reference to witnesses 'who heard and saw' in the Lex Baiuor., Tit. XIII. 2 and XVI. 2.

§ 4. It is to be noted that an eyewitness, being a witness to what he 'knew and saw', could not testify to what he had done himself; he must testify to what he had seen others do. So, if a suit for partition were lodged, and defendant pleaded that the property sought to be divided had already been divided, he could not call on the other co-sharers in the property to say they had participated in a sharing. If he did rely on them as eyewitnesses, the plaintiff could at once object, and his objection was valid that they were not competent eyewitnesses.

§ 5. In Roman Law it was essential that there should be two witnesses to a fact, and in Welsh Law the same rule applied to eyewitnesses. At the same time there was no bar to more, and force was lent to testimony by quantity.¹

¹ V. C. 164; D. C. 422, 458, 460, 608; VII. 134-8, 276, 280-6, 292-4, XI. 412, 436, XIV. 568, 634, 698, 702, 732-8.

(d) The 'tyst'.

§ 1. The word 'tyst' is a derivative of the Latin 'testis', witness; but the best translation of the term in Welsh Law is 'attestator', an attestator, though, of a particular kind.

In early times the proceedings of all courts were oral; there was no 'written record'.

Now, as everything in the administration of justice depended on the observance of rigid formalities in pleading, &c., it is obvious that there must be some means of maintaining a record of what had passed, and of its being brought definitely to the notice of the court that a certain thing had happened in the presence of the court.

§ 2. It was the function of attestators, therefore, to certify to the judges what had passed or was passing in court, exactly as the 'faster' did in Scandinavian custom.

Suppose, for example, during the hearing of a case, a party objected to a witness at a time when the law did not permit him to object, or raised an objection against a surety which he was not entitled in law to take. The opposing party at once drew attention to the irregularity, and certified the fact to the court by the production of attestators, who deposed to having heard the irregular objection.

Again, it was in criminal cases the duty of a defendant to give an immediate reply to a plaintiff's claim. If he did not do so, the plaintiff at once produced attestators to prove that the defendant had failed to answer, and, as soon as they had certified to the omission, the case proceeded 'ex parte'.

Attestators were constantly in use in all stages of suits, wherever a party admitted any fact, omitted to reply or produce proof of a fact he was required to prove, or did anything which might operate to the benefit of his opponent, to certify to the court the fact of admission, omission, or what not.

§ 3. It was possible for a judge to be an attestator in respect of a word spoken to him while on his judgement seat; he could, as we would now say, take 'judicial notice' of the fact, but he had to swear to it. He could not, how-

ever, be a protector or an eyewitness to a fact occurring outside court relating to a case which he was hearing.

This, therefore, is the meaning of the constant definition of a 'tyst' as a person 'who testifies to a discourse spoken in his presence'; he was an attestator of pleadings and proceedings in court.

§ 4. It must not be supposed that there is a uniformity of language in the laws on the subject; quite the contrary. There is constant confusion in the phraseology; 'tystiol-aeth' is used to cover all kinds of evidence, and 'tystion' is sometimes used to include 'protectors' and 'eyewitnesses', though the latter two words are rarely, if ever, confused; but, notwithstanding the confusion of language, the distinction between eyewitnesses and attestators is frequently mentioned. It is pointed out that an eyewitness spoke to a fact occurring before the court sat, an attestator to a word spoken in court; an eyewitness spoke of that which he knew, an attestator to that which he was asked to attest; an eyewitness gave testimony in opposition to a denial, an attestator did not; the testimony of an eyewitness might subject a man to imprisonment or punishment, that of an attestator could not.

§ 5. As to numbers it was axiomatic that there must be two attestators, neither more nor less, while there could be any number of eyewitnesses.¹

(e) Objections to eyewitnesses and attestators.

§ 1. We have already noticed that no 'protector' could be objected to except on the ground that he was not a free landowner.

Both an attestator and an eyewitness could be objected to for several reasons.

§ 2. The principal grounds of objection were the existence of one or other of the three feuds, viz. that there existed between the witness and the party, against whom he was deposing, an unsatisfied murder-, land-, or woman-feud, which is specially defined as living at the time with the other man's wife. It is also indicated that if the attestator

¹ D. C. 420-2, 460-2, 482, 590-4, 608; IV. 26, V, 86, VII. 132-4, 144-6, 154, VIII 186, IX. 240, XI. 436, XIV 634.

or eyewitness were of nearer affinity to the person he was deposing for than to the man he was deposing against, that was a valid ground of objection.

It may be noted that, according to the Vth Book, if a representative of several co-plaintiffs were appointed to conduct a suit, the objections to an eyewitness could only be made if the feud relied upon existed between the eyewitness and the representative, and that a feud between the eyewitness and one of the persons represented was not a valid ground of objection.

A satisfied feud was no valid ground for objection, and if the lord certified that the feud had been settled, it could not be urged against a witness that he was at feud.

These principal grounds of objection are termed ' llysiant ', or ' rejections '.

§ 3. There are numerous secondary lists of what are termed ' gwrthneu ' or facts warranting a contravention of a witness.

Some of these relate to absolute incapacity, others to lack of credibility. The Dimetian Code mentions, among the grounds for contravention, corruption, being interested in the suit, acknowledged breach of faith, notorious perjury, theft or robbery, excommunication by name, evident enmity, and being a breaker of the peace.

Other lists variously include, in addition, husband and wife as against each other, foreigners as against Welshmen, bondmen, foreigners ignorant of the language, drunkards, deaf, mute, blind, or insane people, boys under fourteen, men of Gwynedd, Powys, or South Wales against residents of the other countryside, friars, anchorites, hermits, monks or priests who had broken their vows, unless pardoned by the Pope or Bishop, spendthrifts, married adulterers, persons guilty of patricide or matricide, persons guilty of unnatural offences, sacrilege, treason, and false coining, and judges guilty of deliberate false judgement.

§ 4. In certain cases eyewitnesses were required to have special qualifications, e.g. a person deposing to partition of land or to a case of ' mutual strife ', must be landowners of an adjoining ' tref ', likewise a witness in a ' dadanhudd ' suit.

§ 5. These variations are but natural, and are accounted for by the fact that, through the centuries in which Welsh Law was administered, there was a continuous development proceeding. Originally it would seem that there were certain fundamental grounds of incapacity—minority, being a wife, being deaf, blind, insane, bond, or ignorant of the language—operative against all kinds of witnesses; that protectors must be Cymric landowners; and that eyewitnesses and attestators must not be suspect on account of feud. Later, other grounds, which challenged a man's credibility, such as cowardice, conviction of crime, untrustworthiness manifested by breach of faith or perjury, and the like were added.

§ 6. In Ireland there were similar bars on the competency of witnesses. Co-owners, purchased witnesses, degraded priests, cuckolds, women, angry men, and persons who would benefit if the case were decided on their testimony, were all lumped together by the Heptads (V. 285) in a common incompetency.¹

(ii) *Other evidence in Welsh Law.*

We have now to consider very briefly certain other forms of evidence.

(a) Record of court.

§ 1. The first of these is the so-called ' record of court '. In the Triads of Dyfnwal Moelmud we find many references to the maintenance of a written record of court, which it is said was destroyed at the conclusion of the case, but outside the Triads we have little evidence of its existence. It is possible the author was thinking of the court at Ludlow, one of the peculiarities of whose existence is that practically no records have survived.

§ 2. The maintenance of a record of court was a late introduction, and there is no reason to suppose that there was, in this matter, a more rapid development in Wales than elsewhere.

The Venedotian and Gwentian Codes have no references to the maintenance of such a record. The Dimetian Code

¹ D. C. 422, 454, 590; VII, 132, VIII, 204, IX, 218, 276, X, 326, XI, 408, XIV, 654, 700, 740.

and the XIVth Book mention the priest as the clerk of the court, who maintained a cause-list and kept a note of the pleadings until a case was decided, adding that the clerk was introduced as an official by Hywel Dda.

§ 3. There are various references to the 'cof llys', which Mr. Owen has translated as 'record of Court'. The phrase literally means the 'remembrance or recollection of Court', which, it is obvious, need not be assured by anything written.

The Dimetian Code states that one of the certain final testimonies is the testimony of a court showing 'cof' (translated by Mr. Owen as 'producing the record'), and that the 'cof llys' was conclusive proof of an agreement entered into between parties, the termination of a suit, and an illegality done by a lord towards his man in court.

It also says that a 'cof llys' was by the swearing outright of the 'cofwadurion' or 'remembrancers', and that it was concerned with what occurred in the presence of court, and that no defence was of avail unless it was in time according to 'cof llys'.

None of these passages indicate a 'written' record, and the swearing outright of 'cofwadurion' seems to be the same as the swearing of attestators.

Other references to 'cof llys' appears in the Xth and XIVth Books, but none of them refer unmistakably to written record.

It appears, therefore, that 'cof llys' meant not a written record, but the recollection of the court as to what happened in court, after the fact had been fixed in memory by the swearing of attestators.

§ 4. That a priest was present in court at all times is indubitable; he was there to give religious sanction to the proceedings, to pray for guidance, and, as he was frequently the only literate man in the assembly, the practice may have grown up of his keeping a cause list and notes on the proceedings, but there is nothing to show that any such record was available in evidence.¹

¹ D. C. 364, 404, 458, 460, 588, 592; X. 324, 356, 384, XIV. 658, 692.

(b) Documentary evidence.

The use of documentary evidence in the early courts of Europe is distinctly traceable to the Church. In the Welsh Laws there is no mention of documentary evidence being admissible at all, and we may assume that, at any rate in the tenth century, it was not of any value.

(c) The 'tystiolaeth marwol'.

§ 1. There are some references in the Laws to what are called the 'tystiolaeth marwol' (dead testimonies). The references are to be found in the Southern Codes as well as in the Triads of Dyfnwal Moelmud.

§ 2. Two distinct meanings are assigned to the term in the Dimetian Code.

In one passage it is asserted that if an attestator were brought against a witness before he testified in order to contravert him, or were produced to assert that a party had not raised a defence in a suit when he had actually done so, or to assert that he had said something which he had not said (all acts during the hearing of a suit), that testimony was 'marwol' or 'dead' and valueless.

The other references give a different significance to the phrase. They are confined to certain testimony admissible in land suits only.

If there had been dispute and fighting between two parties in respect to land or land boundaries, and that dispute had been duly terminated, then, if the original parties were all dead, the sons or grandsons or relatives could, in a subsequent suit, prove what they had heard on the matter from their ancestors. This was evidence of tradition from the dead, and was permissible and called 'marwol', as being from the dead.

In a suit for land by 'ach ac edryf', the elders of the countryside were, before the defendant was called, required to make a return as to whether or not plaintiff was of the kin and descent he alleged. That return was said to be 'marwol', because it was conclusive.

Again, where a man claimed land on the ground that it belonged to him by descent, he could point out the fire backstonc, or other mark existing on the land and placed

there by the collateral through whom he claimed, as evidence of occupation. He could also point out barns or other erections, or ploughed furrows. Their existence could be proved probably by reputation, and such evidence was admissible.¹

(iii) *The production and testing of witnesses.*

§ 1. We may now turn to the mode of procuring the attendance of witnesses and of challenging such as were subject to challenge.

§ 2. When pleadings were in progress the parties had, in making their allegations, to assert that they had witnesses, protectors, or eyewitnesses, or both to support them.

They might say that they had so many witnesses, specifying the number, or they might say, 'I have enough to know that that which is asserted is true.'

Where it was appropriate to hear witnesses on both sides, after one party had asserted that he had witnesses to support him, the other might say he had as many and as good, or he might say that he had more or better.

It was of the greatest importance, as we will note, what the actual words used were, and the careful litigant would not commit himself beyond saying that 'he had enough who knew', and, where appropriate, that those he had were as many and as good as the other side's.

§ 3. When the pleadings had been completed and the matters in issue fixed, should the judges find themselves unable to decide on the pleadings, the party or parties were questioned as to who their protectors or eyewitnesses were.

The party questioned, accompanied by his pleader and guider, was alone entitled to withdraw to another part of the field and consult; any one unauthorized joining in the consultation being fined three kine.

The party or parties returned to the field, and announced by name the witnesses relied upon, adding again, if they were careful, the words, 'and enough to know'.

Until this was done no witnesses could be called, e.g. a party could not support his claim by producing evidence

¹ D. C. 452-4, 460; G. C. 772.

before the other side had replied to the claim; if he did so, the evidence was disregarded.

§ 4. If, in pleading, the party had merely said that he had so many witnesses, without adding, 'I have enough to know' or equivalent words, then he was bound down irrevocably to the list he had given, and the people he produced must be those mentioned in full. It is even said in the XIVth Book that they must be produced in the exact order in which they had been named, so that if a man promised to produce David and John, he could not produce John before David.

A party could not deviate from his list given without the words, 'and enough to know', by a hair's breadth; and so if any one of his witnesses failed him later or were challenged successfully by the other side, the whole of his case collapsed. He had made a promise to prove by such and such testimony, and by that testimony alone, that his assertion was true, and he had failed to carry out that promise.

If, however, he had added the words, 'and enough to know', he was not bound down irrevocably. The men he had mentioned had to be produced; but if they failed for any cause, the party was entitled to substitute in their place any one present in the field of judgement.

Likewise, if, in a case where evidence on both sides was heard, the reply of the second party had been that he had better or more men to support him than the other side had, it was of no use his producing only men equal in quality and quantity to his opponent's. He had promised better proof, and not merely equal proof; and, having produced merely equal proof, he had failed in his promise and lost the advantage of equal division of the property in suit, which in some cases was the form judgement must take when proof was equal.

§ 5. We have already noticed the period of adjournment for witnesses not in the field—three, nine, or fourteen days, as the case might be—the day fixed for evidence being the day for 'loss and gain' or final disposal.

No process of court was issued to compel appearance of witnesses; a party was responsible for producing them

himself, and no one could be compelled to give evidence against his will.

§ 6. On the day fixed for 'loss and gain', parties attended with their witnesses. There could be no adjournment if the witnesses were absent or dead, nor any adjournment to put in a fresh list. The case had to proceed without delay.

On assembling, parties paraded their witnesses to see that they were in accordance with the list promised. As they were paraded it was competent to the other party to ask what the status of each witness was, but there could be no challenge at that stage. The parade was for information only.

The judges then called on parties to recite the status of their witnesses, and the latter were asked if they would stand by their parties.

Proceedings then commenced by the party leading swearing to his claim, and the witnesses were called, one by one, in the order determined by whoever had the right of proof of the particular issue before the court.

It was the universal rule that the right of leading witnesses rested with him who asserted a fact.

'The law says that in whatsoever case it may be necessary for him to state the causes in the law along with the matter of action, it is necessary for him to prove the causes as he shall prove the matter.'

This was the rule wherever 'res judicata' was pleaded; wherever the plaintiff countered the plea of 'res judicata' by asserting a successful appeal through mutual pledge; where the plaintiff in a case of mutual strife asserted oppression; where in like case the defendant countered by a plea of abandonment; where in a case of 'mamwys' the plaintiff asserted his mother had been wrongly given in marriage to a foreigner; where, in such a case, defendant urged that his sister had been married to some one else or to a Cymro, or where he asserted plaintiff had received ancestral land elsewhere; where in a claim for demarcation plaintiff was said by defendant to have had boundaries already demarcated, or where plaintiff pleaded in reply a new encroachment

since that demarcation; where in a claim for 'dadanhudd' plaintiff alleged illegal ejection; where plaintiff in a suit for sharing of 'tref y tad' asserted he had received no share; or where, if plaintiff had omitted to say he had received no share, defendant asserted he had had; or where plaintiff said the previous sharing had been partial—in fact, all occasions where a fact was asserted and then denied.

The right to lead belonged to the plaintiff or defendant, whichever asserted a fact which was the first fact in issue to be decided between them.

§ 7. The issues before a court might have to be determined by protectors or eyewitnesses, or by both, e.g. in a case of mutual strife there might be two issues, (a) involving title, and (b) raising a question of alleged ejection. Such issues would be determinable (a) by protectors, and (b) by eyewitnesses, and the issue involving a fact would be disposed of first.

§ 8. If protectors were produced to swear, the opposite party rose immediately *before the protector was sworn* and challenged him, if he could, protesting he was not a competent protector.

One authority, confusing protectors with eyewitnesses, states that the former could only be challenged after taking an oath, but this is inaccurate: the challenge was directed not against what the protector might say, but against his capacity to say anything at all.

If the protector were not challenged at this stage, he could not be challenged afterwards.

§ 9. We have already seen that a protector could be challenged on the ground that he was a foreigner, and that two authorities add cowardice, perjury, and breach of a religious vow.

These authorities give important accounts of the procedure to be adopted in challenging a protector.

If the protector were being challenged on the ground of being a foreigner, the objecting party stated: 'God knows you are a foreigner, and, if you deny it, I have enough who know that it is so, and no foreigner can be heard against a Cymro.' If the would-be protector admitted the challenge,

he was not heard. If he were prepared to maintain he was not a foreigner, he asserted an 'arddelw', of which there were three open to him :

- (i) Assertion of status as a Cymro.
- (ii) Denial of being a foreigner.
- (iii) A demand on the other side to declare to whom he was alleged to be commended, coupled with a denial of being a foreigner.

The procedure varied according to which of these 'arddelws' he raised.

If he asserted status, he mentioned the status—that of office or blood, using the usual phrase that he had enough who knew the fact.

If the party challenging would not admit the status named, the issue before the court became the question whether the protector had status or not, and the would-be protector was entitled to produce protectors to support his status, if they were in the field. If they were not in the field, no adjournment for their production could be given.

These supporting protectors could themselves be challenged in exactly the same manner, subject to this limitation that a protector to support status of a would-be protector could not be challenged, except on the ground that he was a foreigner. If these supporting protectors survived the challenge, then it was held that their support of the original would-be protector entitled the latter to be sworn.

If there were no protector to his status in the field, the party challenging could appeal to the lord ; and, inasmuch as there could be no status without investiture by the lord, a statement by the lord that investiture had or had not been granted was conclusive.

If the would-be protector could not produce protectors who would support him, or if the lord determined that he had not had investiture, he was not allowed to swear.

If the would-be protector raised the 'arddelw' of denial of being a foreigner alone, he was asserting a negative. The objecting party having asserted a positive was entitled to lead eyewitnesses to establish his assertion—not pro-

tectors—provided the eyewitnesses were in the field. If they were not, no time was granted to him.

These eyewitnesses could be objected to by the would-be protector in exactly the same way as other eyewitnesses, and proof of the objection was heard as proof of objection to an original eyewitness would be heard. There was, in fact, a ' case within a case ' going on. If these eyewitnesses survived the challenge and swore to the protector being a foreigner, the latter could not be heard in the suit.

If the protector raised the third 'arddelw', the challenger had to mention the Cymro whose commended foreigner he asserted the protector to be.

If such Cymro were in the field, he was produced at once, and should he say the protector was not his foreigner, that was conclusive, because the law would not allow property to be forced upon a person against his will. If he were not in the field, there was to be no adjournment for his production. If he alleged that the protector was his foreigner, the ' onus probandi ' shifted on to the protector, who was then entitled to produce protectors to his status, and if his protectors supported him well and good, it was held that he was not a foreigner ; if they failed, the statement of the alleged overlord prevailed, but it could not avail against protectors establishing status.

If the opposite party challenged a protector on the ground that the latter was a coward, the contention was raised by the challenger stating : ' Your word is of no effect against any one, whether it be good or evil. You are a coward, and I have enough who know it.' The protector formally denied the allegation, and the judge then asked the challenger to produce his eyewitnesses to the assertion. No time was granted to produce them, if absent, but, if present, they were produced, sworn as eyewitnesses always were, and subjected to the same objections. They had to swear to ' knowing and seeing ' the protector refusing to go on service with his lord on no less than three occasions. If the necessary number of eyewitnesses survived objections to themselves and swore what was required of them, the protector was rejected.

If the challenge were to the effect that the protector was a 'religious', who had broken his vow, the procedure was identical, the eyewitness in this case being required to swear to 'knowing and seeing' the protector making his vow and breaking it.

In the case of challenge on the ground of perjury the procedure was the same, the eyewitness of the challenger swearing to 'knowing and seeing' the protector giving false evidence and to his doing penance thereafter for his deed.

§ 10. After these proceedings were completed in respect of the first protector, he was rejected or accepted according to the validity or reverse of the challenge. Then the next protector was called forward, and the same procedure gone through with him, and so on until the last protector had been produced and disposed of.

Two protectors were sufficient to support a person's assertion of title or status if they survived challenge, unless more had been promised, but the statements must correspond.

§ 11. The protectors admitted to prove were sworn and heard, and then, if they supported the party calling them, his status or title was established in law: if they failed to support, it was not established.

§ 12. The evidence of a protector could not be denied by the production of any evidence on the other side; it was unrebuttable. But in certain land suits, in which it was possible under the land laws for there to be two distinct sets of 'priedorion' having full title, the other side could then proceed to establish its title by the same process. Title might be better or worse according to the length of occupation, but if both established a four-generation occupation, title was equal, and the law directed a sharing.

If the protectors failed to prove equal or better title, the land went to the claimant; if the protectors of both parties failed to establish title, the land went to the lord.

§ 13. In the case of a surety witness, the fact of whose suretyship was challenged by one of the parties, the only difference in procedure was that his being a surety must be challenged before the surety had placed the sacred relics

to his lips. If he were not challenged then, the challenge being that he was not a surety, he could not be challenged later.

The fact as to whether he was or was not a surety was decided by the production of eyewitnesses.

The challenge was made by the oath of the party challenging, and denied by the surety's oath, followed, it is said, in one authority, by compurgation.

Contract-men were not challenged: their statements were denied, and the question submitted to compurgators.

§ 14. The procedure for producing and challenging eyewitnesses was similar to that pertaining to protectors, but the mode of weighing their evidence was materially different.

When the determination of an issue depended on eyewitnesses, there were two courses open to the opposing side: he could either challenge the witnesses or could produce witnesses in support of his rival contention. He could not produce witnesses to a negative or to deny the other side; he relied on proof of a counter-allegation to nullify the proof of the other party. The same rule occurs in the Laws of the Conqueror, c. 46:

'Absonum videtur et juri contrarium ut probacio fiat super testes qui rem calumpniatam cognoscunt.'

No party could do both, that is, he could not challenge the first party's witness and produce evidence of his own. He could not even challenge some witnesses and produce evidence in support of his own contention to counter others. He must select one line of defence or the other. If he challenged the witnesses, he entered a plea of 'rejection' or an 'objection' against each one successively; if he resolved on offering witnesses, it was said that the parties had committed their 'arddelw' to the witnesses.

§ 15. If the first mode of proceeding were adopted, it followed in the main the lines of challenge in the case of protectors, but there were some differences.

As each eyewitness was produced in order before the court, he made an oral statement, without oath, in the first instance.

The opposing party then 'pressed him to the extremity',

and if he pressed one he must press all, that is he demanded that his statement should be repeated on oath on the relics.

If the eyewitness declined to take the oath, his oral statement was set aside, and the witness stood down. If he took the oath he repeated the statement, and then, and not until then, did the opposing party challenge him by 'rejection' or 'contravention'.

Any one challenging an eyewitness before—and the same rule applied to attestators—was debarred thereafter from challenging, though the Dimetian Code states that objection by 'gwrthneu' could be taken when the witness started his statement.

The reason given is a simple one, viz. that no one knew before the eyewitness spoke what his evidence, which might be favourable to the opposing side, would be.

The objection was made by 'counter-swearing' against the witness, alleging he spoke falsely, and naming the objection against him—feud or what not. If the witness admitted the feud or other objection, or did not deny it, his admission or non-denial was at once certified to the court by attestators, denominated in this case, 'gwrth-tystion', against whom no objection could be taken, and the witness stood down.

If he denied the objection, the opposing party was entitled to establish not that he had spoken falsely, but that there was a feud or other valid objection against him. This was done by the production of eyewitnesses to the objection, they themselves being subject to the same process of objection.

If two or more unimpeachable eyewitnesses in the field swore to the feud, it was held proved, and the original witness was disregarded. If proof of the objection failed, the witness's statement was received as true. The same process was repeated until all the eyewitnesses were disposed of.

§ 16. If the proving party had promised a definite number of eyewitnesses, and one or all of the stated number failed or did not appear, the party failed to establish his case. If he had promised 'enough to know', he could produce as

many as he pleased, and if he succeeded in producing two who were unimpeachable, he had proved his point; if he failed to do so, he failed to prove his point. At least two eyewitnesses, as we have already seen, were essential.

Of course, if there were no defence at all, the proving party simply produced his eyewitnesses, whose evidence was certified to the Court by attestators as being unobjected to.

§ 17. If the opposing party selected the other method of meeting a claim, viz. by the production of witnesses to support his counter-contention, they were produced after the first proving party had produced his. What happened then was peculiar.

They could not be challenged if they were competent and privileged, and the result depended on what the opposing party had promised—witnesses better, superior or more numerous, or simply equal.

The question of superiority, inferiority, or equality of witnesses was left to the judge or bench to decide.

The judges were to be influenced in deciding which was the superior set of witnesses by the comparison of status, respectability, and number. That was the test, and apparently the sole test, of the value of eyewitnesses in competition with one another.

Having weighed the value of the evidence of the eyewitnesses in this balance, the judges decided the matter in favour of that party whose contention was supported by the better witnesses, and, if the witnesses were equal, then, if the defendant had promised better witnesses, the decision was in plaintiff's favour, but if he had promised only equal eyewitnesses, the subject-matter was divided equally, provided title was equal.

§ 18. Attestators, not being 'gwrth-tystion', were dealt with in exactly the same way, and, when the whole case was concluded, either party could produce attestators to certify to the court that this point or the other had not been denied or defended.

§ 19. Now at first sight this system would seem to be open to the charge of prolonging litigation if challenging

were resorted to extensively. It is not likely that that ever was the result, for the reason that no party would, for the mere fun of producing incompetent and demonstrably false testimony, go on doing so indefinitely. Ordinarily, the facts of a case and the standing of protectors and eye-witnesses would be perfectly well known, and common sentiment would not allow a gross abuse of the procedure. Moreover, there was ever present the real spiritual fear of falsely swearing on the sacred relics, and, behind it all lay the power of the Church, for over and over again we are reminded that, if any one gave false testimony, the Church was to proceed against him.

Further, to prevent delay, there was the very definite legal provision that challenging could not be used in order to protract litigation. Witnesses to support challenges must be in the field at the time; and, at most, a case could drag on for not more than one term to another, for, if at the end of that time neither party had failed with his protectors and eyewitnesses, it was held that the plaintiff had not established his contentions.¹

(iv) *Statements not 'evidence'.*

§ 1. There were certain statements, which we would now class as evidence, which in ancient Welsh Law were outside the ordinary procedure relating to evidence.

§ 2. First of all was the statement of plaintiff or defendant. Such statement invariably preceded all witnesses, but it amounted to nothing but a sworn statement of claim, and, if denied by the other side, it proved nothing.

§ 3. The next statement was the statement of a 'lliw' or light, in cases of theft absent, a case in which no 'evidence' was admitted, and which was decided by a compurgation. When a complainant had no personal knowledge of a theft, he could say that he was complaining on the information of a light, and the informer was produced after

¹ V. C. 146-8, 150, 152, 154, 156, 160, 162, 164, 250; D. C. 396, 420, 422, 426, 458, 460-2, 534-6, 588, 590; IV. 28, V. 66, VI. 110, VII. 126, 132, 134, 136, 138, 140, 142, 144, 150-8, 162-4, VIII. 176, 186, 202, IX. 218, 220, 222, 224, 230-4, 242-6, 252, 264, 274, 280, 282, 284, 286, 292, 302, XI. 406, XIV. 568, 634, 654, 660-2, 694, 696, 698, 700, 702, 704, 738.

him to swear to the information given and his knowledge thereof. The information was the basis of the claim, but it was not 'evidence' in the Welsh sense of the term, subject to the rules and results accruing from established proof.

§ 4. The third statement was the statement of an 'arwaesaf' or warrantor in cases of theft present. In such a case the owner of property stolen could proceed against the man in possession by suit to recover possession. The man in possession could, among other defences, plead an 'arddelw' or 'avouchment' of a warrantor, i. e. he could allege that he had received the property bona fide from a third party. He could cite him as his 'warrantor'; and if the warrantor admitted giving the property, the original defendant was freed from the suit, and the 'warrantor' was substituted in his place.

Now it is obvious that a cited 'warrantor', particularly a dishonest one, might refuse to take over responsibility.

It was a cardinal rule of the Welsh law of evidence that no person could deny the evidence of his own 'witnesses'; and, if a 'warrantor' had been a 'witness' of any sort in the eyes of the law, a perfectly innocent defendant would have been deprived of the power of proving his bona fide possession derived from a third person or even complainant.

This impossible situation did not, however, arise; for a 'warrantor' was not a 'witness', and so where a man cited a 'warrantor', and the latter refused to take over responsibility, it was competent for the original defendant to prove by 'eyewitnesses' that the alleged warrantor had delivered the property to him. It can be seen at once, therefore, why the systems of sureties to bargains was an all-important part of the Welsh Civil Law.¹

§ 5. The system of evidence which we have been discussing, dependent upon the formalities of oath and counter-oath, was condemned in violent language by Giraldus Cambrensis, but he clearly did not understand the system, and only saw the externals of what he was condemning.

The best commentary on the system is that it was common

¹ V. 62; VI. 124; VII. 162.

to every European people in the early Middle Ages—not the Welsh only, but the Anglo-Saxons and Germanic tribes without exception.

The Welsh people clung tenaciously to the system, and Edward I, when he swept away the system of compurgation in criminal cases, confirmed the practice of trial by ‘evidences’ in civil matters on the urgent representation of the Welsh themselves. We can with advantage reproduce the fourteenth section of the Statute of Rhuddlan :

‘Whereas the people of Wales have besought us that we would grant unto them that concerning their possessions immoveable, as lands and tenements, the truth may be tried by good and lawful men of the neighbourhood, chosen by consent of parties ; and concerning things moveable, as of contracts, debts, sureties, covenants, trespasses, chattels, and all other moveables of the same sort, they may use the Welsh law whereto they have been accustomed, which was this, that, if a man complain of another upon contracts or things done in such a place that the plaintiff’s case may be proved by those who saw and heard it, when the plaintiff shall establish his case by those witnesses whose testimony cannot be disproved, then he ought to recover the thing in demand and the adverse party be condemned ; and that in other cases, which cannot be proved by persons who saw and heard, the defendant should be put to his purgation, sometimes with a greater number, sometimes with less, according to the quality and quantity of the matter or deed ; and that in theft, if one be taken with the mainour he shall not be admitted to purgation, but he holden for convict. . . .

‘We . . . do grant the premises : yet so that they hold not place in thefts, larcenies, burnings, murders, manslaughters, and manifest and notorious robberies.’

The Normans would have substituted for the system the far more unsatisfactory system of trial by ordeal or wager of battle, which placed the ascertainment of truth in the hands of a Deity, prepared to manifest it through the medium of boiling water, hot iron, mortal combat, or the cursed morsel.

III

THE LAW OF PLEADINGS

1. *Introductory.*

§ 1. Giraldus Cambrensis notes, as one of the characteristics of the Welsh people of his day, ‘that they omit no part of natural rhetoric in the management of civil actions’.

This, on the whole, is a fair summary of the apparently intricate system of pleading prevalent in the old Welsh Laws.

§ 2. The law of pleadings is comparatively a late introduction into any system of law. When the original system, whereby a man was left to seek his own justice by the strong arm, was supplanted by a submission to arbitration, there was no settled form of procedure. The arbitrators discussed the case among themselves without hearing speeches or witnesses ; they were generally cognizant of the facts, and they gave judgement in accordance with the traditions applicable to similar facts.

Out of the arbitrators sprang the courts with the appointment by the King of experts, who had not the same cognizance of facts, but who were skilled in applying the traditional rules to facts once ascertained, i.e. in giving judgement according to rule upon the facts.

Procedure, pleadings, statements of case, production of witnesses, and form of judgement all grew up, when courts were established, to provide for the formal submission of the case to the court’s jurisdiction, for the presentation of the claim and reply, for the proof of contentions, and for the adjudication on the facts ascertained. Hence we find a complete absence of curial procedure in the Irish Laws, which recognized no courts, and a very advanced system in Wales, where courts had been in existence for centuries.

§ 3. The characteristic feature of all early regulations relative to pleadings is a rigid formality to be observed in

stating and answering a claim, failure to observe any one formality frequently vitiating the claim or reply in its entirety. Traces of this ancient characteristic are present in the Welsh Laws as we have them, and we have strong insistence placed on the importance of correct pleadings.

But though traces of this characteristic exist, we have the very striking fact that the Welsh Laws had advanced considerably, and did not, as did early Roman law, make an error in pleading necessarily involve the vitiating of a claim.

§ 4. The effect of an error in pleading is well expressed in the following extract :

'Every kind of fault in pleading, which shall not affect the strength of a suit and its matter altogether, causes a delay in suit, without total failure, and, therefore, it is permitted to recur to law (i. e. to invoke the law again).

'Every kind of fault in pleading, which shall affect the strength of a suit and its matter altogether, so that it do not press upon the mode of a suit and practice of pleading, accords in causing a total failure, with the exception of suits to which are assigned known limits in law, as in a claim beyond a year and the like, and that is a bar to gain upon a completed period.'¹

Again, in the description of defences available, as stated in the XIth Book, p. 446, we are told that a defence, that the claim was one to which no answer was required, could be raised when there had been a fault in pleading (i. e. in plaintiff's statement of claim), which affected the gist and matter of the suit altogether, *though not pressing upon the mode of a suit or the practice of pleading*, such as 'intervention in a common country', or a trifling claim, or the lapse of time, so as to become an everlasting impediment and the like, and that a defence with answering 'so that nothing shall be lost through the claim', resulted in 'impediments of terms, and then it is permitted to have recourse to law'.

Yet again we are told that no title to land could be lost simply through a fault in pleading, unless the fault were thrice repeated; and lastly it is provided that a prosecution, in which a 'dirwy' or 'camlwrw' was payable to the King for the offence charged, could not be thrown out by the use

¹ X. 372, 374.

of a faulty expression by the prosecutor, unless the King or lord permitted it—a provision in marked contrast to the English rule under which an error in the phraseology of an indictment might operate to secure the acquittal of an accused person.¹

§ 5. The import of these extracts is that mere irregularities in pleading had the effect only of forcing the plaintiff to renew his suit in more regular form; that it was not unless there were a legal bar to a suit, such as adverse possession, failure to prosecute within the statutory period after filing, want of interest in the subject-matter of the suit, limitation, and so on, that a suit was to be dismissed entirely; and that no irregularity in pleading could by itself benefit a person accused of an offence.

§ 6. The rigidity demanded in pleadings is characteristic of all laws which possessed any kind of judicature, consensual or compulsory.

It was a feature of early Roman law, it was also a feature of early Germanic law, and, as an illustration of how far it was insisted upon in the latter, we may mention that, among Germanic tribes, it was originally the rule that if in denying the plaintiff's claim, word by word, the defendant stammered, the latter at once lost his case, a provision which throws a definite light on the exclusion of stammerers in Welsh law from giving testimony.

This uniform insistence on rigidity was not without a reason. The reason was that when causes were submitted to arbitration, the fact that the remedy which a man had, wherewith to right a wrong, was force was never lost sight of. The submission to arbitration never forgot that, though it was a substitute for force, it itself was a procedure of coercion, but a coercion which had to be applied according to a well-defined method sanctioned by custom and public opinion, which would suffer no deviation from rule.

2. *The plaint.*

§ 1. The Welsh law of suits divided cases into three main classes—possessory suits for land and for movable property,

¹ D. C. 484, 546.

suits for damages, and prosecutions (*gyrr*). Pleadings naturally vary to some extent according to the nature of the claim.

§ 2. Pleadings proper commenced after the parties had been arranged in court and had furnished sureties to abide law.

The plaintiff must be prepared to plead as soon as sureties had been given; and if he were not so prepared, he was at once non-suited, and judgement was entered in defendant's favour. It is of interest, however, to note, as showing the survival of the original idea that submission to adjudication was consensual, that a plaintiff, who was not prepared to plead before sureties had been given, was fined and was at liberty to withdraw his suit, reserving to himself the right to institute a fresh suit within a year and a day, at the expiration of which term no new suit could be instituted.

§ 3. There was no absolute necessity for a written plaint, but the practice in later times was to initiate proceedings on written plaint.

Several examples of model plaints are given in the XIIth Book.

A perfect plaint had to contain certain particulars; these particulars are called the four bonds of a suit, the 'rhwym dadl', and consisted of the following:

- (i) A statement of the names of parties, the Court or official to whom the plaint was presented. The Court must be mentioned, but it sufficed to designate the official by the title of his office.
- (ii) A statement of the cause of action, i.e. the nature of the property claimed (land, goods, &c.), the plaintiff's title thereto, the name of any security entitling plaintiff to recover possession, and the circumstances in which plaintiff was deprived of his property.
- (iii) A statement showing the exact amount of compensation or the exact amount of property claimed—so many 'erws' of land, so many head of cattle with their qualities, &c.
- (iv) A statement as to the time when the cause of action arose, either by deprivation of property or refusal to restore; together with a statement as to the law of which defendant had committed a breach, i.e. the law of theft, surreption, injury, or what not; provided that it was not necessary to mention the law of which there

had been a breach if the claim were one to recover an 'alltud', one concerned with cattle-trespass where defendant had impounded cattle in a jurisdiction other than that in which the cattle had been seized, or one of 'dadanhudd'.

The effect of omitting one of these 'rhwym dadl' was that there was an ambiguity in the plaint; there was an incomplete demand, and the court could not grant relief without knowing the whole of the grounds on which relief was sought; so a plaint, not containing the four bonds, was inadmissible, but the plaintiff could sue again.

If, however, the omission had only been of the statement of what law had been broken, the judge might at any time inquire and admit amendment 'pro tanto'.

If the plaint contained inaccurate statements of fact, that was quite another matter. Inaccuracy in statement of fact was a 'faulty word', and, when the inaccuracy was established, the plaintiff lost his claim to the extent of the faulty word.¹

3. Cause of action.

§ 1. In using the phrase 'cause of action' (*defnydd hawl*) we are employing a term, which has a more or less definite meaning, often difficult to express in concrete terms, in modern jurisprudence. Using non-technical language, a cause of action means the whole set of circumstances which entitle a person affected thereby to a remedy against a person or persons responsible for such circumstances.

§ 2. That does not quite cover what was meant by 'defnydd hawl'. It included that; but it meant more especially the manifestation of those facts or circumstances by a particular episode entitling the person affected to sue.

What is meant will, perhaps, be more easily understood by considering how the Welsh Laws dealt with the matter.

Every cause of action, it is said, must be based on a sight, or a word, or a deed; there could be no cause of action, for example, based on a thought; there must be a manifestation by means of something overt.

¹ G. C. 756; IV. 22, 24; VIII. 202; IX. 242, 244, 252; X. 316, 318, 384, 390; XI. 400, 424, 440, 442; XIV. 614.

Every sight, word, or deed did not, of course, constitute a cause of action; it must be a sight, word, or deed infringing a law.

§ 3. Three sights (*golwg*) are mentioned on which an action could be brought; the sight of a witness as to what he had seen, the sight of an informer as to what he gave information about, and the sight of an accessory to the crime of homicide, theft, or arson.

The meaning of this characteristic Triad is at first sight obscure; but its connotation is that one who was an accessory to murder, &c., by seeing and not interfering to prevent, could be proceeded against criminally because of his 'sight', that in theft cases, where the owner had no personal knowledge of the facts, he could take action on the information given by a person seeing the thief in possession of the stolen property, and that issues of fact in cases which were not to be decided by compurgation, but by evidence, must be supported by the testimony of 'eyewitnesses', i.e. men who knew and had seen the facts.

§ 4. Likewise, it is stated that there were three causes of action based on words: the utterance of a word causing 'tongue-wound', the utterance of a faulty word, and the utterance of a word by an accessory amounting to tongue-reddening in homicide, theft, or arson.

This again is a typical Triad, where three facts, often essentially different, were strung together because they had one common factor, in this instance the 'use of words'.

The meaning of the provision is that one who was an accessory to murder, &c., by spoken encouragement or conspiracy, could be proceeded against because of his word, that a person insulting the King, the judge in court or the King's priest, could be prosecuted for 'tongue-wound', and that the use of a faulty word, though depriving a party of his remedy in that suit, did not operate to bar a new suit.

'Faulty words' occurred only in pleadings, and might be faulty because of their excess or insufficiency. They could be uttered by a plaintiff in stating his claim, by a defendant in defending, and by a defendant in denying. If a plaintiff uttered a word in excess or too little he lost his claim 'pro

tanto'; and though the Codes do not mention a subsequent suit, the later laws do in respect of the part affected by the error; e.g. if a plaintiff, entitled to ten 'erws' of land, claimed only seven by error, he could not later in that suit ask for the full ten, but he could bring a subsequent suit for the three he had omitted in his pleadings: hence his faulty word gave him a 'cause of action' in the Welsh sense of the term. A defendant uttering a faulty word in defending or denying, i.e. in not replying in full to the claim made, lost his defence 'pro tanto', and was fined a 'camlwrw' for not answering fully, the recovery of which operated as a cause of action to the King.

§ 5. In regard to causes of action based on deeds, the commentators do not attempt to compress the deeds into Triadic form. It is frankly admitted that 'the law is not competent to show nor to declare what several deeds are matters of action'; but it is pointed out that every deed committed against law was a cause of action to him affected by it against the person doing the deed, and further that there were certain deeds done by a man which entitled him to a remedy, e.g. where a man had performed labour on land or the like, he had a cause of action to recover payment from the man on whose behalf he had done the work.¹

4. *Pleadings on appearance in court. General.*

§ 1. We may now turn to consider the pleadings on the appearance of parties in court after they had been arranged.

In both trials by compurgation and evidences, oral pleadings were commenced by the plaintiff making a statement of his case on oath, with the same particulars as those which have been recited as requisite in a plaint.

To this statement defendant replied—if it were a civil case, after obtaining time for aid, if a criminal case, immediately.

A refusal by defendant to plead, if he were called on three times, was tantamount to a confession of claim, and judgement was given in plaintiff's favour.

§ 2. If the case were one to be decided by compurgation, there were two forms of reply open to the defendant, an

¹ D. C. 456, 458; X. 394; XI. 434, 436, 438, 440.

acknowledgement or a denial. If there were an acknowledgement, that ended the case; if there were a denial, the question was submitted to compurgators adjudicated upon the defendant.

§ 3. If the case were one to be decided by 'evidences', there were three forms of reply open; an acknowledgement, a denial, and a defence, or what is frequently termed the raising of an 'arddelw' or avouchment, a system of trial which survived in civil cases until abolished in the reign of Henry VIII.

In one case in which compurgation was the appropriate form of trial, an avouchment could be raised, with the result that the character of the suit was at once changed, and it became triable by 'evidences' and not by compurgators. That was the case of theft absent where an avouchment of custody of guests was raised.

§ 4. An acknowledgement it is quite easy to understand, so also a denial.

An acknowledgement was simply an admission of the claim, and might be partial or complete. If there were only a partial acknowledgement, that part which was not acknowledged had to be denied or defended, just as if the whole claim had been denied or defended.

§ 5. A denial was a repudiation of the claim in whole or part. A denial had to be made by reciting the plaintiff's claim and denying it word by word. There could be no denial by a general statement to the effect that 'I deny everything you have urged'; the denial must be clear, detailed, and immediate, and the omission to deny any one allegation of plaintiff was construed as an acknowledgement of that part.

It was not permissible for a party, called on to plead, to consult with his advocate as to whether he would admit or deny any fact alleged, and any attempt to consult operated as an acknowledgement.

As soon as a fact was alleged and denied, that fact became a fact in issue, and a decision upon it was come to either by compurgation or after hearing 'evidences', according to whichever was the appropriate method prescribed by law.

§ 6. It is extremely difficult to express in modern terminology what was meant by a 'defence' of avouchment.

Wales had no monopoly of this method of pleading; it was prevalent among the early English and Germanic tribes, but nowhere is its mode of operation described with such detail as it is in the Welsh Laws.

Perhaps the best description of the system is to be found in the somewhat archaic language of the VIIth Book:

'A lawful "arddelw" is a stay of law; and a stay of law is anything that shall turn the law from the subject concerning which there is a mutual arguing to another thing which shall be as good as it or better, so as to become necessary to arrest the law in respect of it (i.e. the original subject) or in respect to the testimony that shall be produced thereon.'¹

In other words the defendant neither admitted nor denied the claim made: what he did was to make a statement alleging facts which, if true, put the plaintiff out of court at once. It consisted in opposing a new case to that of plaintiffs. That statement of defendant became the fact in issue, and the decision on the original fact asserted by plaintiff was stayed until a decision was come to on the statement made by defendant.

The importance in practice of 'avouchment' was that the defendant acquired the privilege of proving it, diverting proof from plaintiff's original allegation, the privilege of which was plaintiff's, to the defendant's new statement.

To an 'avouchment' raised by the defendant, it became necessary for the plaintiff, in his turn, to admit or deny it or to raise a 'counter-avouchment', which in its turn went to the root of defendant's 'avouchment'. If he admitted the 'avouchment', he was out of court on the whole of his claim; if he denied it, evidence was led by defendant to prove it; if he raised a counter-avouchment, he stayed the law as regards the defendant's 'avouchment' and diverted proof from it to his counter-avouchment, thereby recapturing the privilege of proof—proof not on the original claim, but on the counter-avouchment.

To this counter-avouchment again the defendant could reply by admission or denial or a still further avouchment,

¹ VII 156

and so on until the pleadings were reduced to a series of 'avouchments', the last of which must either be acknowledged or denied.

The decision on the last 'avouchment' governed the whole case, for each 'avouchment' must go to the root of its predecessor, and the point in issue was, by this process, narrowed down to a single fact.

§ 7. To deal at present only with the broad outlines of 'avouchment', we find that there were two kinds of 'avouchment' which could be raised, that of law or 'status', and that of fact.

An 'avouchment' of law was similar to what is, in some systems of law, called a preliminary plea in law, a legal plea striking at the root of plaintiff's claim altogether, making it possible to decide the case on that plea without going into the merits of the case at all.

The defendant neither admitted the facts nor denied them: he raised a plea in law which absolved him from admitting or denying. For example, he might plead that the claim was either time-barred or barred by the rule of 'res judicata'. That plea diverted proof from the question of facts alleged in the plaint to the question whether the claim was time-barred or 'res judicata'.

But the raising of such a plea differed very materially from the raising of a preliminary plea in modern law; for, though if a preliminary plea be found in favour of defendant urging it, the plaintiff is at once out of court, the defendant is not if he loses it, he can still plead on the merits. Under old Welsh law, however, if a defendant raised an avouchment and lost it, he lost the whole case.

§ 8. A long list of 'avouchments' in law, as distinct from 'avouchments' of fact, can be gleaned from various parts of the authorities. The list includes:

- (i) A contention that the plaint or claim was illegal on the ground that plaintiff had no status to sue, or that the suit was premature or filed at the wrong time.
- (ii) A contention that defendant was absolved from answering in the court, in which the suit was filed, by virtue of the fact that the court had no jurisdiction over him, e.g. that he was a clerk in holy orders, not subject to the 'cymwd' court.

- (iii) A contention that the claim was 'res judicata'; a 'trifling claim' as it is termed in the laws.
- (iv) A contention that the plaint was defective, e.g. that it did not in itself amount to an assertion of facts corresponding to the law to which appeal was made; as, for instance, where a plaintiff sued for 'violence' on facts, which, if true, did not amount to 'violence' in law, or that the person claiming had no interest in the subject matter of suit, or that there had been no legal summons, or that the property claimed was not fully specified, or the relief claimed was not given, or the parties were not named, or the time of an alleged contract was not mentioned.

It is probable that many of these 'avouchments' (some of which could be countered by amendment) were of later growth than the time of Hywel Dda, and indeed that is the inference to be drawn from the fact that some are not found in the Codes, and from the terms of a passage in the Xth Book, which says that among the pleas not found in the Law of Hywel Dda were certain unspecified avouchments.

§ 9. The operation of an avouchment of fact was similar. The defendant, instead of denying or admitting the claim, asserted a fact which, if true, was absolutely inconsistent with the claim made, and the law was diverted from ascertaining whether the original fact alleged was true or not, to ascertaining whether the new fact alleged was true or not. We may illustrate by means of an example. A man might be charged with having committed theft by night, the property not being found, i. e. a case of theft absent. Instead of admitting or denying the charge, he could raise the avouchment of custody of guests, that is, he could assert that on the particular night on which he was alleged to have committed theft, he was in the house of another man as his guest.

This particular charge, theft absent, was ordinarily submitted for decision to compurgation, but if the 'avouchment' were raised, the law was at once stayed. No compurgators were called, and the inquiry was diverted from the question whether accused had committed theft to the question whether, on the night in question, he was in the house of his alleged host, a fact he had the right to prove by 'protectors'. If he succeeded, the charge failed; if he did not, the failure operated as an acknowledgement.

§ 10. An 'avouchment', once set up, could not be receded from or denied by the person putting it forward; the defence was based irrevocably on the 'avouchment', which was to be proved by appropriate 'evidence'; and if the 'avouchment' failed, the whole case was adjudged against the person raising it.

§ 11. Every reply to a claim had to be confined strictly to that which was urged, and so an 'avouchment' must strike at the root of plaintiff's claim.

A negative did not form an 'avouchment'; it constituted a denial, hence the facts alleged must raise a new point. It must cut the ground from under the opposing party's feet, hence a counter-claim (*arhawl*), or to use modern language, a 'set-off', could not be claimed, as if any one had a set-off against a plaintiff, his remedy was not to urge it in answer to the claim, but to proceed upon it as a separate cause of action in a separate suit. This is in very marked contradistinction to the Irish Laws, where a Brehon, called in as arbitrator, took into consideration all manners of set-off in making up his accounts between parties.

§ 12. The system, though at first sight complicated and difficult to describe, was as a matter of fact very simple. There was plenty of room for ingenuity in pleading, but the procedure was inexorable. Parties were fixed down gradually to definite facts in issue, and it was impossible to indulge in speculative pleas in the hopes of defeating one's opponent on a side-issue without risk in case of failure; it was impossible, too, to indulge in alternative or contradictory pleas, or to drag into a case matters extraneous to it. The issue was clearly defined, and on its decision the case turned.

§ 13. When the pleadings had been completed and reduced to writing, they were recited by the presiding judge. Parties were asked if they accepted the pleadings, and if they did not, they were at liberty at this stage, and at this stage only, to amend them.

After amendment they were again recited by the presiding judge. The judges and the priest then withdrew to another part of the field for consultation, and any one interrupting was fined three kine.

On retirement, the priest opened proceedings with a prayer for guidance, and the judges repeated the Pater-noster.

The pleadings were recited once more, and consideration was given to the question whether it was possible to dispose of the issue without further information.

If it could not be, a date, the date for loss and gain, was accorded for compurgation or 'evidences', whichever was appropriate.

§ 14. Before passing on to consider the actual pleadings in specific cases, we may mention, in the briefest terms, the system prevalent in Rome during the formulary period, in which there is a striking resemblance to the Welsh system of pleading.

During the formulary period parties were called before the magistrate, who recorded the pleadings and reduced the case in dispute to clear and definite issues. These issues were forwarded to the Judex, who had to determine what the law was, if the issue were established.

The pleadings or formulae submitted to the Judex consisted of:

- (a) The 'demonstratio' or statement of facts of plaintiff's claim.
- (b) The 'intentio' or statement of relief claimed.
- (c) The 'condemnatio' or form the judgement was to take, if the claim were established or disproved.

If the 'demonstratio' were admitted, the defendant could combat the 'intentio' by urging 'exceptiones'. For example, in a claim to recover a debt, defendant might admit all the facts on which the plaintiff relied, but urge as against the 'intentio' or relief claimed that the transaction was tainted by fraud. The formula was then, say: 'Thus is the relief claimed, if fraud be not established', and the question of fraud would go to the Judex for decision.

Here we have what is almost equivalent to the Welsh 'arddelw'.

To an 'exceptio' the plaintiff could plead a 'replicatio', to which again there could be a 'duplicatio', a 'triplicatio', and so on.

The object of the procedure was to get the facts in issue stated clearly and distinctly, and once they were ascertained they were reduced to formulae for decision upon.

The 'judex' and parties were confined strictly to that which appeared in the formulae, and no one could travel outside the formulae.

§ 15. The system, moreover, is identical with that prevalent among the Germanic and Anglo-Saxon tribes, but we need not here give any references, except in regard to the prohibition on counter-claims being made in a suit, which were expressly forbidden in the *Sachsenspiegel*, III. 2, the *Stat. Stradensis*, p. 554, and in the *Laws of Cnut*, c. 24.

§ 16. We may further note the identification of 'denial', 'avouchment of fact', and 'avouchment of law' with the ordinary medieval division of pleadings into traverse, confession and avoidance, and demurrer, under which, where objection was taken on a point of law, the objector was considered as thereby admitting the truth of an opponent's allegations as to fact.

§ 17. It is worth while also quoting here Prof. Vinogradoff's illuminating account of early legal procedure:

'The history of Common Law procedure presents special opportunities for watching the peculiar combination between rules of logic and the requirements of practical life as conceived and formulated by lawyers. . . .

' . . . The introduction of popular opinion as a factor in deciding the trial made it necessary for the judges to take special care that the moves of the opponents in the legal struggle should be reduced to their simplest and most regular expression.

' . . . The principal feature of this system (of pleading) was the joining of issue, the reduction of matters in dispute to a definite contradiction between "assertion" and "denial", between "yes" and "no".'

§ 18. We may now turn to the pleadings in the various suits referred to in the Welsh Laws, dealing with them in detail in the following order: land suits, civil suits, and criminal suits.

By doing so we will appreciate how in particular cases the general principles were applied.

It must be said that in the laws, which after all said and

done, were only lawyer's notes, there is at times some confusion, not to say contradiction, but they are all resolvable with care.

We fortunately have in the VIIth Book a compilation on pleadings made by an extremely capable lawyer; and MS. 'G', a transcript of the thirteenth century to be found in the Hengwrt Collection, is extraordinarily clear¹

5. *Pleadings in land suits.*

§ 1. The Venedotian Code says there were three claims for land, 'priodolder', 'dadanhudd', and 'ymwrthyn'; but it refers to the following land suits in other places: 'priodolder', 'ach ac edryf', 'dadanhudd', 'ymwrthyn', 'rhan', and 'mamwys'.

It gives no detailed account of the pleadings in suits, other than 'priodolder' suits, and its account of the method of pleading in a 'priodolder' suit, though brief and succinct, is incomplete as to the order in which 'evidence' was to be led and heard.

§ 2. The Dimetian Code is almost silent on the matter of pleadings. It refers to the exhibition (*dangosso*) of a claim and defence, and states one of the practices of law was the maintenance of a lawful mode of procedure in investigation in court, 'as the men of the court and the judges may choose, whether by word after word or turn after turn', but beyond that there is little mention of the form of pleadings, while the Gwentian Code has even less to say than the Dimetian.

This is in marked contrast to the disquisitions in the commentaries, which nevertheless are but elaborations of the Venedotian account.²

(i) 'Priodolder' suits and suits of 'ach ac edryf'.

§ 1. The most important land suit was the suit of 'priodolder', of which there were two forms, a suit of 'priodolder' proper and a suit of 'ach ac edryf'.

§ 2. We have noted in the land laws and the law of

¹ V. C. 146, 148, 164, 166; D. C. 464, 466; IV. 26, 28; VII. 128, 154, 156; VIII. 202; IX. 244, 252; X. 324, 326, 378, 384, 394; XI. 396, 444, 446, 448; XIV. 568, 570, 626, 628, 650, 734.

² V. C. 146, 148, 174; D. C. 420, 534, 536, 588.

limitation that a man became 'priodawr' of land, where it had been held by four successive generations of his family; also that abandonment of land did not immediately involve loss of title to recover; and, that where abandonment had been followed by residence in a strange country, it was competent for any one up to the ninth descent to claim recovery, but if the abandonment had been followed by residence in the same country and continued for three generations, the right to recover was extinguished thereafter.

We also noticed that, during the period of absence, some other person or persons might have entered into possession of the land, and by occupation for four successive generations have acquired for themselves 'priodolder' rights.

§ 3. A suit by 'ach ac edryf' was one where a person, out of possession of ancestral land, claimed recovery thereof from persons related to himself on the basis of being entitled to it by kin and descent (*ach ac edryf*) from an ancestor common to both of them; a claim of 'priodolder proper' was a claim against new occupiers, who might or might not have become 'priodorion' themselves by occupation for four generations.

In the former case the question as to whether the plaintiff was of the same kin and descent as the persons holding the land was referred to the elders of the country to report upon before the defendant was called. If they reported favourably, the defendant could not deny the actual relationship; if they reported adversely, the plaintiff was not allowed to proceed.

§ 4. In describing the pleadings the Venedotian Code apparently only contemplates possession being held by new occupiers. It does not draw any definite distinction between the two; but the Anomalous Laws mention the suits as separate, and particularly assert that a suit by kin and descent could not be pursued except against a stock of co-relatives having the same common ancestor as the plaintiff.

In the actual procedure there was no difference beyond that involved in the elders' return.

§ 5. The Venedotian Code says that on being called upon to state his case, plaintiff made the following assertions:

- (i) that he was the true 'priodawr' of the land in suit by 'kin and descent';
- (ii) that he had been unlawfully ejected;
- (iii) that he was appealing to the law to be reinstated in his property; and
- (iv) that if his allegations were doubted, he had enough to know, i. e. to prove his contentions.

To this the defendant replied, if he contested, as follows:

- (i) that he himself was 'priodawr' and was protecting his land;
- (ii) that if plaintiff was 'priodawr' he had departed from the land of his own accord;
- (iii) that he had enough to know.

The contentions here raised are not so sharply defined as we shall find they were in the Anomalous Laws, and the clear distinction between denial and avouchment is not drawn.

The procedure, however, followed was that applicable to a denial; plaintiff's eyewitnesses being heard first on the question of eviction, then defendant's, followed by the protectors of both parties to title.

No reference is made to a defence going to the root of the case.

§ 6. The account given in the VIIth Book is very clear. In describing the pleadings, it states that plaintiff was to set forth his claim and its extent, and to assert:

- (i) that he was 'priodawr' by kin and descent, having 'protectors to prove title';
- (ii) that he had been unlawfully ejected, and had eyewitnesses to prove the fact.

It then proceeds to enumerate the replies open to defendant—acknowledgement, denial, avouchment.

If there were acknowledgement, plaintiff at once obtained his relief; if there were a bare denial of title and of ejection, plaintiff was entitled to produce his protectors and eyewitnesses to establish his case.

If the defendant's plea took the form of an assertion that, if the plaintiff were a 'priodawr', he had departed lawfully from the land (the form of plea as stated in the Venedotian

Code), that was regarded as a simple denial and not an avouchment, and the right of plaintiff to lead evidence was not affected.

Avouchments going to the root of the case are, however, mentioned.

The instance given is a plea of 'res judicata', an avouchment. This, which was an absolute bar to the suit, must be admitted, denied, or countered by the plaintiff. If he admitted, his case was lost; if he denied, the right to lead evidence on the point was defendant's; if he did neither one nor the other, he could raise a counter-avouchment, asserting that the former judgement had been reversed on appeal, and that subsequent thereto the plaintiff had been dispossessed. If defendant acknowledged this counter-defence, plaintiff's original claim was decreed; if he denied it, plaintiff could prove the fact by eyewitnesses, and if he failed to prove it, he lost his case.

§ 7. The IXth Book gives identically the same form of assertion by the plaintiff, and states defendant must acknowledge, deny, or raise an avouchment that he was neither to deny nor acknowledge. The same results are mentioned as following from denial and acknowledgement, and two avouchments are indicated, one that plaintiff had already had his proper share in the land (i. e. there had been an adjustment out of court), and the other that it was 'res judicata'.

To the avouchment there was to be an acknowledgement or denial, no reference being made to a counter-avouchment. If there were an acknowledgement, plaintiff's case was lost; if there were a denial, defendant was entitled to lead evidence in proof, the decision on the whole case being determined by the decision on that issue.

§ 8. The Xth Book is briefer. It states that when the plaint was before the court defendant was to produce a lawful avouchment if he had one, mentioning as such (a) an assertion that plaintiff had abandoned his land and lost all right to it by absence in the same country for three generations, (b) an assertion of 'car-departure', i. e. abandonment by residence in a foreign country beyond the period

entitling plaintiff to return, or (c) any other lawful avouchment.

Here there was no denial of plaintiff's claim, but an assertion of facts which, if true, cut the ground from under plaintiff's feet.

Plaintiff was given the option of admitting, denying (in which case defendant had the right to lead evidence), or setting up a counter-avouchment, to which, in his turn, the defendant must reply by acknowledgement or denial, leaving the fact last denied as the issue in the case on the determination of which the whole case hinged.

§ 9. A very similar form of pleading in land cases existed among the Bavarians, see *Lex Baiuor.*, Tit. XVII, c. 2.¹

(ii) A suit of 'ymwrthyn' or mutual strife.

§ 1. This case is referred to, but the pleadings are not considered, in the Venedotian Code.

A suit of 'ymwrthyn' was one brought by one of two persons in possession of the same land, the allegation being that the defendant had come into possession by trespassing (*gormes*), and the relief sought being eviction of the trespasser.

It is interesting because the principal point in issue must be title.

§ 2. The pleadings given in the VIIth Book are:

- (i) an assertion by the plaintiff that he had sole 'priodolder' rights in the land, with protectors to prove;
- (ii) an allegation of trespass with eyewitnesses to establish the fact.

The cause of action being defendant's admitted possession, there could be no dispute on that point; the whole case turned on title.

Here again defendant might admit, deny, or raise an avouchment; the same results following as in a 'priodolder' suit. If he alleged his own title, this was merely a denial of plaintiff's assertion, and did not divert plaintiff's right to lead proof as to his own sole title; and defendant could not allege his own sole title, for to evict plaintiff, also in possession, would require a separate suit on the principle

¹ V. C. 146, 148, 152, 172; D. C. 452, 454, 536, 588; G. C. 758, 762; VII. 130; IX. 272, 274, 276, X. 378; XI. 430.

that counter-claims could not be adjudicated upon in the same suit.

If, however, instead of acknowledging or denying, defendant wished to raise an avouchment, there was one of such a character available as to avoid all reference to plaintiff's title. He could urge that he had been in possession for so long a time without interruption as to amount to an 'intervention of country', that is that he had been in possession for three generations, without disturbance, an assertion which, if proved, entitled him to resist eviction.

The law was at once turned from the question of title and unlawful trespass to the consideration of the plea as to whether the defendant's possession, however it arose, had been acquiesced in for such a period of time as to entitle him to remain in possession, and defendant acquired the right to lead proof if plaintiff denied.

§ 3. The account in the IXth Book is meagre. Plaintiff is represented as asserting sole 'priodolder' rights with protectors to prove and eyewitnesses to show that the land came to him from his family stock on partition. Defendant's reply amounts simply to a statement to the same effect, and this authority gives defendant the right to lead protectors and eyewitnesses, followed by plaintiff. In this it differs from the more logical view of the VIIth Book.¹

(iii) A suit of 'dadanhudd'.

§ 1. The next land suit to consider is the suit of 'dadanhudd'. A suit of 'dadanhudd' was of the nature of a suit for specific relief. It could only be brought by the son or grandson of a man alleged to have been in possession of the land in suit at the time of his death. The son came on to the land, demanding the right of 'dadanhudd', that is the right to uncover the hearth of his father upon the land.

In a true 'dadanhudd' suit no question of 'priodolder' title arose; there were two facts only to consider: (a) had plaintiff's father at the time of his death a hearth upon the land? and (b) had plaintiff been prevented by defendant from continuing the possession of his father?

A case of 'dadanhudd' might be based on 'tilth and

ploughing', 'car', or 'bundle and burthen'. These terms have already been explained.

The pleadings in all three were identical, and the difference between the suits lay in the nature of the reliefs that could be granted.

§ 2. In the VIIth Book we are informed that a plaintiff in 'dadanhudd', having entered on the land, asserted:

- (i) that his father had been in occupation of the land through investiture and cultivation;
- (ii) that he had eyewitnesses to prove;
- (iii) that he had been unlawfully ejected, with eyewitnesses to prove.

No title was asserted; nothing but occupation which sufficed to give any man the right to temporary 'dadanhudd' occupation. Defendant could admit or deny.

If he alleged he was 'priodawr', that was an assertion of title, which could not be gone into in a true 'dadanhudd' suit; and if he asserted plaintiff had departed of his own free will, that was a mere denial of unlawful ejection, which did not divert the court from the question in issue or take away from plaintiff the right of proof.

An avouchment of law was, however, open, if he asserted that plaintiff had had 'dadanhudd' possession, and had subsequently been ejected. This was in effect a plea of 'res judicata', for 'dadanhudd' possession could only be claimed once, and a person illegally ejected, after obtaining 'dadanhudd' possession, must sue to recover possession by a 'priodolder' suit.

If this avouchment were raised, the question in issue became not whether plaintiff was entitled to 'dadanhudd', but whether he had had it, and defendant was entitled to lead proof, which if established, debarred plaintiff claiming for fresh 'dadanhudd'.

In a strict suit for 'dadanhudd' the successful plaintiff got specific relief and held for a period varying according to whether he claimed by 'tilth and ploughing', 'car', or 'bundle and burthen'. There was no judgement in his favour as to title, and he got possession not as a 'priodawr', but as a custodian. At the end of the period for which he got

¹ VII. 134, 136, 138; IX. 270, 284.

possession, defendant was entitled to sue for recovery by a 'priodolder' suit, in which the question of title was considered. So, too, if plaintiff failed to get 'dadanhudd' possession, he was not debarred from suing as a 'priodawr'.

§ 3. The IXth Book gives the same grounds of suit, and the replies are a denial of eviction, in which case the plaintiff was entitled to prove eviction by eyewitnesses, and get possession if he could do so, and an avouchment that he, defendant, was in possession by 'dadanhudd' in his favour.

Two persons with different fathers might both be entitled to 'dadanhudd', if their fathers had successively died on the land with a hearth thereon.

Defendant, by raising that plea, asserted a temporary title, which did not contravert plaintiff's assertions, but it went to the root of the claim, for 'one dadanhudd cannot be imposed upon another', that is, while the 'dadanhudd' period of one person was unexpired no other person could claim.

This defendant was entitled to establish by protectors, and, if he succeeded in establishing it, plaintiff must sue for 'priodolder' possession or await the expiry of the defendant's 'dadanhudd' possession.

But plaintiff, without denying defendant's allegation, could raise a counter-avouchment by asserting that the period of defendant's 'dadanhudd' had expired, and that he was seeking, not to enforce one 'dadanhudd' on top of another, but to enforce his own 'dadanhudd' on land held otherwise. Defendant must acknowledge or deny, and the issue was narrowed down to the point as to whether defendant's possession had exceeded the legal 'dadanhudd' period. Everything else in the case, by not denying, had been admitted.

§ 4. The IXth Book does contemplate the plaintiff asserting title in a 'dadanhudd' suit and the production of protectors thereto; but it is obvious that, if he did so, his suit was regarded, as against defendant in possession, not as a 'dadanhudd' suit, but as a 'priodolder' one, for his possession, if he succeeded in establishing title through protectors, became permanent, 'for', as the commentator says, 'he can never be disturbed thereafter'. The circum-

stances in which title could legally arise in a 'dadanhudd' suit have been indicated above (Pt. II, c. ix, § 4).

The IXth Book makes it clear that a person ejected by a 'dadanhudd' claim could sue by a 'priodolder' suit to recover possession, alleging title, with protectors to prove, and trespass, with eyewitnesses to support. The possessor by 'dadanhudd' replied by asserting his own title, and this authority gave him the right to lead protectors, asserting that where title was disputed the man in possession always led protectors.

§ 5. The assertions of plaintiff are given in practically the same terms in the XIVth Book; so, too, the replies, viz. denial of eviction or assertion of defendant's own prior 'dadanhudd'.

If there were denial of eviction, plaintiff produced eyewitnesses; if there were assertion of prior 'dadanhudd', plaintiff must deny or raise a counter-avouchment that the period of defendant's 'dadanhudd' had expired.

The account is meagre, but it agrees with what the other authorities say. It further agrees that title need not be asserted in a 'dadanhudd' suit; but if asserted, the suit was treated as a 'priodolder' suit having final effect.¹

(iv) A suit of 'rhan' (partition)

§ 1. The suit of 'rhan' was a suit to enforce possession of a share in 'tref tadawc' by partition or readjustment of partition between members of a family of the same generation—two brothers, cousins, or second cousins.

The suit could not be employed by any one related to defendants beyond that degree of relationship, nor could any one within that degree claim for 'priodolder', for the latter suit presupposed a claim for the whole land and not for a share.

§ 2. In this case plaintiff, according to the VIIth Book, recited:

- (i) how he was entitled to a share, i. e. his title with protectors to prove; and
- (ii) that he had not received a share, with eyewitnesses to establish that fact.

¹ D. C. 466; VII. 140 et seq.; IX. 276 et seq.; XIV. 738.

If title were denied, plaintiff led proof; if the defendant simply alleged plaintiff had received a share, it depended entirely on plaintiff's reply as to who led proof. If he simply denied defendant's counter-assertion, he waived his own right to lead eyewitnesses; but if he were wise, he would point out that defendant's reply was not an avouchment, but a denial, in which case plaintiff led proof; the reply, being a denial, would debar defendant from raising another avouchment.

If, however, instead of counter-alleging that plaintiff had received a share, defendant said, 'I am not to answer to his claim as I have already shared with him', it was an avouchment, and plaintiff must acknowledge, deny, or raise a counter-avouchment, which might take the form of admitting a partition, but asserting that only part of the land liable to partition and claimed had been shared. If there were a denial of partition, defendant led proof; if there were a counter-avouchment of partial sharing only, defendant must admit or deny, plaintiff in the latter case leading proof.

§ 3. In the IXth Book the account given is briefer. The assertions of plaintiff are the same as in the VIIth Book, to which defendant must reply by acknowledgement, denial, or avouchment that he was not to answer. If there were denial, plaintiff led proof. The avouchment referred to is an assertion of complete sharing to be met by a denial or counter-avouchment.

The IXth Book does not differentiate, as does the VIIth Book, between the two ways of urging defendant's avouchment, and treats the assertion not as a denial, but as raising a new issue, which defendant was entitled to establish, unless countered by a counter-avouchment. The counter-avouchment mentioned is an allegation of partial sharing, which, according to this authority, would not be admitted as an avouchment if defendant had asserted a complete sharing, but would be regarded as a denial entitling defendant to lead proof.

There is here a difference of opinion as to whether a proper avouchment had been raised or not; but the principle

followed is the same in both cases, viz. that that was an avouchment, changing the issue, which went to the root of the assertion which it was attempted to counter.

This authority further mentions the avouchment of law by pleading 'res judicata', which gave the defendant the right to establish it.¹

(v) The suit of 'mamwys'.

§ 1. An interesting case illustrative of pleadings is the suit of 'mamwys', in which a plaintiff, the son of a foreigner by a Cymraes, claimed a share in land from the relatives of his mother, who had given her in marriage, or had handed her over as a hostage, or had not adequately protected her.

§ 2. In this case there was no assertion of title, but an assertion of facts, which, if proved, gave plaintiff a right to a share in land. Hence we find no mention of protectors.

The plaintiff asserted his mother was a Welshwoman given by defendant in marriage to a foreigner, and claimed a share not as a 'priodawr', but as an inheritor, and stated he had eyewitnesses to prove.

If defendants merely denied the allegation, plaintiff led proof.

Defendant could, however, raise avouchment. Two pleas are mentioned, viz.:

- (i) an assertion that the Welshwoman, their relation, had been married to a Cymro and not a foreigner, and that consequently plaintiff was entitled to 'tref tadawc' elsewhere;
- (ii) an assertion that though plaintiff's mother had been married to a foreigner, he, plaintiff, had received land after claiming by 'mamwys' elsewhere.

The author of the VIIth Book draws a very clear distinction between these two pleas. The latter was a clear avouchment of 'res judicata' or of settlement out of court, which defendants were entitled to prove, if denied, as it went straight to the root of the claim; the former was in reality a denial of plaintiff's assertion that his father was a foreigner, and if plaintiff pressed the point that it was

¹ VII. 164 et seq.; IX. 292-4; XI. 432.

a denial and not an avouchment, the plea was treated as a denial entitling plaintiff to lead.

§ 3. The IXth Book gives exactly the same pleadings, and in dealing with the avouchments points out that if the defence raised was that plaintiff's mother was not related to the defendant at all, it would not be an avouchment, but a denial, for plaintiff's case was based on an assertion of relationship.

An avouchment must raise fresh facts separate from what had been asserted; a defence which did not do so was a denial.

If defendants had asserted that plaintiff was entitled to 'tref tadawc' elsewhere, there was a new fact asserted which went to the root of plaintiff's claim, for no person could have 'tref tadawc' from two sources, and so this defence was an avouchment to be acknowledged, denied, or countered by a counter-avouchment.

The IXth Book also mentions the avouchment of 'res judicata'.

§ 4. The suit is mentioned also in the XIVth Book, but that authority confines itself to saying that where a man sued as the son of a violated hostage, he could not prove violation by eyewitnesses, as violation was a matter for compurgators to determine, and likewise that where a man sued on the ground that he had avenged one of his mother's kin and was entitled to a share in their land, he could not prove he had committed murder by eyewitnesses, for the fact of murder was also a question for compurgators, but what he could do was to prove that proceedings had been taken in respect to violation or murder in court.¹

(vi) Suit to demarcate boundaries.

§ 1. As already noticed elsewhere, the demarcation of boundaries was not a judicial function; where there was a dispute as to boundaries between two persons, he who had superior status was entitled to demarcate.

The principal question for decision, therefore, when a suit for demarcation was filed, was which of the two contesting parties had superior status entitling him to demarcate.

§ 2. The plaintiff, in demanding demarcation, asserted he

¹ VII. 138; IX. 284, XIV. 734 et seq.

had superior status with protectors to prove. Again, defendant could acknowledge, deny, or raise an avouchment. If he denied, plaintiff led protectors.

Defendant could, however, instead of denying, raise an avouchment, alleging, with eyewitnesses to prove, that plaintiff had already had boundaries demarcated on such and such a line, and no one could claim to have the same boundaries twice demarcated. The avouchment went to the root of the case. If plaintiff acknowledged the fact, that ended the case; if he denied, defendant led eyewitnesses to that, the sole issue, and the decision on the issue determined the whole case.

Plaintiff could, however, advance a counter-avouchment by alleging that the previous demarcation had been on the line he now claimed, but that since then the defendant had encroached beyond the line, in fact, asserting a new state of things giving him a fresh cause of action.

This became the issue in the case, decision on which, after hearing eyewitnesses, determined the whole suit.

§ 3. The IXth Book gives a very brief account, and confines itself to the issue of superior status without mentioning avouchments.¹

The procedure in pleadings in respect to land is of particular interest, for it would appear to be largely indigenous.

Germanic Law rarely recognized any action for land; only actions for debt, or as we would call them, 'civil suits'. The reason for this was that, in regard to property, possession and right were practically coextensive; and inasmuch as there could be no private possession or property in land, land being tribal and not personal, there could be no action by an individual to obtain possession of land.

By elaborating a procedure to enforce private rights in land we see that, though in many particulars the tribal idea survived in Wales, that country attained to a conception of private property in land, individual and group, at a comparatively early time.

¹ VII. 150; IX. 294 et seq.

6. *Pleadings in civil suits.*

(i) Suit to recover a commended foreigner.

§ 1. The first suit to consider is the suit to recover a commended foreigner. We have seen in the law relating to status that a foreigner, whose family held land for four generations, acquired a permanent tenure coupled with a liability to be bound to the soil.

The suit to recover a foreigner applied to cases where a foreigner, who had become 'adscriptus glebae', absconded from the land. It is referred to briefly in both Southern Codes, but our knowledge of pleadings is derived mainly from the Vth and IXth Books.

§ 2. The Vth Book states that in such a case the plaintiff was to assert that the man was his commendee, 'with enough to know'.

Should the defendant traverse the claim, he could assert :

- (i) that he was a free-born Welshman, or
- (ii) that he was the commendee of another person.

The second plea was regarded as a denial, a denial that he was plaintiff's commendee, and accordingly plaintiff was entitled to lead proof. The first plea was regarded as an avouchment and not a denial, an entirely new case being set up, viz. that he was free and could be no one's commendee. The defendant was, therefore, entitled to lead protectors to prove his alleged status, the protectors being free Welsh relations of his own.

The Vth Book calls this diversion of proof from the original allegation to a new one, 'cyfraith atgas', which it defines as 'a case where the defendant shall turn the proof from the plaintiff to his own side like turning law to the opposite side', pointing out thereby, what has already been remarked, that the avouchment might be of fact or of law.

§ 3. The IXth Book repeats the assertion of claim made in the Vth Book as follows :

'It is due for you to be an "alltud" to me, and your ancestors were also "alltuds" to my ancestors; you, therefore, ought to be an "alltud" to me',

the usual assertion of there being 'enough to know' being added. It proceeds that there were three answers open :

acknowledgement, denial, and lawful avouchment, 'that it shall not be necessary for him to answer', i.e. a defence going to the root of the plaintiff's claim.

If there were a simple denial, plaintiff led eyewitnesses; if there were an allegation of being a freeman, that was an avouchment entitling defendant to lead protectors to status.

It proceeds, then, to consider the case where there was no question of the defendant being a foreigner, the question being whether he was plaintiff's foreigner or the foreigner of another in whose possession he was. In that case the competitor was to be impleaded, and in reply to plaintiff's claim, if he asserted he was superior, then, as he was in possession, he became entitled to lead protectors who, if they supported him, excluded the eyewitnesses of plaintiff.¹

(ii) A suit of surety and debtor

§ 1. We have already noted that the principal method in which transactions of a business nature were entered into was through sureties, and that the primary mode of enforcing a debt was by resort to 'distress'.

But, notwithstanding the survival of distress in Wales, matters of fact in dispute were adjudicated upon, in later times at any rate, by the courts, before distress could be taken.

§ 2. We have, moreover, in the law relating to suits for debts secured by sureties, a system quite different from that in which the defences available were acknowledgement, denial, and avouchment. There was under this mode of trial no decision according to the evidence of protectors and eyewitnesses—it was one of the cases where evidences were entirely excluded.

There were two methods of trial in surety cases, viz. decision by compurgation, and decision by the tongue-man statement of the surety.

§ 3. There was no need for a plaint, though in the XIIth Book, p. 464, a model plaint is given in which the plaintiff alleged :

- (i) that the surety had stood surety for payment by the debtor of a stated sum on a stated date;

¹ D. C. 612; G. C. 774; V. 82; IX. 298-300.

- (ii) that the date had elapsed and the surety had not been able to compel payment by the debtor ;
- (iii) that demand for payment by the surety had been made ;
- (iv) that the surety should be compelled to pay.

Whether a plaintiff were used or not, there was no differences in procedure after the initial stages.

The parties appeared before the judge for him to adjudicate, according to set form, upon the points in dispute.

§ 4. The Venedotian Code contemplates three possible matters in dispute :

- (i) where the creditor claimed a debt, and the debtor denied its existence and the creditor was supported by the alleged surety ;
- (ii) where the creditor claimed a debt and the debtor denied its existence, and the alleged surety denied that he was surety ; and
- (iii) where the parties all agreed there was a debt and the alleged surety was surety, but there was a dispute between parties as to the amount due.

It takes each of these cases, and briefly states what the law applicable to each was.

In all cases, on the appearance of the parties, it was the first duty of the judge to ascertain if the surety were admitted as a surety, for if that were so, the surety's statement was binding as a tongue-man's.

In the first case, however, there was an emphatic denial by the debtor that there was any debt at all, and consequently that there was any surety.

The denial took the form of denying the surety was a surety, and was made in the first instance without oath. The surety then declared, also without oath, that he was surety and his statement was at once certified to the court by attestators, and he could never afterwards recede from that position.

The debtor was then sworn on the relics and declared the alleged surety was no surety of his. If he did not, he became liable for the claim. To this sworn declaration the surety was called upon to reply with a counter-oath alleging he was surety. If he declined to swear, the debtor was at once freed from the claim, and the surety, whose unsworn statement had been certified to the court, became responsible.

If he did swear he was surety, he, having performed the duties of a surety, was freed from liability, and the alleged debtor, to be absolved, had to produce compurgators to compurgate him from the debt, he paying the judge's fee.

The compurgators consisted preferably of himself, four persons related to him on the paternal side, two on the maternal, all within ' galanas ' degrees, but compurgators of paternal relatives alone were admissible.

If the compurgators supported the alleged debtor, he was freed from the claim ; if they did not, he had to pay the amount sued for. In case there was a number of sureties, compurgators for each one had to be produced separately.

§ 5. This *résumé* of the account is repeated in the VIIIth Book in a much more verbose form, but nothing of any value is added, except that this latter account indicates that the surety was absolved from liability where the creditor sued the alleged debtor for payment, and not the surety to enforce payment, the moment that the defendant denied that the alleged surety was a surety.

§ 6. The Dimetian Code merely refers to the case by stating that, where an alleged debtor denied a surety, he was to provide compurgators of the same character as those mentioned in the Venedotian Code.

§ 7. The case is also mentioned incidentally in the Xth Book, where it is provided that a debtor could not deny his surety, if suretyship were given in the publicity of the parish, in a lawful session, or in the presence of the lord.

§ 8. In considering the second case, the accounts given in the versions contained in MSS. Titus D. II. and the Llyfr Teg are followed. The other accounts, which substitute ' ekanogyn ' (debtor) for ' hawlwr ' (claimant) in the latter part of paragraph 7 (V.C. 116) of Mr. Owen's rendition, make the passages meaningless.

In this case, i. e. where both debtor and surety denied the creditor's claim, proceedings started by the usual demand as to whether debtor and surety admitted. The surety was entitled to three days' time, according to some authorities ; to none, according to others.

When the surety denied, the creditor swore on the relics,

and the surety did likewise, and if he swore he was not surety, the debtor was at once absolved from the claim.

The surety was also absolved from the claim unless the creditor counter-swore to his being surety. If the creditor did that, compurgators were adjudged on the surety to compurgate himself, they being of the same character as those adjudged on the debtor in the previous case. The decision of the case followed the finding of the compurgators.

Evidences to prove that an alleged surety denying the fact was in fact surety were strictly excluded.

If the surety were dead, his place in denial might be taken by his son or by the lord, if the latter had succeeded to the estate. In the former case the compurgators were drawn not from the mother-kin of the son, but from the mother-kin of the deceased surety, and, in the latter case, from the surety's kin, and not from the kin of the lord.

To this case we have many references in the other parts of the laws, but they differ in no way from the preceding accounts.

§ 9. The third case was where all were agreed that a debt was due, but there was a dispute between the creditor and debtor as to the amount of the debt.

In that case the surety, being an acknowledged surety, was sworn. Whatever amount he swore to, provided it corresponded with what either the creditor or debtor had declared, was conclusive on the subject: the surety was a tongue-man.

If he supported the debtor, that was all the debtor paid; if he supported the creditor, the debtor paid that amount, or, failing him, the surety paid.

The Anomalous Laws develop this case in a very interesting manner.

They contemplate the possibility of the surety forgetting the amount he had stood surety for, or asserting an amount which agreed with neither the creditor's nor the debtor's estimate.

In the former case the surety was given three or nine days in which to refresh his memory; if at the end of that time he did not recall, the debtor became liable for the

amount he had himself admitted, and the surety for the difference between that sum and the amount declared by the creditor.

In the latter case, if the surety swore to a sum less than what the debtor had admitted, the result was the same as if he had forgotten the amount altogether; the debtor paid what he admitted, the surety the difference between that and the amount claimed, though some authorities omit mention of the latter liability.

If he swore to a sum exceeding the creditor's claim, the debtor paid what he admitted, the surety the difference between that sum and what he himself alleged.

The possible case of a surety swearing to something in between the amount claimed and the amount admitted is also discussed. It is referred to as a case where the surety admitted part of his suretyship and denied the other part. In such a case the creditor first swore to the amount, then the surety counter-swore, the creditor again counter-swearing. A peculiar form of compurgation was then adjudged, viz. the surety's sole oath to be taken in church. That oath was conclusive, as it was considered that a surety admitting part liability was more likely to be telling the truth than one who was denying suretyship altogether. This diminished compurgation was not, however, allowed where there were circumstances existent similar to those preventing an acknowledged surety being a tongue-man.

If there were two sureties, and one supported the creditor, the other the debtor, then, according to one version, the larger amount was payable by the debtor, and, according to another, the lesser.

§ 10. Not every acknowledged surety could be a tongue-man.

An acknowledged surety, whose veracity was doubted, could be objected to on the ground of partiality, and if the objection succeeded, the surety paid the whole debt.

Likewise a surety could not be accepted as a tongue-man if it were manifest that, by reason of the debtor's poverty, the satisfaction of the debt must necessarily fall on him; the temptation for him to swear to the lowest sum would

be too great to admit of his being accepted without question. In this case the decision was left to seven compurgators of the same character as the compurgators already mentioned.

So also a surety who had failed to perform his duty as surety towards the creditor, when called on to perform it, could not be accepted as a tongue-man. His statement must be supported by a similar compurgation. Yet again, if the surety had become a surety in the presence of the court, his oath had to be supported by the oath of the presiding officer.

§ 11. Other possible cases besides these three are referred to in the Laws.

The debtor might, for instance, admit the claim, but assert that it was not payable because the goods he had bought, and payment for which was demanded, had failed in soundness and title, and therefore he was not liable to pay.

The law would not allow that defence to be taken, on the general principle that there could be no set-off pleaded in a suit; it must be urged by separate suit. So if a creditor sued, say for the price of a horse sold, the debtor could not urge in that suit that the horse was defective either in title or soundness. As the law explains, the price was due at the time of sale, but there was nothing due in respect of failure of soundness or title till the defect was ascertained, which must of necessity be subsequent to the bargain. The claim for price, therefore, was for a 'debt certain, a debt present, and a debt known'; the counter-claim could only be for a 'debt of chance, a debt hereafter, and a debt unknown'.

If the creditor obtained judgement or recovered the price in another way, the defendant could sue for damages on the basis of his counter-claim against the man who had stood surety for title and soundness. Such a suit could also be filed without plaint and disposed of summarily.

§ 12. The debtor might also, when sued, allege part payment, while admitting the actual transaction. The procedure when this defence was raised is peculiarly interesting.

The creditor commenced by swearing to his claim and

citing the surety. The debtor replied by admitting the transaction and the surety, but alleged the debt was less than what was claimed. He then asserted part payment.

The position, therefore, was that there was nothing to which the surety could swear. The question whether debtor had repaid part was one of which the surety need have no necessary knowledge. There was consequently no pleading by the surety, and, as the creditor could then only proceed against the debtor, the surety was free.

In order to prove part payment, the defendant was entitled to produce eyewitnesses. If they supported the debtor, his avouchment was established. If the evidence he produced failed to support him, he could not thereafter change his line of defence and deny the surety was his surety. If the debtor had no eyewitnesses to produce, the creditor was at once entitled to urge that the debtor was making a claim, which it was the creditor's right to deny. This contention prevailed, and the creditor was put to oath. He counter-swore, denying part payment, and his oath prevailed.

It is possible that this was not a valid reply in early days, and that an allegation of part payment would have been dealt with as a counter-claim, defendant being relegated to a separate suit, for the use of avouchment was foreign to the conception of a suit of surety and debtor.¹

(iii) Suit on contract.

§ 1. The method of enforcing a contract was by a suit of the nature of an action for specific performance. The plaintiff sued for performance, naming the contract-men, and if the action were successful, the lord enforced it through the contract-men.

§ 2. The Laws do not say much about the action, beyond remarking that it was similar to the action in a case of surety and debtor.

The plaintiff appeared in court and stated his case, alleging that such and such a contract had been entered into, and that such and such persons were contract-men.

¹ V. C. 108, 112, 114, 116, 118, 126, 136, 138; D. C. 396, 398, 424, 426, 430, 432, 598, 612; V. 66, 68; VI. 102, 116; VIII. 174, 176, 178, 180 et seq., 208; IX. 256, 264, 304; X. 324, 334, 388; XI. 444, 446; XIV. 576, 634, 658, 662, 664, 692, 728.

If the fact of contract were admitted, and the alleged contract-men were also admitted, their statements were conclusive on the terms of the contract. If the fact of the contract were denied, there was swearing by the plaintiff, counter-swearing by the defendant, and a further counter-swearing by the plaintiff.

Compurgators of identically the same nature as in surety-cases were then adjudged upon the defendant, and the finding of the compurgators was conclusive.

No mention is made of an avouchment.

Contract-men could not be objected to on the ordinary grounds on which a witness could be objected to; nor is it indicated that any opposition could be raised to the statement of a contract-man other than that he was not one at all.¹

(iv) Suit on 'briduw'.

§ 1. The action to enforce a 'briduw' was like that to enforce a contract, one of the nature of an action for specific performance, the King and the Church being required to enforce its performance.

§ 2. The suit was based on the oath of the plaintiff asserting the nature of the undertaking. The defendant could either acknowledge in part or in whole or deny, the denial being made on oath on seven sacred altars or on the same altar seven times.

No defence by avouchment was open.

If the defendant denied entirely or only partially, his own oath was conclusive on the point, unless the plaintiff counter-swore. If he did so, the question in issue was left to the decision of compurgators, composed as in surety and contract cases, adjudged upon the defendant.

One peculiarity in 'briduw' cases was that a woman defendant could produce women compurgators.

If the compurgators supported the defendant, the plaintiff lost his cause: if they failed, the 'briduw' was enforced by the King; the defendant was fined a 'camlwrw', and proceeded against by the Church for perjury.²

¹ V. C. 136; D. C. 424, 426, 598, 612; IX. 304; X. 388; XIV. 576, 634.

² V. C. 128, 132, 134; D. C. 430, 598; G. C. 728; XIV. 570, 576, 658.

(v) Suit for damages by animals.

§ 1. Damages by animals might be caused to crops or to other animals.

The common remedy in the former case was by impounding the animals trespassing, and in both cases the usual course was to settle the matter without resort to court, according to fixed scales of damages.

Cases, however, did come into court, and were apparently disposed of summarily on the oaths of parties.

§ 2. Where damages had been done to crops, the oath of the captor was conclusive as to where they were captured; but, if they were not captured, the owner's oath exonerated himself.

If there were any dispute as to the amount of the damage, it was settled by the oath of the owner of the cattle.

If the damage caused were the killing of another animal, the oath of the village herdsman was conclusive as to the animal responsible, if the injury occurred in the herd. Otherwise apparently eyewitnesses were allowed.

It will be seen that the laws throw little light on an action of this nature, but it is clear that there was no compurgation, other than by a single oath, and eyewitnesses were resorted to rarely.¹

(vi) Other civil suits.

§ 1. In dealing with the law of bargaining we saw that the Welsh commentators refer to a number of transactions other than ordinary transactions by way of purchase and sale—'llog', 'echwyn', 'cyfnewid', 'benffyg', and 'adneu'.

In suits to recover, the form varied according to whether the property were land or other goods.

§ 2. Land could be subject to 'llog' or 'benffyg', and a suit to recover such land is specially referred to in the Xth Book.

The plaintiff appeared in court, stated his interest and claim, to which the defendant replied by acknowledgement, denial, or avouchment. The nature of the avouchment, which might be raised, is not indicated, and all we are told

¹ V. C. 326; G. C. 744; IX. 242; XIV. 596, 602.

is that the dispute was settled by the testimony of eye-witnesses. That is to say, suits for land, subject to 'llog' or 'benffyg', followed the ordinary procedure in land suits.

§ 3. Other property might be the subject of all of these transactions. 'Llog' could only be entered into through contract-men, 'cyfnewid' through sureties, and these must be sued for by the form applicable to contract or surety cases.

The other transactions might be entered into through sureties, contract-men, or 'briduw', or without any form. If they were entered into through sureties, &c., they were sued for accordingly.

If they were not, the suit was based, not on the transaction, nor upon the formalities accompanying it, but on the right to recover possession.

This, and the nature of the suit and procedure, indicate that these transactions unaccompanied by sureties, contract-men, or a 'briduw' oath, were of late introduction.

§ 4. A suit *re* 'echwyn' could be sued without plaint; that we are informed definitely, but we are not told whether a plaint was needed in other cases or not.

§ 5. In all of these cases, where there had been no surety, &c., the plaintiff, on appearance in court, stated his claim, which might be met by acknowledgement, denial, or avouchment.

If there were denial, the plaintiff swore to the claim and led eyewitnesses.

The avouchments indicated are :

- (i) A plea of 'res judicata', which could be established, if denied, either by the defendant leading eyewitnesses, or by the plaintiff appealing to the lord that there had been no claim before.
- (ii) An allegation that the property had been restored, which, if denied, could be proved by defendant's eyewitnesses.
- (iii) An allegation, in the case of deposit, that the deposit had been stolen from the defendant's house, along with property of his own, in which case defendant produced himself and others dwelling with him as compurgators to clear himself of the suggestion of theft.

This is a peculiar and interesting case, for it is the only avouchment provable by compurgation. It is, however, not a strict avouchment, but a compurgation from an incipient charge of theft.

- (iv) An allegation, in the case of deposit, that the amount deposited was less than what plaintiff asserted. Here again defendant produced himself and one other as compurgators, but again the compurgation was directed to freeing the bailee from a possible charge of theft or unlawful detention.

§ 6. In cases of 'benffyg', where the actual property lent had to be restored, the plaintiff was entitled to meet the avouchment, not only by denial, but by a counter-avouchment, if he asserted that the property restored was not the original property lent. He made it a definite positive statement, and not a mere negative, by alleging that defendant had consumed or sold the original property, and if that were denied, plaintiff led eyewitnesses to the consumption or sale alleged. A counter-avouchment could, however, be taken against this counter-avouchment by the defendant asserting that, though the original property had been consumed or sold, the plaintiff had had his claim satisfied by the property restored being given in compensation therefor. If this were denied, the defendant led eyewitnesses.

§ 7. An interesting possible case is mentioned in the VIIth Book relative to a suit for 'benffyg'.

If plaintiff sued, and, upon suit, defendant offered property back which plaintiff denied was the original property lent, defendant could assert on oath that it was the original property, and he was entitled to lead eyewitnesses to prove the fact.

Plaintiff, however, could raise an avouchment instead of denying, agreeing that the property was the original property, but alleging that it was being offered back to him subject to a claim on it by a third person, and that, therefore, it was not exactly the same property. If defendant denied there was a claim upon it, plaintiff could lead eyewitnesses to prove there was. Instead of denying, however, that there was a charge upon it, defendant could raise a counter-avouchment, asserting that the charge existed on the property when given to him, and if this were denied, defendant led eyewitnesses; though plaintiff could, by asserting a definite charge created during defendant's

possession, counter this move by reverting to his original declaration contained in his first avouchment, and claim the right to produce eyewitnesses on that issue.

§ 8. We must not omit to notice that, according to the Dimetian Code, if there were a claim for the restoration of property subject to 'benffyg', instead of the procedure by evidence, a verdict of country could be directed, if the defendant were proceeded against for arrogance (*haer-llugrwydd*).

§ 9. It seems clear that in the rules regarding these transactions we are in the presence of a much later development of the law than that which existed when transactions were entered into with the formalities of suretyship, contract, and 'briduw'.

It would seem to be indicated that, as the need for the older formalities in transactions was, in certain cases, not insisted upon, a new procedure in suits became necessary, since the old procedure, which relied on the existence of sureties, contract-men, or 'briduw' oaths, was no longer applicable, and so the procedure relative to land suits and some other cases was adapted to new circumstances.¹

7. *Civil suits in other systems of law.*

§ 1. The Germanic system of trials of alleged civil transactions was of a similar nature, but we cannot do more than be very brief.

Though similar, it did not recognize compurgation in actions for debt.

Under Germanic Law all actions for debt, like the Welsh actions for surety, contract, and 'briduw', were founded upon the transaction itself, the validity of the transaction depending not on an agreement of will, but on the observance of strict formalities. In Germanic Law the transaction was concluded by the delivery of some article, a straw or a glove or other tangible object, by the obligor to the obligee: the 'vetta' of German Law, the 'wadium' of Lombardic Law, and the 'wed' of Anglo-Saxon Law. The 'wed' was delivered in the presence of witnesses.

¹ D. C. 466, 484, 598; VII 168, 170; IX. 234, 236, 238, 240; X. 378, 380; XIV. 598, 658.

To avoid immediate payment, where that was not desired, earnest-money (*handgeld* or *arrha*) was introduced, and the contract still subsisted.

Where there was a surety the 'wed' was deposited with him, and he became thereby responsible to the creditor in case the debtor failed to pay. The depositing of a 'wed' had exactly the same effect as the grasping of hands in Welsh Law.

In all contracts a time was, as in Welsh Law, fixed for completion. On the expiry of that time, when resort to court was compulsory, if the defendant did not pay or the surety enforce payment, the creditor went into court, asking permission of the court to exercise his right of compulsion.

He sued on the fact that certain formalities had been observed, which laid upon the defendant an obligation to make a definite payment, failure to discharge which rendered him liable to a fine or 'borh-bryce'.

After parties appeared, the plaintiff opened proceedings by a triple oath, or 'for-ath', alleging that certain moneys were due. If it were denied, defendant replied on oath, and that sufficed to clear the defendant, without resort to compurgators, or he might reply by an 'exceptio' or avouchment, e.g. repayment, which was established or repudiated by oath or counter-oath.

So, too, if the suit were by the vendee in a transaction claiming indemnification because the warranty of goods had failed, the vendee swore by 'for-ath' that so much was due to him. The vendor must either make good or deny on oath knowledge of any unsoundness, and that oath sufficed to clear him.

If he could not swear the clearing oath, permission was accorded to the plaintiff to distrain.

That in brief was the Germanic system. The principle was similar, the details were different.

§ 2. We may simply add to this general account the specific case of a suit in English law on 'God-borh' = 'briduw'.

It was disposed of entirely by oath and counter-oath;

there was no room for a further counter by plaintiff or submission to compurgation.

The rule governing procedure is contained in the Laws of Ælfred, c. 33 :

' If any one accuse another on account of a " God-born " and wish to complain he has not fulfilled any of these " God-born ", let him make his " for-ath " in four churches, and if the other will prove himself innocent, let him do so in twelve churches.'

With this may be compared Flata, Lib. II, c. 63 :

' Inter mercatores vero habetur talis consuetudo, quod si tallia proferatur contra talliam, allegando per eam solutionem rei petita, si ex parte adversa dedicatur tunc considerandum erit quod ille, cujus tallia deditur, eam probet hoc modo ; quod adeat IX ecclesias et super IX alteria juret, quod talis quaerens talliam deditam sibi fecit nomine acquietantiae debiti in ea contenti, sic ipsum Deus adjuvet et haec sancta.'

8. Pleadings in suits on crimes and torts.

(i) Suit of theft present.

§ 1. The principal offence, the trial for which is described in the Welsh Laws, is the offence of theft. It is particularly interesting because the mode of pleading and trial is described in very minute detail, and because nowhere else is the procedure, which was the common form among Germanic tribes as well, to be found so fully depicted.

Not only have we, in the Welsh Laws of theft, an account of the method of trial in court, but we have also in the procedure of the ' oath of the absolver ', which has already been described, a survival of the procedure existent in pre-curial days.

§ 2. There were two forms of trial for theft in Wales, radically different in character, according as to whether the case was one of ' theft present ' or ' theft absent ', i. e. according as to whether the alleged stolen property was found in the possession of the person accused or not. In one instance of theft absent the procedure followed was similar to that followed in the case of theft present, and in one case of theft present the procedure adopted was that ordinarily applicable to theft absent.

§ 3. In the XIVth Book it is said that the original form of trial for theft in Wales was by the ordeal of hot iron,

boiling water, or combat. We may dismiss that at once as inaccurate, for the Welsh Laws have no trace of ordeal, and it was, in fact, introduced in other countries to supplant compurgation.

§ 4. The trial of a case of theft present was in its essence a civil suit to recover the property, and not a criminal prosecution. It is similar in its main characteristics to a suit to recover possession of land.

The procedure consisted of three stages, the detention of property (*daly lledrad*), the swearing to the property (*damdwng*), i. e. the formal claim, and the raising of shields (*tarian*), or as it is generally called, the assertion of an avouchment by the defendant. Except in one case there was no submission to compurgation as there was in the case of theft absent.

§ 5. When a person had lost his property he was fully entitled to search for it, wherever he willed, and, should he discover it, he was entitled to detain it (*daly lledrad*). If the property were delivered over to him without opposition, he was to take it and proceed at once to the lord or judge, and swear he had recovered it and by what method, and that the property was his.

If the owner removed the property without the accused's consent from the latter's custody, the accused could not be compelled to answer any charge until the property were restored to his possession.

If accused refused to give up the property, the claimant could demand the assistance of the officers of the lord, who at once set out, seized the property, and brought it with the person in possession to court.

The property was released and handed over to the accused, who retained it until the decision of the case, if he gave security, exactly as was the case in the ' *actio sacramenti* ' of Roman Law ; if the judge, however, decided on parting the accused from the property, the latter was not bound to give security, and the property was then kept in safe custody, and could be used by no one until the decision of the case.

If security were given, the surety or ' *gorfodog* ' became

liable, should the thief default in appearance, to any penalty other than death, which might be inflicted upon the accused.

A day was fixed for hearing, and on the day so fixed parties appeared before the court, and the property alleged to have been stolen was produced.

When the court had been arranged the judge called on the claimant to step forward and state his claim (*damdwng*). The plaintiff then swore on the relics to the property being his. If the property were a live animal, he took hold of its right ear with his left hand, placing his right hand on the relics; if it were a bird, he placed his left hand on its head; and if it were inanimate property, on any part of the property he liked, the right hand always being on the relics. He then swore that 'no one was the owner of the property but he and his lord and his wife, and that he was not separated from the property except by theft, violence, or surreption', naming the day on which he was separated.

It will be noticed he did not swear the defendant was the thief. The reason will be obvious later. There was no direct charge of theft against any one, there was merely a claim to recover property which had been stolen.

Throughout the swearing the defendant also had his hand upon the property, using his right hand to grasp the left ear of the animal, where the stolen property was an animal.

§ 6. This formality is one which, in one shape or another, is to be found in all early laws, and was symbolical of the consensual submission to the jurisdiction of the court.

We may simply refer here to the practice in Rome in a trial of 'theft manifest'. The thing stolen was produced in court and the litigants confronted each other, spear in hand, across the subject in dispute, symbolical of an intention to fight for it. The judge, the representative of public opinion, demanded the laying aside of the spears, and the submission of the dispute to arbitration. The parties acquiesced in the demand, and the weapons were laid aside, and the court then became seised of jurisdiction by consent.

§ 7. After plaintiff had sworn to the property being his,

the defendant stepped forward. He might admit the property was the complainant's; if he did so, he fell under the law of theft, and was at once sentenced as a thief.

It will be noticed he did not admit theft, but, as he was found in possession of stolen property and gave no explanation, his possession was conclusive proof that he was the thief.

Instead of admitting complainant was the owner, he might do one of two things: (a) assert a counter-title to the property, or, to use the legal phraseology, advance an avouchment or raise a shield, under which he took his stand, and which absolved him from replying to the claim, or (b) he might simply assert his innocence, or as it is called, raise an avouchment of innocence.

The first-mentioned reply was the ordinary one employed. There was no denial of theft, for there was no allegation of theft against him; the defendant took his stand absolutely on the alleged counter-title, and if the counter-title failed him, the plaintiff having sworn to his own title and to loss by theft, it followed, in the eyes of the law, that the defendant was in dishonest possession and guilty of theft.

§ 8. There were three avouchments which the defendant could raise, the avouchment of custody before loss (*achadw gyn coll*), the avouchment of birth and rearing (*geni a meithrin*), and the avouchment of a warrantor (*arwaesaf*), a term for which the equivalent in early English Law was 'warranty' or 'geteuma'.

§ 9. The avouchment of birth and rearing was a statement by the defendant, sworn to by himself, that the alleged stolen property, if an animal or a bird, was the offspring of a mother owned and possessed by him, born in his possession, reared by him, and not separated from him for three nights either by sale or gift, that is, that the subject of the case had been born and bred by him and not transferred by him.

The reason for mentioning three nights is connected with the rule of law requiring any one finding stray animals or lost property to report the fact in that period to the lord.

If he were not in a position to say the property had not

left his possession for three nights, he could not raise this avouchment, but separation from property for three nights did not bar any one claiming property as a plaintiff.

If the animal had been caught wild and tamed, the oath was varied to assert catching and taming.

This avouchment was applicable only to living things, and of course was inapplicable to any property alleged by defendant to have been acquired by him by purchase or otherwise than by breeding.

The defendant had to mention that he had protectors to support his title; they had to be named, and he could not vary his list unless he had added, 'I have enough to know'.

The raising of this avouchment gave the defendant the right to lead protectors. They were produced on the next hearing, and, if they supported defendant, he was free from further responsibility; if they failed him, he fell under the charge of theft.

§ 10. The avouchment of custody before loss, which was applicable to all property, animate or inanimate, was a statement, similarly sworn to, that the property, alleged to have been stolen, had been in defendant's possession anterior to the date on which the claimant stated that it had been parted from him. Hence the need there was for the claimant to mention the date on which he had been parted from his property.

This avouchment shifted proof, and entitled the defendant to lead protectors; the result of the case, as in the previous avouchment, depending on whether they supported defendant or not.

It must be noted here that, in one passage of the Dimetian Code, doubt arises as to whether a successfully established avouchment liberated the defendant from the claim.

This passage (which applies to the avouchment of guests as well) states that the avouchment 'interposes between the litigants and compurgators of country'. It proceeds:

'No complete answer, nor complete exculpation, nor complete defence is afforded thereby to such as may obtain them, only assistance, so that it may be easier to credit him under the shield that he shall get than without it.'¹

¹ D. C. 480.

This is opposed not only to numerous passages in the Anomalous Laws, which liken a successful avouchment to a judgement which liberates a defendant, but to the emphatic pronouncement of the Venedotian Code: 'It is not right that there should be compurgation after detention and swearing, only an "arddelw"', to the equally emphatic statement of the Gwentian Code, 'That defends a person from a charge of theft', and to references, in the Dimetian Code itself, that a lawful avouchment is produced 'to clear the defendant of theft'.

The dubious passage in the Dimetian Code does not occur in all the MSS. from which the tract has been reconstructed, though it does in the majority, and inasmuch as the production of compurgators after the proof of an avouchment is directly opposed to the frequent pronouncement that 'evidences exclude compurgation', we can only conclude that this passage is a late interpolation.

§ 11. The third avouchment, that of the warrantor, was applicable to all property, animate or inanimate.

The avouchment consisted in the defendant asserting that the property had come into his hands from another person at such and such a time and at such and such a place. That person was called a warrantor, and any one, irrespective of status, not being a priest or one whose attendance could not be enforced in court, could be named as a warrantor.

If a warrantor failed, it was impossible for the defendant afterwards to assert another person was his warrantor. The mere naming of a person as a warrantor was, of course, not sufficient. The alleged warrantor was called; and either he had to admit or it had to be proved against him that he had handed over the property to the defendant acting bona fide. The warrantor took upon himself the responsibility from the original defendant, and he was substituted in the proceedings for the latter. In the words of the Dimetian Code:

'He is to answer immediately for the disputed property, abide by the law, and do that which might be adjudged for him to do.'

The plaintiff again swore to the property in the hand of the warrantor, and the latter in his turn was entitled to raise any avouchment the original defendant might have raised.

If he raised the avouchment of a warrantor himself, and thereby passed on the responsibility of answering to a third person, he could do so, and any new warrantor could proceed in exactly the same manner.

There was, however, this limit to the power of passing on the avouchment of a warrantor. The first defendant and the first warrantor were entitled to the same adjournments in which to produce a warrantor as parties were entitled to within which to produce witnesses, but the second warrantor, or third hand as he was called, could not set up a third warrantor, unless such were present in the field of judgement. Provided, however, there were warrantors in the field, the responsibility of answering could be handed on indefinitely.

One passage in the Anomalous Laws asserts that no warrantor could be called unless he were actually in the field of judgement, but this is in direct opposition to the provisions of the Codes.

We can now understand why all bargains were conducted through suretyship securing title; and why, in a proceeding for theft present, the complainant did not accuse the person in possession of theft. If he did so, and the defendant set up a warrantor successfully, the complainant would be out of court. As he had definitely charged one man with theft, and that man had established bona-fide acquisition of the property from a third, the complainant could not vary his charge and accuse that third person of theft.

As the warrantor stepped into the shoes of the defendant in possession and accepted responsibility for accounting how the property came into his own hands, we can appreciate the remark of one of the commentators:

'A wonder that a person does is becoming " arddelw " to another for theft, as to which he is unable to get an " arddelw " to take the thing also out of his hand, and for which he may be hanged as a thief without thanks.'

§ 11. We have stated that a warrantor named ' had to

admit or it had to be proved against him that he had handed over the property to the defendant bona fide '.

The fact that a man who refused to accept responsibility could be proved to be a warrantor is expressly mentioned on two occasions, and that for an interesting reason.

It will have been noticed that no suit of theft present or claim to recover stolen property was ever supported by eyewitnesses.

Protectors could be produced, informers could be produced, warrantors could be produced, but never eyewitnesses; but these two passages say that eyewitnesses could be produced to establish against an alleged warrantor that he had handed over the property to defendant; and the provision is justified on the ground that the original defendant was not charging theft against the warrantor, nor even alleging that the property was stolen. He was merely establishing that he himself had acquired the property ' bona fide '.

§ 12. What was the effect of successfully establishing the avouchment of a warrantor? All authorities are agreed that failure to establish this avouchment, when pleaded, resulted in the defendant falling ' under the law of theft ', and all but one that the proof of the plea resulted in the immediate discharge of the defendant.

The one exception is in the Dimetian Code, and is connected with the passage already considered when dealing with the avouchments of birth and rearing and custody before loss.

The passage runs:

' So calling a warrantor (the word used is the English word, " warrant ", so pointing to the fact that the passage is a late addition) is not a complete answer to the person who shall call him, but an endeavour to obtain some one who may fully answer for him, and who may bear the whole for him; and, on that account, whoever shall obtain a warrantor let them both stand together in the law in the court until the whole suit shall be determined by a judgement between them and the plaintiff; for it cannot be known by any way before the conclusion of the judgement whether one of them be in fault or both of them, or whether either of them be in fault, and it cannot be known likewise whether the warrantor shall will to effect all for himself and the disputed property and for the defendant, or whether he shall not will; and neither is it known whether he be able or not able.'

No reliance can be placed on this passage, for the reasons already indicated, and because it is in direct opposition to all others.

We have only to add in regard to this defence that, if the person from whom the defendant alleged he had obtained the property bona fide were dead, the defendant was adjudged compurgation.

§ 13. The actual working of this system may perhaps be illustrated by reference to a particular case, which is fortunately preserved to us in the surviving fragments of the Ruthin Court Rolls.

It appears that during the rising of Madoc ap Llywelyn there was a considerable amount of cattle-lifting indulged in, and among the cattle so stolen was a black cow belonging to one William the Shepherd, who was killed at Cilcein. His widow Leuke started proceedings against one Wilym ap Hywel, who was found in possession of the cow. The extracts below relating to the three hearings in the case are quoted almost in full, as they show the system of pleading in actual operation.

First hearing :

' Wilym ap Hywel was attached because he received a cow of black colour, which belonged to Wilym, the lord's shepherd. Being called he was accused. He vouches Wyn, his brother, to warranty. The said Wyn appeared, and vouched a certain woman named Alice to warranty. The said Alice appeared and was interrogated. She answers and says that the aforesaid cow is her own, of her own calving and upbringing. And Leuke, wife of the said Wilym, asked, " Who warrants this day the aforesaid cow ? " The said Wyn warranted it and took the cow by the ear, and forasmuch as Wilym was not present, therefore he is commanded to come at the next Court and the said Wyn finds pledges for bringing up the said cow.'

Second hearing :

' Wyn ap Hywel brought up a black cow, which was replevied at the last preceding Court, and when in full court he came with the aforesaid cow, there appeared Leuke, late the wife of Wilym the Shepherd, and accused Wyn concerning the said cow, that it was her own on the same day when the said Wilym was alive and died on Saturday, after the departure of the lord from Dyffryn Clwyd, at Cilcein ; and the said Wyn charges that he bought the said cow from English Alice,

and vouched her to warranty, and she warranted it, and immediately he releases the cow, and puts himself in the lord's mercy. The same Leuke by XII men sworn to credit, proved the cow to be her own, and had it after oath made. Afterwards she made fine with Wilym ap Hywel.'

Third hearing :

' Wilym ap Hywel attached for receiving a cow of a black colour, which Leuke widow of Wilym the Shepherd claimed to be her own proper chattel, which was her husband's. . . . Afterwards he made satisfaction with £5.'

§ 14. We may pause here to consider the provisions in the early English Law of a similar character.

There are numerous fragmentary references to the avouchment of a warrantor in English Law.

In the Laws of Hlothaire and Edric (A. D. 673-86) the 7th clause runs :

' If one man steal property from another and the owner afterwards lay claim to it, let him vouch to warranty at the King's hall if he can, and let him bring hither the person who sold it him : if he cannot do that, let him give it up, and let the owner take possession of it '

while clause 16 runs :

' If (goods bought in Lundenwic) be afterwards claimed of a man (vendee) in Kent, let him vouch the man who sold it him to warranty ; if he cannot do that (and this is important as corroborating the view that a person accused could prove a denied warrantor), let him prove at the altar with one of his witnesses or with the King's wic-reeve that he bought the chattel openly in the wic . . . but if he cannot prove that by lawful averment, let him give it up and let the owner take possession.'

In the Laws of Ine (A. D. 688-725), c. 75, we have an almost parallel passage :

' If a man attach stolen property and the person with whom it is attached then avouch another man to warranty ; if then the man will not accept it, and say he never sold him that, but sold him other, then must he prove who vouches it to that person that he sold to him none other but that same.'

The Ordinance of Greatanlea (A. D. 924) also mentions the defence, § 24 :

' He who buys property with witness and is after obliged to vouch it to warranty, then let him receive it from whom before he had bought it.'

In clause 4 of Ælfred and Guthrum's peace it is provided that every man must know his warrantor for men and for oxen and for horses, and in the Treaty with the Wealhas Dunseatas, clause 8 provides that cattle stolen in one country and found in the territories of the other country must be vouched to warranty. In Ethelred's Laws it is provided that a 'geteuma' can proceed only to the third hand, recalling the identical provision of the Welsh Laws.

In the treaty Ethelred entered into with Olaf Tryggvysson (A. D. 993) the law is very clearly stated, cc. 8, 9 :

'If any one attach that which he had lost, let him with whom he attaches it declare whence it came to him : let him deliver it back and appoint a "borh" (surety) that he will produce his warrantor at the place where it is claimed. . . . Let him deliver it to the party who sold it to him, and desire that he clear if he can. If he accept, he then clears him with whom it was first attached. Let him afterwards declare whence it came to him. If any one accept and make no such further avowry, but will possess it, this may not be refused, if true witness make way for him to possession.'

Cnut in § 23 of his Ordinance of Winchester appears to have amended the procedure and provided :

'Let no man be entitled to any vouching to warranty unless he have true witness who saw and heard whence that came to him which is attached with him',

obviously introducing that which had not been allowed before, viz. the production of eyewitnesses to supplant the production of a warrantor.

A further amendment was introduced by the Conqueror (Leges, c. 21), which allowed proof of innocence by the production of a warrantor or other title to possession (*hemoldborh*) with witnesses; but if a warrantor could not be produced, the possessor could exculpate himself by compurgation, if he had other proof of title.

'Si clamaverit quis vivum averium quasi furto sibi surreptum et dederit vadium, et invenerit plegios de clamio prosequendo, oportet eum qui rem in manu habet, warantum suum producere, quod si non potest, 'hemoldborh' et testes producat. Si vero warantum producere non potest, nec 'hemoldborh', sed testes habet quod in mercato regis emerit, et 'hemoldborh' sed nec warantum nec plegium, sit vivum vel mortuum, perdet rem illam que calumpniatur, et simplici

juramento suo et testium suorum se purgabit. Quod si nec warantum nec plegium nec testes invenerit tunc, praeter causam clamantis, vere domino suo solvet.'

The avouchment of birth and rearing is also recognized in these Laws of the Conqueror, for the passage proceeds :

'Si autem probare poterit per tres partes visneti sui quod sit de nutritura sua, disrationabit.'

Mention is also made of the avouchment of birth and rearing in Athelstan's Ordinance of Greatanlea, c. 9 :

'He who attaches cattle, let five of his neighbours be named to him, and of them let him get one to swear he takes the cattle by folc-right, and he who will keep it to him, let there be named ten men, and let him get two of them and give the oath that it was born on his property.'

Both the avouchments are mentioned in the Fragment on Oaths, cc. 2 and 3. We there see the prosecutor swearing on the relics that cattle found with a suspected thief belonged to himself, and the defendant counter-swearing :

'But as I cattle have, so did I lawfully obtain it. And as I vouch it to warranty, so did he sell it to me into whose hand I now set it. And as I cattle have, so did he sell it to me who had it to sell. And as I cattle have, so did it come of my own property, and so it by folcright my own possession is and my rearing.'

As a last instance of similarity we may refer to the English provisions where the alleged vendor, called as a warrantor, was dead.

The Dooms of Ine, c. 53, provide that the dead man might be cited as a warrantor 'by vouching the tomb of the dead to warranty', a mode of swearing we have seen employed in Wales in the case of a dead surety also.

The procedure was to swear on the tomb that the dead man had sold the property to the person in possession, and the taking of such oath absolved the accused from all liability to punishment, though, provided the complainant proved his ownership, the property went to the complainant.

The Treaty between Ethelred and Olaf Tryggvason provided that if any one vouched his warranty to a dead man, the sons of the dead man could clear his name; but, if the dead had no sons, then the defendant could prove by witnesses against the dead, unless the friends of the latter

compurgated his memory. In that case, because 'denial' was always stronger than 'affirmation', the result of the exculpation of the dead by the compurgation of his friends was to cause the charge of theft to recoil on the person vouching the dead to warranty.

An exactly similar procedure of vouching the dead to warranty existed among the Germanic tribes.¹

The resemblances might be carried even a little further. As in Wales, no unfree man could be vouched to warranty for a free man ;² where persons were vouched to warranty and resided elsewhere, an adjournment of one week was allowed for each shire the accused had to travel to bring in his guarantor (Treaty with Olaf) ; and echoes of the limitation of the right to call warrantors up to the third hand occur in the same Treaty, which says that formerly the law had been that, where avouchment took place 'thrice', the warrantor had to be brought to the locality where the goods were seized, but not beyond, the new regulation of the Treaty being that all warrantors (whether of the third hand or beyond) were to be brought to the venue of seizure.

§ 15. Fragmentary references to the same system occur in the Scots Law, and numerous ones in the Germanic Law. To mention the latter would be endless, and it is here enough to draw attention to the Law of Filfortis in the Lex Salica, Codex I, Tit. XXVIII, XLVII.

§ 16. We have considered hitherto the three avouchments which could be raised in defence in an action of theft present. Was there any other line of defence open to the defendant ?

It is quite clear that the three avouchments, though they cover most of the circumstances in which the possessor of alleged stolen property could assert and establish that the property was not stolen, or, if stolen originally, was in his possession bona fide, they do not cover all the circumstances. For example, it was quite possible for the defendant to have acquired the property bona fide, on the date on which it was alleged to have been stolen, by purchase from the com-

¹ See e. g. Jus Prov. Alamman., CVII, § 2, and CVIII, § 3.

² *Ine*, c. 47.

plainant, who dishonestly sought to regain it by an action of theft present.

None of the three avouchments mentioned would be of the slightest avail in such circumstances.

The Laws are perhaps somewhat obscure as to what would happen in such a case, but we have indicated that there was a further defence open which is termed the avouchment of innocence. It was not a true avouchment, but it was a defence which some authorities assert could be urged.

But before we consider those authorities it must be pointed out that the law was so framed as to avoid, if possible, any action being brought at all which could not be met by one or other of these avouchments.

Transactions were almost universally conducted through sureties, contract-men, or by 'briduw', and this fact ensured or tended to ensure a knowledge of the real facts. In addition to this, a suit for theft present had to be opened with an oath that the complainant had not been separated from his property, other than by theft or surreption or violence ; while, if a claim failed, the complainant was himself subjected to penalties. This combination of circumstances would at least reduce the chances of false charges considerably.

To return to the passages in which the avouchment of innocence is mentioned.

The Venedotian Code says very clearly that if stolen property were found upon a person, who asserted his innocence, and that the property was left in his hand or forced on him against his will by a third person, he was entitled to raise that defence and claim compurgation, the Code adding that this was the only case where compurgation was adjudicated after detention and swearing. In this account it is supported by the XIVth Book. The procedure was identical with the defence of 'denial'.

The Vth Book allows a defendant to assert that his captor had palmed the stolen property on to him, but refers only to an oath, to be met by a counter-oath, as the procedure to be followed, adding that, if the defendant only said that he was innocent of the theft and sought no other avouch-

ment than his innocence, he was to be allowed compurgation. So also a provision in the Xth Book, which says that, where an alleged warrantor was dead or could not be found, the defendant was allowed a compurgation, points to the conclusion that compurgation could be claimed in theft present wherever one of the three avouchments could not be raised appropriately.

The avouchment of innocence (*gwirionyni*) is twice mentioned in the XIVth Book as one of the avouchments which were consistent with denial, and which, if not supported by compurgation, was tantamount to a confession.

The XIVth Book gives utterance to quite inconsistent views. In one passage it says, in most unmistakable language, that in a charge of theft present no reply was open but one of the avouchments, and it instances an attempt to raise the defence that the goods in defendant's possession were left with him by complainant. Such a defence is stated to be quite inadmissible; and the author is led to the conclusion from his premises that in such a case the defendant, though in fact innocent, must pay the penalty of theft.

Elsewhere, however, the author revolts from this logical conclusion, and, besides mentioning the avouchment of innocence, allows a warrantor (and there is no reason to suppose a warrantor had more extensive rights of defence than the original defendant) to raise in defence that the alleged stolen property was left with him, or exchanged with him, or pledged to him, or legally impounded by him, if it were an animal.

After discussing avouchment it also has a separate chapter 'on other legal defences', which it says are not avouchments, but may nevertheless be proved by eye-witnesses, and enumerates 'permission to move the thing, gift of the property by the plaintiff and pledge', and in yet another passage, dealing with surreption absent, it asserts that defendant could prove that the property in dispute had been removed by him with plaintiff's consent, or had been given him as a full gift. Similar is the case in connexion with charges of surreption and violence in the VIIIth Book.

The passage in the XIVth Book renders it perhaps unsafe to assert definitely that, in a case of theft present, it was a well established rule that a defence, other than that of the three avouchments, could be raised; but the other authorities mentioned appear to prove that the practice grew up of permitting other defences, which were disposed of either after hearing eyewitnesses or by adjudicating compurgation.

§ 17. We have now to consider three peculiar cases, in two of which, though the stolen property was present, the procedure adopted was that applicable to theft absent, and the third where the whole property was not present, but action was taken as if it were.

The cases all involve the question of identification of the property, which as we have seen by the provision of 'damdwng', or swearing to the property, was an essential part of an action for theft present.

The first case relates to meal, bees, honey, and flesh separated from the skin. None of these could be identified by the owner, unless they happened to be in a vessel which the owner could swear to as his. The owner, though convinced that the property was his, was debarred from a 'damdwng', and so the action of theft present was closed to him. He must take action for theft absent, that is, there must be a prosecution or 'gyrr', the result of the case being left to compurgation.

The second case was where property was stolen from a blind man. Though the property was recovered, the man, being blind, could not swear to its being his, as identification in law could only be by sight. Nor could a blind man appraise the value of his goods, an essential to be observed when the question of punishment arose in theft present. Hence he, too, must proceed by an action of theft absent.

The third case was where part only of what was termed 'inseparable property' was discovered and part not. The ordinary rule of law was that, where a portion of separable property was discovered out of a quantity stolen, the owner could only proceed to claim recovery of the portion discovered, and not the value of that not discovered; for instance, if

two cows were stolen at the same time and only one were found with the suspected thief, the owner could proceed against him, in an action to recover, only for the one found with him. He might prosecute for theft absent in respect of the other, if he liked, but he could not bring an action of theft present for it.

This rule was, by some authorities, applied also to a case where a portion only of inseparable property was found, but others allowed an action for the whole on the strength of the portion found.

Inseparable property is not defined, but it implied property which could not be divided without destroying its original integral character.

The standard illustration is that of an animal, the carcass of which was separated from the skin. Now the carcass was unidentifiable, but the skin was identifiable. If only the carcass were found with a suspected thief, an action for theft absent was appropriate, but if the skin were found, then an action of theft present was available in respect not merely of the skin, but of the whole animal stolen.¹

(ii) Pleadings in a suit of 'theft absent'.

§ 1. An action for 'theft absent' is almost invariably styled 'gyrr', a prosecution, a term which is never applied to an action for theft present. Its characteristic was submission for decision to compurgators.

The action was commenced with a plaint (*gweyn*), a model form of which is given in the XIIth Book.

§ 2. The plaint was not supported by what the Welsh Laws call 'evidences'—protectors and eyewitnesses—but by what we would nevertheless call 'evidence' in modern law. In order to avoid confusion, this proof will be called hereafter 'supporting facts'.

These 'supporting facts' are referred to in different parts of the laws, and the procedure varied according to the 'supporting fact' relied upon.

¹ V. C. 138, 246, 248, 250, 252; D. C. 430, 438, 448, 462, 480, 482, 492, 602, 610, 612; G. C. 702, 774, 786, 788; V. 60, 62, 64, 78, 80, 84; VI. 100, 102, 106, 124; VII. 156; IX. 212, 214, 216, 230, 264, 296, 298; X. 340, 392, 398; XIV. 568, 570, 572, 574, 600, 616, 622, 632, 634, 638, 640, 642, 644, 648, 650, 652, 654, 662, 670, 672, 674, 684, 700, 702, 722, 724, 726.

§ 3. The first to note is where, before proceeding to court, the complainant had asked the defendant to take the absolver's oath, and defendant had refused to do so. The challenge to such an oath, as we have seen, was a survival from the pre-curial period, and refusal to take the oath fixed the person challenged with liability to compensate the loser for the lost property.

In the Curial period refusal to take an absolver's oath became a 'supporting fact', which the loser of property could rely on in support of his complaint.

The loser of property could complain (*a*) that the suspect had refused the absolver's oath, or (*b*) that he had refused such oath, and was, therefore, guilty of theft absent.

If the first course were adopted, the defendant's sole available reply was a denial of the refusal. If he denied the refusal, some authorities say that the complainant could establish it by eyewitnesses, others that the defendant was adjudged twelve compurgators to compurgate himself from the alleged refusal. In either case, if the defence failed, the defendant was punished, not as a thief, but as one who had refused the absolver's oath.

If the second course were adopted, the 'supporting fact' was provable by eyewitnesses, and defendant must either admit or deny the alleged theft. If he denied it, compurgation was adjudged upon him, and if the compurgators supported him, he was acquitted; but if they did not, he was punished for theft absent, and not for refusal to take the oath.

§ 4. The second 'supporting fact', on which a prosecution could be based, was the tongue-man statement of a fellow thief about to be executed.

Where this supporting fact existed, all that it was necessary to prove was the statement. No other proof was needed, and no compurgation could be adjudged. The statement was conclusive of accused's guilt of theft absent.

§ 5. The third supporting fact was where there was 'dogfnag', or 'competent information', to which full reference has been made already.¹

¹ p. 289 supra.

In this case the lord prosecuted on the statement of 'dogfnanag'.

Nearly all the authorities assert that in 'dogfnanag' proceedings no defence was open to accused: he was convicted and sentenced for theft absent. The Venedotian Code, however, says that the practice in Gwynedd and the view of many authorities was that accused was entitled to deny the charge, just as if there were 'gyrr' by the owner, and that compurgation was to be adjudged.

§ 6. The next supporting fact is the most important of all, the supporting fact of 'lliw' or 'light', the procedure in which applied generally to other cases of theft absent.

In this case the complainant came into court accusing a particular person of theft, alleging either that he and another man or another man alone, whose veracity he would support, would swear to a 'lliw'.

A 'lliw' consisted of a statement, sworn on the relics, that the accused had been seen, by the person swearing, in broad daylight with the stolen property, when the sun was high on hill and dale, passing through a stated 'tref'. The deponent swore he was speaking not for hatred, nor enmity, nor reward, nor worth, but for the sake of truth only.

No married woman could swear a 'lliw'.

In the early English Laws (Fragment on Oaths, c. 4) we have a precisely identical oath, the owner of lost property swearing 'that he charges not through hatred or envy or unlawful lust of gain, that he has no personal knowledge but what the informer told him, and that he believes the informer', and there can be no doubt that the English Law of the time had a similar procedure.

When the court was assembled, the prosecutor swore three times on the relics produced by himself, exactly as in early English Law, naming the person on whom he charged the theft, describing the thing stolen, the quantity of matter stolen, the 'lliw' on which he relied, and the time of the theft.

The accused formally denied the charge, and stated he would also deny the informer. If there were a mere oral assertion of theft unsupported by oath, it was sufficiently answered by the accused's oath.

The informer was then produced to swear to the 'lliw'.

If he declined to do so, after having once asserted a 'lliw', he himself was proceeded against for theft. It is said in the Xth Book, but in it alone, that the informer might be objected to as an eyewitness might be.

After swearing to the 'lliw', the complainant swore supporting the informer's veracity, such oath operating as the swearing of the charge. Unless the 'lliw' were so supported, it was adequately met by accused's sole oath.

The accused was then called on to answer the charge. If he admitted, that ended the case, except for sentence. If he were prepared to deny, he took the complainant's statement, word by word, denying it also three times. If he failed in denying any part of it, he was cast.

That concluded the pleadings in case of denial. The truth or falsity of the charge was submitted to compurgators, varying in quantity according to the nature of the property stolen. The decision of the compurgators was conclusive, and no matter what support was afforded by the 'lliw', the charge was overridden by compurgation.

The XIVth Book, however, asserts that a 'reputed' or notorious thief could claim no compurgation when proceeded against by 'lliw'.

Instead, however, of acknowledging or denying the charge and thereby claiming compurgation, the accused could rest his defence on a particular avouchment, the avouchment of custody of guests.

This avouchment was an alibi, but an alibi of a special kind. It is not mentioned in the Venedotian Code, but it is in every other part of the Laws.

After complainant had stated that his property had been stolen at such and such a time, if the time stated were night, but not otherwise, the accused could reply that he was in a position to prove that, at that particular time, he was in the house of another person as a guest. The avouchment went to the root of the case, and the proof was shifted from the charge to the defence. The accused was, thereupon, entitled to produce as his protectors the host in whose house he had passed the night along with two other members of the household.

These protectors took oath that on the night in question,

from the time when the cattle had been tied up for the night until the morning, the accused had been in the house with them, and, as proof that he had never left the house in the interval, the host swore that he had passed his hand over the accused three times during the night. The oath so taken was conclusive of accused's innocence: if the oath failed, the accused was convicted without further proceedings.

§ 7. The next case in which complainant asserted a 'supporting fact' is mentioned in the Dimetian Code and the XIVth Book. We have already noted that a person who lost property was entitled to search for it wherever he willed, and if he were obstructed in doing so, he could go into court and charge the obstructor with 'theft absent', using the fact of obstruction as a 'supporting fact'. The procedure thereafter was, 'mutatis mutandis', identical with that applicable to a charge based on 'lliw'.

§ 8. The question arises as to whether it was possible to institute a charge of theft absent without one or other of these 'supporting facts' being alleged. The question is not free from difficulty.

All that the Venedotian Code says is that there could be no compurgation except where the owner swore that the accused had really stolen the property; while the XIVth Book states that compurgation was demanded where theft was 'imputed', where there had been obstruction to search, or where there was 'lliw'. 'Imputation' is not defined, nor is it said that a 'supporting fact' was necessary or not to the 'imputation'.

The Dimetian Code, however, is explicit. It demands compurgation where a man refused the absolver's oath, where there was obstruction or 'lliw', and states that no one is to produce compurgators for theft without one of these 'supporting facts' against him. The absence of any explicit procedure where no 'supporting fact' was relied upon supports the view that it was essential for a 'supporting fact' to be asserted.¹

¹ V C 110, 242, 246; D. C. 400, 402, 418, 424, 438, 462, 480, 594, 610; G. C. 744, 786; VI. 100, 110; VII 154 et seq; IX 214, 216, 224, 226, 232, 256, 296, 298; X. 310, 312, 388; XI. 436; XII. 466; XIV. 574, 576, 600, 618, 620, 632, 648, 654, 664, 666, 676, 680, 682, 684, 686, 692, 708, 718.

(iii) Pleadings in a surreption suit.

§ 1. The procedure applicable to trials for surreption was identical to that applicable to trials for theft.

There was the same division into surreption present and surreption absent. The same procedure as to 'detention' existed, and in both cases a plaint was requisite.

§ 2. If the charge were one of surreption present, no direct charge of surreption was brought against the man in possession; the suit took the form of an action to recover property taken surreptitiously; but if it were an action for surreption absent, a direct charge with the time of offence stated was made.

§ 3. If the property were present, there was the same 'damdwng', and the defendant could reply by raising the same avouchments, and prove his avouchments by protectors.

He could also assert as an avouchment that the property had come to him with the plaintiff's consent, and, if the plaintiff denied this, the defendant led eyewitnesses. Plaintiff, however, might assert that defendant had cited him as a warrantor, and therefore he must rely on plaintiff's statement, and not produce eyewitnesses; but the law provided that if the defendant did not expressly cite the plaintiff as a formal warrantor, he was entitled to prove plaintiff's consent to the removal by eyewitnesses.

§ 4. If the property were absent, the defendant could acknowledge, deny, or raise an avouchment. The procedure on denial was the same as in theft, viz. submission to compurgation. The avouchment indicated was an assertion by the defendant that he had restored the property and had settled with plaintiff thereby, and, if this were denied, the defendant led eyewitnesses to prove restoration.

The plaintiff might attempt to raise a counter-avouchment, and assert that, though he had received some of the property back, he had not received all of it, or else that he had received it back on account of some other due. If defendant merely denied this, plaintiff led eyewitnesses; but if he urged that the restoration being admitted, even in part, there was a settlement of claim established, the

objection was valid, and plaintiff must sue separately on another cause of action.

We see, therefore, that the procedure was identical with that in theft.¹

(iv) Pleadings in a suit of violence.

Trials for violence were also conducted on the same lines. There was seizure of property, if possible, plaint in the form to recover property if it were present, and in the form of a direct accusation of violence if it were not.

If the property were present, there was the same 'dam-dwng', and the same denial or avouchment, to be established in exactly the same way. If it were absent, there was the same denial and submission to compurgation, or avouchment of restoration with eyewitnesses to prove, and the same counter-avouchment of part restoration only, as in surreption, similarly countered.²

(v) Pleadings in cases of insult.

§ 1. A trial for insult was of the nature of a civil suit—to recover the honour-price due. Model plaints are given in the VIIIth and XIIth Books.

§ 2. The plaintiff opened proceedings, when parties were assembled in court, by giving details of the assault, offering to establish the charge, if doubted, as he had enough to know. Defendant could admit or deny: no other defence was open.

The plaintiff alleged on oath that he had suffered insult or disgrace, assault or attack, and blood and wound, the disgrace being to himself, his lord, and kinsmen.

Denial had to be word by word, and on oath, and the question was submitted to compurgation. If the guilt were established, the honour-price had to be paid and a 'dirwy' to the lord.³

(vi) Pleadings in homicide cases.

§ 1. Little is said anywhere on this subject. A model plaint is given in the XIIth Book, and there appears to have been the usual procedure of oath, counter-oath, and a further

¹ D. C. 480; VII. 154 et seq., IX. 232, XIV. 600, 642, 724

² D. C. 464; G. C. 764; VII. 132, VIII. 208, IX. 230, 232, 238, XIV. 600, 640, 670, 724.

³ V. C. 238; D. C. 594, 598; VIII. 190, 208, XII. 474, XIV. 578.

counter-oath. Evidences were not called, and the question was submitted to compurgation.

The claim was in the nature of a suit to recover compensation, and it had to be admitted or denied, 'there being no law for murder but denying galanas'.

§ 2. We must not omit to notice, however, the very drastic provision where a man refused to plead to a charge of homicide.

In all cases where a man declined to plead, judgement was given against him; but in homicide cases, if an absolutely innocent man stood on his innocence and declined to plead, he could be slain with impunity, and his kinsmen could claim no blood-fine for him, for they could not deny that which the dead man had not troubled to deny in his life.¹

(vii) Pleadings in a trial for breach of cross.

§ 1. The case where an allegation was made that an interdict by way of cross had been broken is of great interest, but unfortunately the references to the suit are few and brief.

It is of interest because it is the only case where both modes of decision are said to have been applicable.

§ 2. A cross to be effective had ordinarily to be planted in the presence of witnesses, and if a suit were brought alleging a breach, the allegation was sworn to three times by the complainant. Then, if the interdict had been placed in the presence of witnesses, it is stated that the fact was proved by eyewitnesses, and breach of the interdict could not be denied, except by lawful objection to the eyewitnesses or by the urging of an avouchment.

The particular avouchment mentioned is an allegation that it had been obeyed, or complained against, or contested by suit.

If, however, the interdict could not be proved by eyewitnesses, the oath of the complainant could be met by a counter-oath of the defendant, and thereupon three compurgators, the defendant himself, one of his father-kin, and one of his mother-kin, were adjudicated upon him.

¹ D. C. 412, 598; G. C. 776; XII. 466, XIV. 602, 624.

§ 3 It must be stated that proof by eyewitnesses, as a possible procedure, is mentioned by one authority only; and the other two authorities, which refer to the trial, simply state the question of fact was left to compurgation.

The employment of alternative procedures must, therefore, be accepted with doubt, especially in view of the fact that such a course was against the strict rule of law.¹

(viii) Pleadings in other cases of tort or crime.

§ 1. Pleadings or procedure in other cases are nowhere described in detail.

We are simply told that a case of arson, when prosecuted as a crime, was tried as 'theft absent', with submission to compurgation and without power to raise an avouchment; that cases of treason, rape, accessories, fighting, public attack, removal of boundary marks, unlawful building or ploughing on another's land, encroachment on waste, stealthy slaying of cattle, and removal of carcasses belonging to others, were likewise all submitted on denial to compurgation.

§ 2. It is not necessary to give all the numerous references, which, without exception, show that the sole procedure in other cases of a criminal or tortuous nature was an oath by complainant alleging the offence, met by a counter-oath denying, and followed by submission to compurgators, varying according to the gravity of the offence charged, the finding of the compurgators being conclusive.²

(ix) General.

§ 1. A consideration of the Welsh actions for theft present and civil suits, not sued on the formalities of a contract, show that they were actions simply and solely to recover movables.

An action for theft or surreption present was a suit to recover property, possession of which had been lost against will, an action on 'benffyg', &c., to recover property possession of which had been parted with voluntarily.

In the former case plaintiff could sue to recover the object

¹ VIII. 254, X. 308, XIV. 712.

² V C. 240; D C 598; V. 72, VIII. 208, 210, IX. 262, 328, X. 390, XIV. 578, 602, 624.

from the hands of any person in whose possession he found it; in the latter he could only sue the person to whom he had himself delivered possession.

§ 2. In this the Welsh Law was identical with other systems. The Roman Law provided that 'Mobilia non habent sequilam'; the Norman French, 'Biens meubles n'ont point de suite'; the Germanic, 'Hand wahre Hand'. A man could only seek his trust where he had left it.

As we have already seen, the rule caused considerable difficulty where a deposit had been stolen from the bailee, and the commentators were left in a state of uncertainty as to whether the owner or bailee must sue.

§ 3. Now the Germanic system was to all intents and purposes identical, but it would involve too much space to give all the references contained in those laws.

The Germanic system recognized two forms of trial to recover movables; one to recover property parted with voluntarily, the other to recover property lost involuntarily.

In the former case the plaintiff sued, not on the basis of any transaction, but on the simple assertion that the property was his, and that he was entitled to recover.

The defendant, if he admitted the property was plaintiff's, but alleged he himself was no longer in possession, was entitled to swear on his own oath that the object had perished, or been stolen, or otherwise removed from his possession against his will, and such oath cleared him from the claim.

If, however, he were in possession, he must either give up the property on plaintiff's oath or establish his own ownership, by putting forward and proving a counter-title of original acquisition, or inheritance, or producing a warranty who would say that he and not plaintiff had delivered the property to defendant.

There were, as in Welsh Law, two assertions: 'the property is mine', and 'it was lost against my will'.

Where the property was present, the trial started with a formal seizure and an oath of plaintiff.

Defendant could reply by admission or denial or advancing 'exceptiones'. If there were admission, defendant paid the penalty of theft. If there were denial, plaintiff led

proof that the property was his, and if he succeeded, defendant was convicted.

If he alleged 'exceptiones', the privilege of proof was defendant's, and the 'exceptiones' permitted correspond with the 'arddelw' of Wales, viz. an allegation of purchase, an allegation of birth and rearing, or an allegation of custody before loss (which proved not that plaintiff had no title, but that defendant had not removed the goods from plaintiff's possession), and an allegation of warranty or 'arwaesaf'.

The system among the Germanic tribes was, therefore, in all main essentials the same as in Wales.

IV

JUDGEMENT AND EXECUTION

§ 1. IN early law the real judgement was that which we would now call the fixing of issues. When pleadings had been completed the judges determined what the facts in issue were, and what proof was appropriate to determine such issue.

That was the judgement, given before proof. The giving of proof was a proceeding following upon judgement as a preliminary to executing it, and was not followed by any other judicial function.

By the time the Welsh Laws were redacted this stage had been passed, and that was the judgement which was a determination of the case after the necessary proof had been given.

§ 2. We have seen that the determination of facts in issue was arrived at in some cases by compurgation, and in other cases by a more or less mechanical rule of weighing evidence, which provided that the statement of witnesses must be accepted, if they were of status to give evidence and withstood all legal objections.

The functions of a judge were (*a*) to determine whether the privilege of witnesses had been established according to customary procedure, (*b*) to determine, where the question of equality or superiority of witnesses was a matter of import, which set of witnesses was, according to the rigid rules of law, superior, and which inferior, and (*c*) after the determination of the facts, to apply thereto the law prescribed as applicable to that particular set of facts.

The judge did not in any sense of the term, as we now understand it, 'weigh' the evidence; in fact, there was no room for that, for no person could produce negative evidence to disprove a fact affirmatively established by evidence produced according to the requirements of the law.

§ 3. In cases where there was compurgation, there were,

as we have seen, no 'evidences' in the Welsh conception of the term: the compurgators gave their verdict on the information and the oaths of parties, using at the same time their local knowledge and knowledge of the parties.

This original practice continued unaltered in North Wales, where the strict demarcation between the functions of the judge and the functions of the compurgators or evidences remained unimpaired. In South Wales, however, where compurgators of country took the place of compurgators of kin, and where the compurgation of country, as time went on, was sworn by the landowners who formed the bench, a bridge was created whereby, without any violence to the older conception, the determination of a question of fact became a function of the Court, at least where compurgation was the appropriate form. The bench and the compurgators became one and the same.

§ 4. To ensure that judges were cognizant of the facts to which they had to apply the law, and that they did apply the law correctly to the facts, a definite and strict procedure was provided in the laws.

When all the evidence in a case had been completed, the men of the Court summed up. The presiding judge, in summing up, had to be most careful, and his summing up could be challenged for certain definite reasons by parties.

If a party did object, he was entitled to demand a copy of the record, if such existed, and that record was conclusive proof of any fact urged in objection by the party; if none existed, the party objecting could prove his contention by the swearing of attestators.

The summing up could be objected to on the ground that the judge had strayed from the point by omitting a point in issue, or by introducing a point which was not in issue, and should a judge commit an error in this particular, he was liable to be fined a 'camlwrw', and his summing up had to be rectified.

If a fact supported by testimony were omitted in the summing up, the party who had proffered proof of it could draw attention to the omission. If the judge said he had not heard it (and herein we can see the importance of pro-

ducing attestators to certify during proceedings), the party could put him to the relics; and, if the judge maintained, on the relics, that he had not heard the testimony, that fact could not be used, inasmuch as it was essential that every fact deposed to should have been in the hearing of the judge. If, however, there were more than one judge and 'gwrddas' in the field, and one judge and the 'gwrddas' had heard the testimony, the fact proved had to be considered.

§ 5. Having summed up, the judges withdrew to consider their judgement, and any person coming to listen to their deliberations without permission was fined three or six kine, according as to whether the lord was absent from or present in the field. Where there was a bench of judges and there was disagreement among them on any point in the judgement, the opinion of a two-thirds majority prevailed, though the same authority indicates that there must be unanimity.

§ 6. In arriving at the judgement applicable, previous written decisions could be relied upon and analogous precedents followed, and much importance was attached to the rule of 'stare decisis'.

'For similar cases, similar decisions are required,' says the Dimetian Code, that being one of the maxims of Hywel Dda's Law, and if a judge gave a judgement contrary to one previously given by him in a similar case, he was fined.

Written law, that is the opinions of juriconsults as in Rome, must be followed until abrogated by superior decision, and if there were two written opinions regarding the same matter, contradictory of each other, then and then only was the judge to apply that which seemed most reasonable.

§ 7. Having considered their judgement, the judges returned to the field, taking security again from both sides to abide by the judgement and for payment of their fees.

In delivering judgement, the judge again recapitulated the claim and the answer thereto, the facts and pleadings in the suit, and then pronounced judgement, explaining it to the parties.

§ 8. A judgement once delivered could not be altered by the judge delivering it. He was prohibited from 'remembering

his law after judgement', and the judgement could only be amended after a challenge by way of 'mutual pledge'.

§ 9. Every judgement, in order to be binding, had to be delivered in the presence of parties, and in the hearing of the lord. This rule applied just as much to a case where a party wilfully absented himself as to a case where absence was due to other causes, but there was this distinction that, whereas the former could only be reopened if the defendant appeared within a year and a day and submitted himself to law, the latter was altogether inoperative, and could be ignored.

§ 10. A judgement delivered 'in praesentia' was conclusive, unless it were challenged by mutual pledge, when it became dubious (*ammou*) until the appeal were disposed of.

The principle applied to criminal cases as well as to civil, so that if a man were found guilty 'in absentia', and he appeared in Court before sentence was pronounced, submitting himself to law, the Court was bound to hear him; and, if it refused, the accused was freed from the charge, and the presiding officer became liable to a fine.

So also where a plaintiff had absented himself, he could, at any time before judgement (subject to the fine for contempt), come into Court and submit himself to law. If he did that, there could be no *ex-parte* judgement.

§ 11. Judges were exhorted to adjudicate immediately, but it would seem that it was not incumbent on them to deliver judgement on the day for 'loss and gain'. We are told that 'failure of the judge to recollect his judgement' would delay the day for loss and gain. This appears to imply that a judge had time to consider judgement, but he could not get time, if parties objected, unless he swore on the relics that he did not recollect, i.e. that he was not clear on his law.

If he did so swear, he was allowed a period of nine days in which to confer with men of larger experience than himself, and on the ninth day he pronounced judgement in the presence of parties. During the period of delay, and in fact throughout a suit, the defendant held possession of property in suit, and, if plaintiff contumaciously absented

himself when judgement was pronounced, defendant was to retain any land in dispute.

If, on the adjourned hearing, the judge were unable to arrive at a decision, he was fined 180 pence, and deprived of his office, and the case was heard 'de novo' before another judge.

The Dimetian Code allowed him fifteen days, if he were an official judge, and if he then failed to deliver judgement, he was dismissed from office, while judges by privilege of land were allowed three adjournments, after which they were to be detained in custody until they delivered judgement.

§ 12. A judgement once passed 'in praesentia', after full hearing and not challenged, operated as 'res judicata' to bar all subsequent claims, and any one not abiding by a final judgement was liable to confiscation of all his property.

We have to add that a compromise entered into before judgement operated as 'res judicata', that where there was a definite legal penalty attached to a judgement, it could not be averted by the payment of compensation, and that no judgement could be given for more than that which had been claimed.¹

§ 13. The Codes have little to say about the execution of judgement.

The only direct provisions are that execution must be taken out within a year and a day of judgement, failing which there became an 'intervention of country', that is the decree became time-barred, and the person in possession of the property decreed was no longer liable to give it up, and that, where judgement for property was given, the decree holder was entitled to take the Court apparitor with him and seize the property by force, if necessary.

This did not apparently apply where a surety had been given to abide judgement, which was the normal course, and in that case it was the duty of the surety to secure delivery. It seems that in all such cases the ordinary law of distress was applicable.

The law of distress was, in fact, adjusted to the execution

¹ V. C. 28, 154-6, 164; D. C. 400-2, 440, 458, 466-8, 470, 476, 478; IV. 26-8, VI. 106, VII. 146, IX. 236, 246-8, X. 328, 350-2, 370, 382, 390, XI. 398, 400, 412, 420, XIV. 568, 648, 652, 692.

of decrees of Court, without any radical change in law, by making it a condition precedent to distress that permission of Court should be obtained.¹

§ 14. This is exactly what happened in other countries where courts assumed the functions of previous consensual arbitrators.

Under the Roman Law of the XII Tables, execution was postponed until thirty days after decree, at the end of which time payment had to be made or a vindex (surety) found to ensure payment

In early Germanic Law the right to distress was a private right ; but, by the time the laws of the Teutonic invaders of the Roman Empire were redacted, the previous permission of the courts to enforce that right had become a necessary preliminary. The right of private executive action closed, among certain Germanic tribes, with the Lex Salica, and the process was extended, among others, by the Lex Ripuaria, Lex Burgundorum, and the Lex Langobardorum.

Similar was the case in England. Under the laws of Hlothaire and Edric, c. 10, it was the law that satisfaction of a decree must be made in seven days or security given for satisfaction ; while the Laws of Ine, c. 9, show that the right to recover, without resorting to the courts, was recognized by custom, for that right was expressly abolished :

‘ If any one take revenge before he demand justice, let him give up what he has taken to himself and pay bote of 30s.’

What happened in England was what happened in Wales. The party who had a claim was allowed to exercise his right of distress unaltered, subject to permission of Court being obtained after adjudication. The transition from the stage of private execution without resort to law, to the stage of exercising that right after permission being granted, is clearly brought out in Cnut’s Secular Laws, c. 19, and the Conqueror’s Laws, c. 45 :

‘ Let no man take distress till he has three times demanded his right in the hundreds. If after three demands he does not get justice, he is to go to the shire-gemot. If that then fail, let him take leave either from hence or thence that he may seize his own.’

¹ VI. 116, XIV. 728.

PART X

APPENDICES I TO XIII

AND

GLOSSARY OF WELSH TERMS

APPENDIX I

THE LESSER 'GWELYS' AND SEPARATE 'GAFAELS' IN DENBIGH

| <i>Ville.</i> | <i>Name of Gwely.</i> | <i>Remarks.</i> |
|---------------------|--|--|
| Bachymbyd. | Ithel Pengwern. | Called progenies, and holding termed a gafael. |
| Ysceibion. | David ap Griffith. | Called progenies. |
| Brynlluarth. | Ior' ap Heilyn. | " |
| | Ken' ap Llywelyn. | " (held 5 acres). |
| | Ienna ap Llywelyn. | " " |
| Prees and Llechred. | Ieuan Wenwes. Meurig Wenwes et Ieuan Ddu. | 2/3rds in Llechred; 1/3 of holders unfree. Spoken of as gwelys. |
| Eriviat. | Erefyn or Eryfyot. Madoc. | Called gwely. " |
| Archwedlog. | Heilyn ap Carwed. | " |
| Wigfair. | Morythe. | 2/3rds gwely free, 1/3rd unfree; free part divided in 2 gafael after sons of Morythe; 1 gafael being subdivided into 2 gafael, named after grandsons of Morythe. |
| | Pridydd Moch. | 2/3rds free, 1/3rd unfree; free gwely being also called gafael Pridydd. |
| Meifod. | Hirodel. | 1/9th free, 8/9th unfree. Emancipated <i>ex deo principis</i> in return for military service only. |
| Cilcedog. | Edenewyn Ringild. | Case of emancipation by office; other gwelys in ville of same descent being unfree. |
| Hendregyda. | Ithel ap Grifi'. | Divided into 8 progenies, named after Ithel's eight sons, each holding 3/4-gafael. |
| | Gwgan Goch. | Divided into 4 gafael, 2 of which were held jointly, and 2 (1 of which was also called gwely) were held separately. |
| Bryrfanigl. | Wyrion Barth. | |
| Esgairebrill. | Bleth ap Wilym. Meurig ap Wilym. | |
| Ereithlyn. | Silene. | Also called progenies. Divided into 2 gwelys and 1 cynnwys. |
| | Eleuan. | Also called progenies. Divided into 3 gwelys, 2 of which held by same co-sharers. |
| | Mordic Felyn. | Called progenies. Divided into 3 gwelys. |

| <i>Ville.</i> | <i>Name of Gwely.</i> | <i>Remarks.</i> |
|-----------------------|-------------------------------|--|
| Treborth and Dyserth. | Cadwallawn ap Trahaearn. | Divided into 5 gafaels: Ithel ap Ririd held 1/3rd; Cadwgan ap Cadwallawn in 2 gafaels, each 1/6th of holding; Dolphyn ap Cadwallawn in 2 gafaels, each 1/6th of holding. |
| | Eignon ap Meredith. | Called progenies only, in 1 gafael. |
| | Cadyfor ap Eignon. | Also called progenies; in 3 gafaels named after sons of Cadyfor. |
| Mochdre. | Map Bonhedd. | Called gwely, progenies, and wyrion. Divided into 3 gwelys, named after sons of one Madoc. |
| | Wyrion Gwr Newydd. | 1/2-gwely; also held separate gafael on rent. |
| Mochdre. | Elidyr ap Eden'. Cynddelw. | One holder only. |
| Rhiw. | Griffri. | " |
| Barrog and Petrual. | Tegwarded. | Divided into 3 gafaels, named after sons of Tegwarded. |
| Gwytherin. | Lleched Frych. | Divided into gafaels, 2 held jointly by same person, 2 others by ten holders, and 3 separately. |
| | Eignon Mynachnewydd. | A monastic holding, divided into 5 gafaels, named after sons of Eignon. |
| | Gweithydd or Gwely Mawr. | Divided into 6 gafaels. |
| Llewesog. | 1 gafael. | |
| Bachymbyd. | 1 gafael. | |
| Lleweni. | 3 gafaels. | 1 gafael in two portions, 1 gafael enfranchised by office, 1 named after three people. |
| Prees. | 2 gafaels. | Same holders in both, rest of holdings of family unfree |
| Penporchell. | 1 gafael. | |
| Gwerneigrön | 17½ gafaels. | 4 known by same name and held by same persons, 3 ditto, and 2 ditto by other holders, suggesting gafael a defined area. 6½ other gafaels in ville, all unfree. |

APPENDIX II

THE LESSER 'GWELYS' IN ANGLESEA

| <i>Ville.</i> | <i>Name of Gwely.</i> | <i>Remarks.</i> |
|---|--|--|
| Trefwastrodion. | Ken' ap Tegwarded. Hywel ap Tudor. Eignon Fras. Eignon ap Issac. Gwalgeithion. | A falconer's gwely from 'gwalch', a hawk. |
| Eghissel. | Ithel ap Trahaearn. Wilsenffraid ap Trahaearn. | |
| Trefcornor. | Conus. | Cynnwys? |
| Cerrig Eafael. | Gwas Teynell ap Gronw. | |
| Aberffraw. | Porthorion. Simond. Bodfeurig. Tref Waspadrig. | The door-keepers. Territorial name. The Irishmen's tref. |
| Trefowain cum Rhodogeidio. | Owain ap Cadered. | |
| Caergeiliog. | Eignon ap Roderic. | |
| Bodelwap. | Madoc ap Owain. Llywelyn ap Owain. Phillip ap Owain. | |
| Nhowyn. | Wyrion Iago. Gwas Teyniol. | Cf. Cerrig Eafael. |
| Bodormagh. | Bodormagh. | Divided into two halves. A territorial name. |
| Arienallt cum Treadol. | Ior' ap Ieuan. Owain. Yorgh. Trefdol tir Map Ririd and tir Eignon Foel. | Meaning dubious. Origin of name lost by 1352. Land held by advocarii. |
| Tref Ednyfed. | Gronw ap Eden'. Ieuan ap Eden'. Pill ap Eden'. | |
| Trefadoc, Clegarrog, and Coedana. | Cuheli ap Caderod. Gwythir ap Caderod. Llyw' ap Caswallawn. | |
| Bwttan. | Meredith ap Eynon. Ior' ap Eynon. David ap Eynon. | |
| Llanfechell. | Griff ap Llywelyn Meredith ap Llywelyn. | This Llywelyn was seventh in descent from Owain Gwynedd. |
| Carnedd, Dronwy, Clwchdyrnog, and Aberalaw. | David ap Gwelsanffraid. | |

| <i>Ville.</i> | <i>Name of Gwely.</i> | <i>Remarks.</i> |
|---|--|--|
| Porthaethwy and Gaerwen. | David ap Mabon. | |
| Hirdrefaig. | Meredith Cragh. Adda Wen. | |
| Ysgubor cum Gaerwen. | Meredith ap Ior'. Hywel Foel Ddu. | |
| Gwydryn. | Llywelyn ap Llywarch. Hywel ap Llywarch. David ap Tegwared. Eneas ap Idris. Madoc ap Kefenerth. Ken' ap Tegwared. | |
| Hendregadoc. | Symond ap Gylmot. | |
| Trefiosseth. | David ap Wyn ap David. David ap Wyn ap Ior'. | |
| Cerrigdewi. | Wyon ap Rhys. | |
| Gaerwen. | Wyrion Mabon. Griff Whith. | Apparently of clan of Hwfa ap Cynddelw. |
| Porthamal. | Menw ap Moredig. Issac ap Moredig. Tegeyrn ap Moredig. Ieuf ap Moredig. | |
| Caerdeon. | Griffith ap Mcurig. David ap Eignon. | |
| Caerdegog, Cafnan, and Llanddygfail. | Madoc ap Hoel. Hoel ap Gilth. | |
| Clegerrog. | Tudor ap Griff. Llywelyn ap Gwilym. Trahaearn ap Hwfa. Madoc ap Gronw. Teg' ap Gronw. Wyon ap Heilyn. Ior' ap Heilyn. | |
| Cemlyn. | Hwfa ap Wyon. Madoc ap Wyon. Eignon ap Wyon. Gronw ap Wyon. | |
| Alaw Birth. | Moryth. Keferech ap Barth. | |
| Llanfigel. | Ithel ap Caradoc. Meredith ap Ior'. | |
| Llysdulas, Amlwch Glasraig, Coeduthgor, Lligwy, and Bodsarthur. | Tegheyrn ap Carwed. Hoel ap Carwed. Dolfyn ap Carwed. Atha ap Griffri. Bletherus ap Griffri. Brogwell ap Griffri. Doynowel ap Griffri. | Of common stock. The holder of Gwely Tegheyrn in 1352 was a great-great-grandson of Teg'. The family claimed descent from Cunedda, Carwed being the seventeenth in descent from him. |

| <i>Ville.</i> | <i>Name of Gwely.</i> | <i>Remarks.</i> |
|--------------------------------------|---|---|
| Llaneilian and Bod-cynddelw. | Penrhyn. Baragh. Bodrugan. Bodkendalo. | Names are territorial. |
| Nantmawr. Bodewrid. | Hoel ap Llywelyn. Cinrithiet. | Possibly of tribe of Gweirydd ap Rhys. |
| Pentraeth. | Geraint ap Tegwared. Madoc ap Meilir. More ap Bayre. | Claimed to be of one stock. |
| Bodenriw. Trefolwyn. | Ior' Vaghan. David ap Wyon. Heilyn ap Wyon. Teg' ap Ieuan. Atha ap Ior'. Hebbogothion. | Hebbogothion = falcons. That gwely held in two halves. Actual holders appear in some cases to have been sons or grandsons of protonym of gwely. Possibly of tribe of Gweirydd ap Rhys Goch. |
| Llandegfan. | Coredyr. Iardur. | |
| Mathafarnaethaf. | Arthragh. Dogwell. Oidilio. Kilthaprid. Tegheyrn. Elenyw. Atha Goch. Cadefor. | Some indications of connexions. |
| Mathafarn Wyon. | Gronw ap Wyon. Eignon ap Wyon. Madoc ap Wyon. Eignon Vaghan Edenewyn. | Of common stock, perhaps connected with Cemlyn. |
| Trefor. Castell Ior' cum Parciau. | Ior' ap Kendalo. Gronw ap Iago and Llew Llwyd. David Pridydd. David ap Teg. Map Cadwgan. Ior' Vaghan and Eignon Mon. | A purchased gwely. |
| Tregaian. | Wyrion Iardur. Wyrion ap Kendalo. | |
| Rhoscolyn. | Rhys ap Cadwgan. Tegwared ap Cadwgan. Arthen ap Cadwgan. Cynefor ap Ieuan. | |

APPENDIX III

THE LESSER 'GWELYS' AND SEPARATE 'GAFAELS
IN CAERNARFON

| <i>Ville.</i> | <i>Name of Gwely</i> | <i>Remarks</i> |
|-------------------------------|---|--|
| Llanrug. | Tegwared ap Rurid Genethlyn ap Rurid Coyswyn (?) | A very peculiar collection of names = cyswyn, reputed or allied = the Irishmen's holding = the sinister cloak, i.e. illegitimate |
| Llanfairpriscol | Was Padrig Whith Mantell Ken Crwth Gwgan ap Ithel | |
| | Ior ap Llysian Hywel ap Ilysian Llywelyn ap Ilysian Gionw ap Meredith Griff ap Meredith Llywarch ap Meredith | |
| Treflan and Dinlle | Wyrion Iorwerth Ken' ap Tregyr Pill ap Tregyr Edenewyn ap Tregyr Cefereith ap Tregyr | 1/10th in T 9/10ths in D 2/3rds 1/3rd 4/5ths 1/5th 1/2nd 1/2nd 2/3rds 1/3rd |
| Dinlle | Wyrion I ignon Wyrion Morgan Wyrion Rand Wyrion Ystrwth Wyskywed Hebbogothion Bowynyed | Robe-makers ? Falconers Hat-makers ? |
| Elernion | Hoidilo ap Llywarch | Also called 'gafael' |
| Penarth | Wyrion Roppert Wyrion Carwn Wyrion Itgwal | |
| Ethnng | Gwehelyth | Literally 'stock' |
| Bachelaeth | Wyrion Rhys Wyrion Lignon Wyrion Reon | |
| Bottwnog | Ior' ap Genethlyn Bletherus ap Isaph Gwyr Carrog | Literally 'brook-men' |
| Mynytho | Eignon Trwyn and Eden Genyth Llywarch ap Trahaearn Wyn ap Kenbreit Robert ap Wyn Wyrion Mawr | Mawr = great Perhaps of Wyrion Eden'. |
| Trefgarnedd and Marchgroes | Madoc ap Gronw | |
| Trefgarnedd | Wyrion Seisyll | |
| Madryn and Pen- wyn | Wyrion Rurid Wyrion Heilin | |

APPENDIX III

| <i>Ville</i> | <i>Name of Gwely</i> | <i>Remarks</i> |
|---------------------------------|---|--|
| Ceidio and Rhos. | Was Carrog | Literally 'brook-ser- vants'. |
| Llanengan | Wyrion Utot Madoc ap Sewyll | |
| Rhiw | Heilyn ap Meiri Gwgan ap Wilym | |
| Bodyydd and Tre- fabarthian | Rhys ap Seisyll Gwryd ap Seisyll | |
| Bodferin | Pill ap Isaac Ior ap Isaac | |
| Penllech | Llywarch ap Cynddelw. Rurid ap Cynddelw Eignon ap Gwgan | |
| Pennant | Wyrion Cynan Gwair | Literally 'hay' |
| Penyfed | Wyrion Ithel Wyrion Griffri | Holders great great grand- sons of protonym. |
| Abercin | Sessill | |
| Llyn Ystumilyn | Ithel Goch Iegwared ap Roppert. | |
| Rhedynog | Gionw ap Tegwared | |
| Pencoed | Wyrion Caradawg | |
| Brynbras | Wyrion Ithel | |
| | | |
| <i>Ville</i> | <i>No of Gafael's</i> | <i>Remarks</i> |
| Castell | -3 | Modern Conway An unconnected quantity of 'holdings' |
| Penlassog | 1 | Given by king in exchange for land in Beaumaris |
| Ecc St Petri | 2 | One termed Pedwerydd Ran, i.e. the fourth share |
| Llechan | 1 | Divided into 2/3rds and 1/3rd |
| Glyn and Rowen | 1 | As in Penlassog |
| Caerhun | 6½ | |
| Bodwayo and Dwygyfylchu | 7 | |
| Bodfyllr | 9 | |
| Llanfair | 8 | |
| Llanfairisgair | 1 | |
| Bodhenreg | 3 | Named after three brothers |
| Bodrhydd and Tre- fabarthian | 1 | Trefabarthian held by one man and termed a gafael |
| Penllech | 1 | |
| Dindowedd | 1 | The gafael of the door keeper. |
| Doypenarth | 1. | |
| Gellidara | 1 | |

APPENDIX IV

'GWELYS' IN THE BLACK BOOK OF
ST. DAVID'S

| <i>Ville.</i> | <i>No. or Names of Gwelys.</i> | <i>Remarks.</i> |
|---------------------|---|--|
| Llandewibref. | 8. | |
| Garheli. | 1. | |
| Nantwynlle. | 5. | |
| Blaenpennal. | 1. | |
| Llandewiaberarth. | 4. | |
| Llanon. | 1. | |
| Lodrepedran. | 2. | |
| Henllan. | 1. | |
| Llanogwede. | 3. | |
| Llanlluan. | 3. | |
| Llanarthney. | 3. | |
| Llangefelath Gower. | 7. | |
| Llandeio patria. | 3. | |
| Bangor. | Enewris. Wyrion Redewyth. Wyrion Cuhelin. | |
| Llandogi. | Wylm ap Llywelyn. Wyrion Ieuan. Wyrion Tawel. Griff ap Bleddyn. Blegwryd. | Both held by same lot of co-sharers. In portions, 2/3rds and 1/3rd. |
| Llangadoc. | Canaystref. Clare. Caradawg ap Duryon. Gwgan the Parson. | Half a gwely. |

APPENDIX V

THE 'STIPES' IN THE BLACK BOOK OF
ST. DAVID'S

| <i>Ville.</i> | <i>Name or No. of Stipes.</i> | <i>Remarks.</i> |
|---------------|--|-----------------|
| Cefn Newydd. | Gwely stipes Griff ap Gilbert. " Isac ap Ithna. " Gronw ap Erelwyn. " Cadwgan ap Dofendr. | |
| Trefberneth. | 1. | |

| <i>Ville.</i> | <i>Name or No. of Stipes.</i> | <i>Remarks.</i> |
|---------------|---|--|
| Cyllegan. | Gwely stipes Gladys ver. David. " Walter ap Gronw. " Ropert ap Ieuan. | Also gwely Gwayher. |
| Penenedon. | 5. | |
| Llangweryd. | 3. | |
| Llanlluan. | Stipes Cladoc. | Plus 3 gwelys. |
| Llan Nenydd. | " Cynan Elth. | Said to hold land one league by one. |
| Llandeilo. | 13. | Plus 3 gwelys. One stipes owned four farins, the rest scat- tered throughout patria. |
| Llandeuaysam. | Gwely stipes Ellillo. " Redwyth. " Wern. | |
| Llangadoc. | Stipes Cadwgan ap Gronw, Rhys ap Meredith et heredes, Rhys ap Trahæarn. | Three men held sepa- rate plot. |
| Glasconi. | Gwely stipes Greg. " Cenyllyn. " Cywryd. | |
| Gwenhir. | " Meurig ap Tra- haearn. | Seven men holding 200 acres. |
| Gilfech. | " Hywel ap Tra- haearn. | Three men holding 160 acres. |
| Calfannog. | " Gwgan ap Afael. " Llew ap Denand. " Tegwared Pen- grach. | |
| Redwernan. | " Cuhelin. | A 40-acre holding. |

APPENDIX VI

FREE AND UNFREE 'GAFAELS' IN BROMFIELD
AND YALE, 1315

| <i>Ville.</i> | <i>Tenure.</i> | <i>Remarks.</i> |
|---------------|----------------|--|
| Wrexham. | Unfrec. | 1 gafael held by one man, area with mes- suage and croft 7 acres. 2½ gafael held by one man, area not stated. |
| Gwensanau. | Unfree. | 18 1/2-gafael held by fourteen separate individuals, 2 by two brothers, and 2 by another lot of two brothers. Area not stated. |
| Erryrys. | Unfree. | 17 1/2-gafael, 13 held by separate indivi- duals, 2 by two men jointly, and 2 by two others jointly. Areas not stated, but all equal, and same as in Gwensanau. |

| <i>Ville.</i> | <i>Tenure.</i> | <i>Remarks.</i> |
|------------------|----------------|--|
| Bodidris. | Free. | 2 gafaels held jointly by two men. Area not stated. |
| Chweleirog. | Unfree. | 1 gafael held by four men, 2 gafaels each held by two men, 3 1/2-gafaels held each by one man, and 1 1/3-gafael held by one man. Area not stated, but all gafaels equal. |
| Llandynan. | Free. | 1 gafael held by four men, 22 gafaels held separately by single individuals, 1 1/3-gafael held by one man, and 5 1/4-gafaels each held by one man. Areas not given, but all gafaels equal. |
| Bryntangor. | Unfree. | 1 gafael held by four men, 1 gafael held by three men, 1 gafael held by one man, 1 1/2-gafael held by one man. Area not stated, but all gafaels equal. |
| Dutton Diffaeth. | Free. | 1 1/3-gafael held by one man, 1 1/6-gafael held by three men. |
| | Unfree. | 1 1/6-gafael held by a group of nativi, 1 gafael held by one person, and 1/3-gafael held by one person. |
| Erbistock. | Free. | 1 1/2-gafaels held by eight men jointly = 40 acres. |

APPENDIX VII

UNFREE 'GWELYS' AND 'GAFAELS' IN DENBIGH

A. GWELYS.

| <i>Ville.</i> | <i>No. of Gwelys.</i> | <i>Remarks.</i> |
|------------------------|-----------------------|---|
| Galltfaenan. | 3. | 1/2nd, 5/6ths, and all escheat. Unescheated portions held by four and four men. |
| Nantglyn Sanct. Prees. | 1. 5. | One holder. 1 escheat, 1 as in Penporchell, 1 (Peyned) called gafael in Beryn, 1 held by two brothers, 1 in 6 gafaels, almost entirely escheat, held by nativi of Beryn. |
| Eriviat. | 3 and 2/3rds of 2. | Largest gwely three men; 1/3rd of 2 gwelys free. |
| Llechred. | 1 and parts of 2. | 1 escheat; 2/3rds of 2 free. |
| Bodiscawn. | 2. | Each holding 1/3rd ville. Other 1/3rd held free by related gwely. Also held in Prees. |
| Penporchell. | 1. | As in Prees. Four holders. |
| Taldragh. | 1. | 7/8ths escheat. One holder. |
| Carwedfynydd. | 1. | 1/2nd escheat. Three holders. |
| Pencledan. | 2. | Held by five and three men respectively. Cesses on each individual. |

| <i>Ville.</i> | <i>No. of Gwelys.</i> | <i>Remarks.</i> |
|----------------------|-----------------------|--|
| Garllwyd. | 1. | In 2 plots, six and three holders. |
| Wigfair and hamlets. | 5. | 3 entirely escheat, 3/4ths of fourth also, 1/4th of which held by six men. Fifth divided into 4 gafaels; names show recent purchase. |
| | 2. | Partly free. Vide free gwelys. |
| Meifod. | 3. | 8/9ths-gwely Hirodel held by eight men, gwely Idenerth held by seven men, gwely Hoidilo held partly by other gwelys. part escheat. |
| Cilcedog. | 2. | Eight and three holders. |
| Dynorbyn Fawr. | 1. | Eighteen holders. |
| Twlgarth. | 1. | Abandoned. |
| Mochdré. | 3. | Interrelated. Two, three, and two holders. |
| Rhiw. | 8. | Largest number of holders four. |
| Colwyn. | 2. | Interrelated. Two and one holders. |
| Penmaen. | 4. | Six, six, five, and three holders. |

B. GAFAELS.

| <i>Ville.</i> | <i>No. of Gafaels.</i> | <i>Remarks.</i> |
|-------------------------------------|----------------------------|---|
| Segrwyd cum Cader, &c., and Casyth. | 22 1/2. | Portions of 11 only unescheated. Largest number of joint-holders three. Include 1/2-, 3/4-, and 4/5-gafaels. |
| Prion. | 8 and 1/3rd. | 1 escheat. Sixteen tenants held each 1/4-gafael. Largest number of joint-holders two. |
| Postyn. | 23. | 11 5/6ths escheat. Held in 1, 1/2-, 3/4-, 1/4-, and 1/3-gafaels. All single holders. |
| Llewesog. | 5 1/2. | 4 3/4ths escheat. Three holders each of 1/4-gafael. |
| Denbigh. | Gaf. Rethe. Gaf. Caeth. | As names show, Gaf. Rethe was once free, but had become unfree in time of princes. It was divided into 6 gafaels, some being divided into separate holdings. Some interrelated. Gaf. Caeth was divided into 3 gafaels subdivided into plots. Largest number of holders three. |
| Lleweni. | 18. | 6 escheat, also parts of rest. Largest number of joint-holders four. |
| Beryn. | 7. | 3 escheat. Gwely Peyned here called gafael. See Prees, <i>supra</i> . |
| Llechtalhaiarn. | 2. | Held by grandsons of protonym. |

| <i>Ville.</i> | <i>No. of Gafaels.</i> | <i>Remarks.</i> |
|---------------|------------------------|---|
| Gwerneigrön. | 6½. | Ville also had 17½ free gafaels 4½ escheat. Largest number of holders five. |
| Llysaen. | 9. | 1 gafael also called gwely. Largest number of joint-holders eight. |

APPENDIX VIII

THE TREWELOGHE AND TREFGEFERY VILLES IN CAERNARFON AND ANGLESEA

A. *Trewelloghe Villes in Caernarfon.*

| | | | |
|--------------|--------------|---------------|------------|
| Bodyscallen. | Pen-y-barth. | Llaniestyn. | Brynodol. |
| Penlassog. | Llanengan. | Llecheiddior. | Gest. |
| Bodewin. | Nevin. | Pentyrch. | Rhedynog. |
| Penychain. | Morfa. | Pennant. | Crugeni. |
| Nyffryn. | Arianog. | Llechan. | Penmachno. |
| Glyn. | Rowen. | Dolwyddelan. | Gwydir. |
| Trefriw. | Cylan. | Bryncelyn. | Wig. |
| Llanfair. | | | |

B. *Trewelloghe Villes in Anglesea.*

| | | | |
|-----------------|---------------|----------------|--------------|
| Rhosmor. | Caergeiliog. | Treban Meurig. | Bodenolwyn. |
| Aberalaw. | Llanddygfail. | Cafnan. | Cemlyn. |
| Bodronyn. | Lligwy. | Nantmawr. | Trefarwith. |
| Bodrida. | Maesoglen. | Trefgardet. | Treban Pill. |
| Trefwastrodion. | Carnedd. | Llysdulas. | Esceifiog. |
| Tyndrofol. | | | |

C. *Trefgefery Villes in Caernarfon.*

| | | | |
|------------------------|-------------|--------------|-------------|
| Dinorwic. | Llanbeblig. | Dolellog. | Ethinog. |
| Penmaen. | Trefcoed. | Hirdref. | Bodfean. |
| Bodagho cum Bleiddiog. | Towyn. | Penarfynydd. | Tydweiliog. |
| | Crugeran. | Dolpenmaen. | |

D. *Trefgefery Villes in Anglesea.*

| | | | |
|-------------|--------------|-------------|------------|
| Aberffraw. | Llanlibio. | Llanfol. | Dynyslewi. |
| Rhosmynach. | Deri. | Hirdrefaig. | Dinam. |
| Bodenriw. | Porthaethwy. | Bodunod. | |

E. *Villes in Anglesea containing 'aillts' of the free.*

| | | | |
|--------------|----------------|------------|--------------|
| Nantmawr. | Nantfychan. | Trescawen. | Trefcastell. |
| Gwredog. | Penhenllys. | Twrgarw. | Penymynydd. |
| Ddrainog. | Hendregadoc. | Treffos. | Cafnan. |
| Tregaian. | Lledwigan. | Arienallt. | Bwtan. |
| Llanfighael. | Carnedd. | Dronwy. | Aberalaw. |
| Llancilian. | Pen Garnisiog. | Dynyslewi. | Porthaethwy. |
| Cremlyn. | | | |

F. *Villes in Caernarfon containing 'aillts' of the free.*

| | | | |
|---------------|--------------|--------------|-----------|
| Mochras. | Trefgwyn. | Bodrydd. | Gest. |
| Rhyd-y-glair. | Bryn Eithan. | Llanllyfni. | Clynnog. |
| Penwyn Cybi. | Bryncelyn. | Llandinwail. | Bodanreg. |
| Llanfair. | Meyllteyrn. | | |

APPENDIX IX

TIR CYNFYF IN THE SURVEYS

| <i>Ville.</i> | <i>Land.</i> | <i>Term.</i> | <i>Remarks.</i> |
|-----------------------|-------------------------------|----------------------------|---|
| Lleweni. | Gaf. Ithel Ringild. | Terra emptica. | Pastus at low rate. |
| Denbigh. | 1/6-gaf. Waspadrig. | Tyrprid. | Fixed rental of 10d. |
| Carwedfynydd. | 1/8-gaf. Teg' ap Ken'. | Terra emptica. | On tunc only. |
| Prees. | 1/2-gaf. Bagh. | Tyrpryn. | " |
| Prysllygod. | 1/3-gaf. Rhys ap Hunyth. | Terra emptica. | On tunc and pastus principis only. |
| Melai and Prysllygod. | 2/3-gaf. Mordig ap Trahaearn. | Terra emptica and tyrpryn. | On tunc only. |
| Archwedlog. | Gwely Griff ap Meredith. | Tyr kennyth. | " |
| Cilcedog. | Land of Hoidilo. | Tyrprid. | Rental of 19s. 2d. paid by communitas ville. Also tunc- and butter-rent against which the ville pro-tested. |
| Brynfanigl. | Gwely Wyrion Barth. | Tyr kennyth. | Tunc and military service only. |
| Twynan. | Land of Gronw. | Tyrprid. | Escheated. |
| Mochdre. | Land of Eden'. | " | " |
| Llanrhaiadr. | | " | In Bangor Diocese. |

APPENDIX X

TUNC-LEVY IN THE HONOUR OF DENBIGH

I. CYMWD CAIMEIRCH.

- (1) All freemen, except in Brynlluarth, were exempt from tunc, and no tunc-units are traceable.
- (2) Brynlluarth; original assessment 2s., levied at 4d. per 5 acres.
- (3) Unfree in cymwd assessed per gafael at 1s. in Segrwyd and Prion, 7½d. in Postu, and 4d. in Llewesog.

II. CYMWD ISALED.

- (1) The following tunc-pound units are traceable:
 - i. Prees. The ville was divided into sixths. Five of these were held by separate progenies of the clan Llywarch, 1/6th in numerous plots, free and unfree. One progeny paid 3s. 4d. assessed at 4½d. and 4d. per gafael.

One progeny paid 3s. 4d. assessed at 5d. per gwely.
 " " 3s. 4d., half of which was remitted
 and the rest assessed at 4d. per
 gwely.
 " " 14½d., all remitted.
 " " 14½d., including 8d. remitted, bal-
 ance being assessed on the gafaels.
 The plots paid 7s. 7d., of which 7s. 4½d. are traceable,
 assessed on various units, at rates varying from 14½d.
 to ½d. per unit.

ii. Lleweni. The ville was originally held in 3 free gafaels and
 18 unfree gafaels, many portions of which were
 escheat, and the holders of the rest transplanted.

The free gafaels had paid 5s. 4d. at 1s., 1s., and 3s. 4d.
 per gafael, the latter being divided proportionately
 among 1/2- and 1/4-gafaels.

The unfree gafaels had paid 14s. 8d., at rates from 5d.
 to 1s. 3d. per gafael and 1/2-gafael.

iii. Ystrad Cynan, Nantglyn Cynan, and Nantglyn Sanctorum.
 These villes were held by 1 progeny in 4 gafaels.
 Nantglyn Sanctorum was free of tunc in lieu of albadeth,
 representing apparently 1/2 the tunc-pound. The
 other two villes paid 10s., divided equally among the
 4 gafaels.

iv. Carwedfynydd, Dinas Cadfel (1/2), Penporchell (1/2), and
 Talabryn (1/6th).

Carwedfynydd was held in 9½ free gafaels, some of
 which were amalgamated, the whole tunc on the ville
 being apparently 17s. 6d. Some owners also owned
 1/2 of Dinas Cadfel and Penporchell, whose tuncs
 (2s. 6d. and 3s. 4d.) were included in the Carwed-
 fynydd tunc, and others owned 1/6th of Talabryn,
 whose tunc (1/8th) was collected in Carwedfynydd.

The total tunc was distributed over the gafaels and
 fractions of gafaels in varying sums according to area.
 The owners of the remaining 1/2 of Dinas paid 2s. 6d.,
 divided unequally among gafaels.

The owners of the remaining 1/2 of Penporchell paid
 3s. 4d., likewise divided unequally.

The owners of 5/6ths Talabryn (unfree) appear at one
 time to have paid 8s. 4d., but practically the whole
 was escheat.

(2) The following additional tuncs were paid originally, but the
 tunc-pound units cannot be identified :

i. Galltfaenan, 3s., paid 10¾d. by free owners of 1/3rd the
 ville, 2s. 1d. by unfree owners of 2/3rds at 8d. and
 9d. per gwely.

ii. Gwaenynog, 2s. 6d., paid by the free tenants in lump sum.

iii. Eriviat, 12s. 6d., paid 2s. 6d. by each of 5 free and unfree
 gwelys.

iv. Bodiscawn, 6s. 8d., paid 2s. 6d. by 1 free 1/2-gafael and
 2s. 1d. by each of 2 unfree gwelys.

v. Lleched, 1s. 6d., paid 6d. each by 3 free and mixed gwelys.

vi. Beryn, 5s., paid 7½d. by each gafael, free and unfree.

vii. Twyssog (unfree), 7s. 6d., mode of assessment not stated.

viii. Taldragh, 2s. 6d., paid in equal shares by 1 free and 1 mixed
 gwely.

III. CYMWD UWCHALED.

(1) The following tunc areas are traceable :

i. The clan of Rand Vaghan ap Asser.

This clan held the whole or part of 8 villes, and paid
 a total tunc for all its holdings of £1. Originally
 it was divided equally among the 4 gwelys of the
 clan, and, within each gwely, equally among the
 component gafaels.

In dividing the surveyors increased the total by 6¼d.

ii. Barrog. A free ville held by 6 gwelys, each of which paid
 3s. 4d. Each gwely was held in numerous gafaels,
 but the tunc is not shown as distributed over them.

(2) The following additional tuncs were paid, but the tunc-pound
 units cannot be identified :

i. Llechtalhaiarn, 10d., paid 5d. by each of 2 unfree gafaels.

ii. Clan Rhys Goch in Hendrenennig, 20d. paid in equal
 shares by 6 gafaels.

iii. Pryslygod, 5s., paid 20d. by each of 3 progenies.

iv. Melai. Original total not ascertainable. The ville was
 held by 4 gwelys in numerous gafaels, plus 2 addi-
 tional gafaels. The ultimate assessment is per
 gafael; each, however, paying a different total,
 apparently because of differences in area.

v. Petruel, 5s., divided nearly equally in 13 gwelys.

vi. Garthgyfanedd, 5s., paid 6d. by each of 5 free gwelys, and
 2s. 6d. by 1 unfree gwely.

vii. Llanfairtalhaiarn, 10s., paid 32d. by each of 3 gafaels, and
 2s. by 1 gafael.

viii. Beidiog, 6s. 8d., paid in one lump sum.

ix. Mostyn, 3s. 4d., paid in unequal shares by 4 gafaels.

x. Heskyn, 5s., paid 1s. by each of 5 gafaels.

xi. Pencledan, 2s. 6d. (?), paid 10d. by each of 2 unfree gwelys,
 the balance by several plot-holders.

xii. Rudidien, 3s. 4d. (?), unevenly distributed among the free
 and unfree gwelys.

xiii. Archwedlog, 6s. 8d., paid 3s. 4d. by each of 2 gwelys.

xiv. Llysaled, 20d.

xv. Garllwyd, 5s., paid 1/4th by an unfree gwely owning
 1/4th the ville, and 3/4ths by 4 free gwelys, owning
 3/4ths the ville, approximately equally.

IV. CYMWD ISDULAS.

(1) The following tunc-units are traceable :

i. Wigfair. The ville appears to have paid £1, but owing
 to escheats it was reduced to 17s. 5d., levied unequally
 on free and unfree gwelys, apparently according to
 areas held.

ii. Meifod, 5s., Cilcedog, 5s., Dinorbyn Fychan, 2s. 6d., Twlgarth, 2s. 6d., and Dinorbyn Fawr, conjecturally 5s.

In Meifod levied equally on 3 gwelys, mixed and unfree. In the mixed gwely there were separate assessments on the free and unfree members. In Cilcedog and Dinorbyn Fychan levied equally on free and unfree gwelys; in Twlgarth (unfree) on the whole ville jointly.

iii. Gwerneigrion, assessed at varying rates per gafael, free and unfree.

iv. Abergele, assessed on each clan according to fractional share each owned in ville. Within each clan distributed over the component gwelys or gafael, proportionate to their fractional shares.

(2) The following additional tuncs were paid, but the units cannot be identified:

i. Bodrochyn and Kimmel, unfree gwelys. Owing to escheats only 3s. can be traced divided among 4 gafael of 1 gwely.

ii. Hendregyda, 10s., divided equally by 2 gwelys, and within each gwely divided equally among component gafael.

iii. Brynfanigl, 2s. 6d. (?). Only 3½d. survived on 1/8th ville, rest escheated or exempted.

iv. Cilcein, 3s. 4d. (?), escheats prevent ascertainment of mode of distribution.

v. Trofarth, 7½d., apparently at 1½d. per gwely.

vi. Garthwin, 5s., assessed 20d. on 1 gafael, 40d. on another.

V. CYMWD UWCHDULAS.

(1) The following tunc-areas are traceable:

i. Tebrith and hamlets; divided equally among the 4 gwelys.

ii. Mathebrud, 10s., Llanrwst and Garthmyncannol, 5s., and Esgairebrill, 5s.

Except in Esgairebrill divided in each ville equally among the gwelys, within which it was divided equally among the component gafael. In Esgairebrill divided unequally between 2 gwelys.

iii. Ereithlyn, divided among the gwelys, according to their fractional shares in ville, and within gwelys among sub-gwelys equally, where such existed.

iv. Llwydcoed and hamlets. One hamlet assessed at 5s. was exempt. Rest divided among clans as in Ereithlyn.

v. Mochdre, 10s., and Rhiw, 10s., divided among the free, mixed and unfree gwelys, according to area held.

vi. Penmaen, 10s., and Llysfaen, 10s., divided equally among the unfree gwelys and gafael in each ville.

(2) The following additional tuncs were paid, but tunc-pound units cannot be identified:

i. Trallwyn, 10s., divided unequally among component gwelys.

ii. Treborth, 10s., divided as in Ereithlyn.

iii. Cefnllaethfaen, 6s. 8d., divided as in Tebrith.

iv. Colwyn, 2s. 6d., divided as in Tebrith among free and unfree gwelys.

(3) Note. Cilcennus, an unfree maerdref, was exempt as it paid autumn food-rents.

APPENDIX XI

ARDRETH IN THE SURVEY OF DENBIGH

| <i>Ville.</i> | <i>Land.</i> | <i>Amount.</i> | <i>Remarks.</i> |
|-----------------|----------------------|--|--|
| Denbigh. | Gaf. Reth. | 2s. 6d. | For all customs. Unfree. |
| | Gaf. Cathe. | 12s. 8d. | " " " |
| Nantglyn. | 2 plots. | 5s. 0d. | Rented on old ardreth plus 6s. 8d. |
| Eriviat. | Cottage and 4 acres. | 2s. 0d. | Old holding of a nativus of Gaf. Reth, Denbigh. |
| Beryn. | 1/2-gaf. Rishard. | | Unfree. Escheat for non-payment. |
| Penporchell. | Gaf. Ithon. | 4d. | Free. Ardreth did not cover tunc, pastus satellitum, or forest. |
| Taldragh. | 1/4th of ville. | | Unfree. Escheat. Did not cover tunc. |
| Pencledan. | Gwely Trahaearn. | 5s. 5d. | Unfree. Also paid tunc and did common cymwd services = pastus principis. |
| | Gwely Wylm. | 6s. 0d. | |
| Rudidien. | 1/6th ville. | 5s. 6d. | Unfree. Paid tunc and cymwd services. |
| | 15/64ths ville. | 4s. 9d. | " " " |
| | 1/4th ville. | 5s. 6d. | " " " |
| Cilcedog. | Gwely Eden' Ringild. | 5s. 0d. | An emancipated gwely. Paid tunc; had compounded for all services since annexation. |
| Gwerneigrion. | Gaf. Tegward. | | Formerly on ardreth. Escheated. |
| Cefnllaethfaen. | 2 plots. | each 2s. 7d. | All services commuted. |
| Twynan. | 5 plots. | 6s. 6d., 6s. 10d., 3s. 3d., 3s. 3d., 4s. 2d. | Old free land, rented on ardreth free of all services. |
| Rhiw. | 1/2 ord. | 7d. | Held on ardreth by whole communitas ville. |

APPENDIX XII

LEVY OF 'PASTUS PRINCIPIS' IN THE HONOUR
OF DENBIGH

I. CYMWD CAIMEIRCH.

- (1) Each of 5 free progenies paid 11s. p.a. in four instalments.
- (2) Brynlluarth exempt.

II. CYMWD ISALED.

- (1) Pastus levied as a rule at 93*d.*, or 67*d.*, or 93*d.* and 67*d.* (= mark of 13s. 4*d.*), or multiple thereof per unit, paid in four instalments.

When subdivided within unit, rarely divided equally among component parts, distribution therein being determined by arca held or number of holders.

Owing to escheats, remissions, and practice of ignoring fractions, other than $\frac{1}{4}$ or $\frac{1}{2}$, in dividing, it is sometimes difficult to reconstruct original pastus.

- (2) Instances of general rule :

- i. Lleweni. Assessed at 93*d.* on 1/2-gafael (divided into four sub-shares); 67*d.* on 1/2-gafael; 67*d.* on 1 gafael; 135*d.* on 1 gafael.
- ii. Ystrad Cynan and Nantglyn Cynan. Assessed at 186*d.* and 160*d.* on 2 gafael; 67*d.* on each of 2 1/2-gafael; 98½*d.* and 60½*d.* (= app. 160*d.*) on other 2 1/2-gafael.
- iii. Galltfaenan. Assessed at 46*d.* on 2/3rds of 1/2-gafael = total on 1/2-gafael of 69*d.*; originally probably 67*d.*, difference due to ignoring fractions.
- iv. Eriviat. Full gwelys originally assessed at 67*d.* and 67*d.*
- v. Llechred. 2/3rds of 2 wenwes, assessed at 100½*d.* = 67*d.* × 1½.
- vi. Bodiscawn. 1/2-gafael assessed at 67*d.*
- vii. Carwedfynydd. Assessed 2 gafael each at 134*d.*; 1/2-gafael at 67*d.* (divided into four fractions); 1½ gafael at 67½*d.*; 2½ gafael at 669*d.* (= 67*d.* × 10 app.); 2 gafael at 267*d.* (= app. 67*d.* × 4).

- (3) Exceptions to general rule :

Llechred. 1 gwely assessed at 48½*d.* app.

III. CYMWD UWCHALED.

- (1) General rule as in Isaled.

- (2) Instances of general rule:

- i. Clan Rand Vaghan ap Asser. Assessed at 78s. 2*d.* (= 67*d.* × 14), divided among gwelys, and again among gafael unevenly.
- ii. Pryslygod (other holders). Assessed at 185*d.* (= 93*d.* × 2 app.), divided unevenly among the two gwelys.

iii. Melai. Unescheated gwely assessed at 19s. 6*d.* (= 67*d.* × 3½ app.), divided fractionally among gafael, 9s. 9*d.*, 3s. 3*d.*, 6s. 6*d.*

iv. Barrog. 1 gwely assessed at 39s. 8*d.* (= app. 160*d.* × 3), divided unequally among gafael; 1 gwely at 681½*d.* (= app. 160*d.* × 3 and 67*d.* × 3), divided unevenly among gafael; 1 gwely at 185*d.* (= app. 93*d.* × 2), in which 1 gafael was unassessed and 2 escheat; 1 gwely at 37s. 8*d.* (= app. 160*d.* and 67*d.* × 2); 4 gafael at total of 32s. 3*d.* (= 160*d.* × 2 and 67*d.*), each assessed at varying sums.

v. Talhaiarn. 1 gafael assessed at 93*d.*

- (3) Exceptions to general rule :

i. Melai. Owing to peculiar escheats total assessment unascertainable. In 1 gwely of 6 gafael, 4 unescheated paid sums varying from 14*d.* to 116½*d.*; 1 gwely was unassessed; in 1 gwely of 5 gafael, 3 gafael were escheat and 1 unassessed, the fifth being assessed at 19½*d.*; 2 other gafael were escheat.

ii. Barrog. Total assessment in 1 gwely unascertainable owing to escheats; in unescheated gafael thereof division uneven.

iii. Talhaiarn. 3 gafael assessed at 103*d.*, 96*d.*, and 48*d.*

iv. Postu. 1 gafael at 102*d.*, 1 escheat, 1 at 45*d.*, and 1 at 86*d.* for two years only.

v. Heskyn. 1 gafael assessed temporarily at 149*d.*

vi. Rudidien. 1 small plot at 9*d.*; rest of ville exempt.

IV. CYMWD ISDULAS.

- (1) General rate of assessment was 10s. 6*d.*, or fractions thereof, 5s. 3*d.* and 2s. 7½*d.* per unit, payable in four instalments.

- (2) Instances of general rule:

i. Wigfair. 6 gafael in 1 progeny assessed at 2s. 7½*d.*; 2 gafael in 1 progeny at 2s. 7½*d.* each; 1 progeny at 2s. 7½*d.*

ii. Hendregyda. 1 progeny assessed at 190*d.* (= app. 15s. 9*d.*), divided nearly equally among 8 sub-progenies; 1 progeny at 2s. 7½*d.* on each of 3 gafael; 1 progeny at 2s. 7½*d.*

iii. Gwerneigrion. 11 gafael at 2s. 7½*d.* each; 4 jointly at 10s. 6*d.*; 2 at 5s. 3*d.*, divided into 3s. 6*d.* and 1s. 9*d.*

iv. Abergele. 12 gafael of one clan at 2s. 7½*d.* each; 6 of another ditto.

v. Cilcein. 1 gwely at 2s. 7½*d.*, 1 at 5s. 3*d.*

- (3) Exceptions to general rule:

i. Wigfair. 2 gafael jointly at 4s. 9*d.*

ii. Abergele. One clan of 5 gwelys has 2 gwelys and 3 ex 5 sub-gwelys in third unassessed; 1 gwely paid 8s. 1½*d.*, one 6s. 2½*d.*, 2 ex 5 sub-gwelys 7s. 6*d.* and 7s. 7½*d.* respectively.

iii. Cilcein. 1 gwely at 3s. 6½*d.*

iv. Garthewin. 2 gafael at 2s. 8½*d.*, 1 at 1s. 9*d.*

V. CYMWD UWCHDULAS.

(1) General rule: Pastus levied at fixed rates, varying per clan, payable in four instalments. Christmas instalment assessed on units in clan; other instalments on clan as whole. Allowances on account of escheats in Christmas instalment only.

(2) Instances of general rule :

| <i>Ville.</i> | <i>No. of Gwelys.</i> | <i>Total Joint Contribution.</i> | <i>Separate Christmas Contribution.</i> |
|------------------------------|-------------------------------|----------------------------------|--|
| Tebrith. (Wyr. Pithle). | 5. | 6s. | 1s. 6d. per gwely. |
| Mathebrud. (Wyr. Iddon). | 8. | 11s. 3d. | 3½d. per gwely. |
| (Wyr. Gronw). | 5. | Nil. | 6d. per gwely. |
| Llanrwst. (Wyr. Runon). | 5. | 6s. | 1s. per gwely. |
| Esgairebrill. | 2. | 1s. 6d. | 1 at 3s. 1½d., and 1 at 11¼d. |
| Ereithlyn. | 3. | 20s. | 1 at 8s. 7½d., 1 at 5s. 3d., 1 at un- ascertainable sum. |
| Trallwyn. | 5. | 10s. | 1 at 1s. 8d., 1 at 2s. 10½d., 1 at 2s. 8d., 2 exempt. |
| Treborth. | 1 (in 5 gafaels). | 22s. 6d. | 12s. divided un- evenly among ga- faels. |
| | 1. | Nil. | 2s. 10d. |
| | 1 (in 3 gafaels and plot). | Nil. | 10s. unevenly divided. |
| Llwydcoed. (Wyr. Efelyw). | 3. | 15s. | 15d. per gwely. |
| (Wyr. Alured). | 2. | Nil. | 3s. 9½d. unevenly divided. |
| Mochdre. | 1. | 5s. 3d. | 2s. 10d. unevenly divided in 3 ga- faels. |
| | 1. | 1s. 9d. | Nil. |

(3) Exceptions to general rule :

Mochdre. 1 gwely paid lump sum of 3s. 11d. at each of four terms.

Cefnllaethfaen. 3 gwelys unassessed, one paid annual sum of 10s. 7d., another annual sum of 6s. 8d.

APPENDIX XIII

CLAIMS TO COURTS IN PROCEEDINGS ' QUO WARRANTO '

| <i>Area.</i> | <i>Claimant.</i> | <i>Claim.</i> |
|--|---|---|
| Merioneth. | Walter de Manny. | As Constable of Harlech, Vicecomes of Merioneth, full baronial jurisdiction. |
| Edeyrnion. | Madoc ap Griffith, Madoc ap Griff ap Owain, Ywel ap Griff ap Owain. | To hold courts throughout their lands in respect of personal pleas based on delicts and contracts, and to have the blood-fine exacting fee, infangenatheof, and leyrwite. |
| Llangair. | Madoc ap Elis. | View of frank-pledge, baronial pleas and fines. |
| Doldrewyn. | Ior' ap Eignon, Griffith ap Eignon. | Court of personal pleas and contracts, blood-fine exacting fee and leyrwite. |
| Llandrillo. | | Baronial fees. |
| Conway. | Abbot of Conway. | Unlimited jurisdiction in his territories. |
| Bangor. | Bishop of Bangor. | " " " |
| Beddgelert. | Prior of Abbey. | Fines on tenants on basis of gift by last Llywelyn. |
| Trefgarnedd and Dinorwic. | Ioan ap Griff. | Manorial court. |
| Penymynydd, Trefcastell, and Ddrainog. | Hywel ap Grono, Tudor ap Grono. | Manorial court, assize of bread and ale, and amobyrr. |
| Trefcastell and Gwredog. | Llywelyn ap Grono. | Tri-weekly courts over all tenants, excluding Crown pleas and murders. |
| Anglesea. | The Queen. | Throughout her own estates. |

GLOSSARY OF WELSH TERMS

Note — Words marked † are now obsolete in Welsh

| | |
|---|---|
| <i>Ach</i> | Degree of relationship |
| <i>Ach ac edryd, † edryf, †</i> or <i>edrydd</i> † | Commonly rendered as 'kin and descent' A Welsh land suit 'Edryd' in OW = stock, also to restore, 'edrydd' in OW = paternity Suit was one for restoration of share in paternal land on ground of descent |
| <i>Achadw</i> † <i>gyn coll</i> | MW 'cadw gyn coll', custody (to keep) before loss A defence in theft cases |
| <i>Adlamwr</i> † | It home coming man A temporary tenant of land |
| <i>Adneu</i> | Deposit or pledge |
| <i>Adran</i> | Partition or readjustment of partition |
| <i>Agweddi</i> † | Marriage settlement by husband on wife |
| <i>Arlit</i> † | An unfree landholder of Welsh origin |
| <i>Abadaeth</i> | Probably corruption of 'abadaeth' (<i>abbacy</i>) A render in Survey of Denbigh, payable to 'abbot' landowner |
| <i>Alltud</i> | A foreigner in Wales |
| <i>Amheu, ammeu</i> | MW 'amheus' Dubious, suspect |
| <i>Amobyr</i> † | Maiden-fee payable to lord |
| <i>Amod</i> | Contract covenant one of forms of bargaining |
| <i>Amodwr</i> (pl <i>amodwri</i>) | MW contractor In Codes witness to an 'amod' |
| <i>Anlloddog</i> † | Destitute wasteful |
| <i>Anloedd</i> † | Estate usual place of abode |
| <i>Anlloeddog</i> † | Wealthy, one having a residence |
| <i>Anoddeu, † anodeu</i> | Without intention, or design |
| <i>Ar ac aredig</i> | Tilth and ploughing One of the suits of 'dadanhudd' |
| <i>Ardreth</i> | MW rent tax A render in Survey of Denbigh |
| <i>Arddelw</i> † | Avouchment, assertion especially of ownership or status A defence in many suits |
| <i>Arddelwr</i> † | One who avouches on behalf of another Fictitiously in Triads an officer of a kin-group |
| <i>Arglwr dd</i> | Lord, superior |
| <i>Argyfreu</i> † | A woman's 'peculium', paraphernalia |
| <i>Ar hatwl (arawl)</i> | Counter-claim set-off |
| <i>Arwaesaf</i> † | Warrantor, one who took over responsibility in theft charge |
| <i>Arwydd carenydd</i> | 'A sign of relationship' |
| <i>Astwrnwr</i> † | Lit an absentee = 'essoim' A temporary tenant of land |
| <i>Benthvg, benffyg.</i> | From Lat 'beneficium' A gratuitous loan, equal to Roman 'mutuum' MW = loan simply |
| <i>Bonheddig, -ion</i> | It a man of lineage, i.e. a free Welsh tribesman MW = a gentleman |
| <i>Bragod</i> † | From 'brag', malt A superior malt-liquor, fine ale |
| <i>Bramt</i> | Status, privilege |
| <i>Brawd</i> | Brother |
| <i>Brenin</i> | King |

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| <i>Briduw</i> † | Probably popular corruption of 'Pro Deo'. An oath taken on bargaining without witnesses |
| <i>Bwrn a barch (burn a beych)</i> | Bundle and burthern One of the suits of 'dadanhudd' |
| <i>Bwth, fwd, vwd</i> | A hut |
| <i>Bwyall</i> | Fuel-axe |
| <i>Cach, cath</i> | Bond, serf, slave |
| <i>Camlwrw</i> † | A standardized fine of 180d |
| <i>Canghellor</i> | Lat 'cancellarius', one of King's officers |
| <i>Canllaw, kanllaw</i> | It a handrail A 'guider' in a law-suit |
| <i>Cantrref</i> | A territorial subdivision, containing two or more 'cymwds' Cf 'a hundred'. |
| <i>Car</i> (pl <i>cevaunt</i>) | A relation, friend |
| <i>Cardychwel</i> | Return to home of relatives |
| <i>Carenydd, gerenydd</i> | Relations, relationship, clan |
| <i>germ, † &c</i> | |
| <i>Cargychwyn</i> | Departure from home of relatives |
| <i>Car llawedrog</i> † | OW equal to 'cargychwyn' See Pt I, c xv. |
| <i>Car tomawg</i> † | Home Lit settlement of 'car' |
| <i>Cartrref</i> | From 'ceg', a mouth A pleader, one who babbles |
| <i>Ceghaus</i> † | Protector, saviour A special class of witness, protecting title or status Obsolete in latter sense |
| <i>Ceidwad, -aid</i> | |
| <i>Ceinog baladr</i> | Spear penny, an additional levy towards a blood fine |
| <i>Cenedl</i> | Nation, tribe, clan, relations of an individual, species |
| <i>Cenedl gwel, aug</i> | Group of relations forming a 'gwely' |
| <i>Cenhedlaug</i> † | Adjective from 'cenedl' |
| <i>Cledran gwaesafwr.</i> | 'The pale of the warrantor', the precincts within which one person had right to protect another |
| <i>Cofiadwr</i> (pl <i>cofiad- orion</i>) | Remembrancer Witness attesting proceedings in Court MW recorder |
| <i>Cof llys</i> | The recollection of Court, wrongly rendered as 'record of Court' |
| <i>Corddlan</i> † | Origin dubious Equals either 'corlan' or 'corfflan' |
| <i>Corfflan</i> † | A graveyard |
| <i>Corlan</i> | A sheep-fold |
| <i>Cowyll, † cawell</i> | Maiden-fee, payable to bride Colloq MW a peat-basket |
| <i>Cowyn, gowyn</i> † | Lit a pestilence Fine payable to wife by unfaithful husband |
| <i>Crath anghyfarch</i> | Unightly scar |
| <i>Crynog (crannoc)</i> | A measure equal to 8 bushels |
| <i>Cychwyn</i> | Starting departure |
| <i>Cychwyn angharad, †</i> | Unlawful or unkind departure |
| <i>Cyfar</i> | Ploughing In Flint 'an acre' |
| <i>Cyfarch cyfyll</i> † | Meaning dubious Inquiry as to stock, or full inquiry, or supplication of stock or neighbourhood |
| <i>Cyfarws, † cyfarwys, †</i> | OW present, grant, pension Employed in Triads as equal to 'maintenance', otherwise unknown in that sense |
| <i>Cyff</i> | Stock |
| <i>Cyffnessaf, gyffnessaf, † &c</i> | Next of kin, nearest relative |

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| <i>Cyfnawd</i> | Exchange barter, sale |
| <i>Cyfraith</i> | Law |
| <i>Cyfraith atgas</i> | Lit hateful law Query, is not 'atgas' a derivative from 'ategu' to stay, and not 'atgasu', to hate, where used in laws? |
| <i>Cyfreithiau y Llys</i> | The Laws of the Court |
| <i>Cyfreithiau y Wlad</i> | The Laws of the Country |
| <i>Cyhyryn Canhastyr</i> † or <i>canystyr</i> | Mr Owen renders as 'a piece of flesh with a hundred returns or perplexities' 'Canystyr' of very doubtful meaning, it conveys apparently some sense of embarrassment In laws phrase applied to a particular offence of receiving stolen flesh |
| <i>Cylch</i> | Progress circuit tour |
| <i>Cylch dyfrygwn (dourgon)</i> | Progress of the otter hounds |
| <i>Cylch greonion</i> † | 'Greonion', pl of obs 'greawr' Progress of the herdsmen |
| <i>Cylch hebbogvddion (hebbogothion)</i> | Progress of the falconers |
| <i>Cylch Mawr.</i> | The Grand Tourn the great circuit of the royal household |
| <i>Cymenio</i> † | To equalize |
| <i>Cymeryd</i> | To take |
| <i>Cymorth, commorth</i> | Aid, help Specially, a levy of cattle in South Wales |
| <i>Cymwâl</i> | The chief territorial unit in Wales |
| <i>Cymyn (coman, kman)</i> | Bequest |
| <i>Cynhwystad, cynhasedd.</i> | MW. inclusion Permission, investiture |
| <i>Cynnogyn</i> † | Debtor |
| <i>Cynnryf, † cynnryf.</i> † | OW meant 'toil', hence 'tir cynnryf' meant 'land acquired by toil', i.e. self-acquired land Is often confused with 'cynnydd', which means 'increase', 'tir cynnydd' meaning, therefore, land of increase, i.e. also self-acquired land, additional to inherited land |
| <i>Cynwys (kenwes, wenwes)</i> | MW contents OW permission Term used in Surveys for share of an illegitimate son in land, obtained 'permissively' |
| <i>Cyrch cyhoeddog</i> † | Lit public attack An offence of gang-rioting. In MW 'cyhoeddu' |
| <i>Cvstadlu</i> | To compare |
| <i>Cyswynfab</i> † | A reputed or illegitimate son |
| <i>Cyt Eitfedd</i> | Collateral heir The particle 'cyt' conveys a sense of 'jointness' |
| <i>Da</i> | Movable property |
| <i>Dadanhudd</i> † | Lit uncovering A special land-suit |
| <i>Dadferwyr</i> † | Restorers (of boundaries) |
| <i>Daered</i> † | Income, funeral-fees, masses for dead |
| <i>Daly</i> † <i>Uedrad.</i> | Detention or seizure of stolen property |
| <i>Damdwn</i> † | Swearing in Court especially to value |
| <i>Dangosso</i> † | From 'dangos' to show Showing, claim |
| <i>Dawnbwyd</i> † | Lit 'gift of food' Render in kind due from unfree |
| <i>Dechreu (dechref) rhan</i> | The beginning of partition |
| <i>Dedfryd hawl</i> | Lit verdict on claim |
| <i>Defnydd hawl</i> | Cause of action subject of claim |
| <i>Dialwr</i> | One who avenges In Triads, a fictitious official. |
| <i>Diasbad</i> † <i>uwch annwfn</i> | Lit 'a cry over the abyss' A special claim for share in ancestral land |

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| <i>Diddy</i> | Nothingness, a nullity |
| <i>Dily sdawd, † dily srwydd.</i> | Guaranteed soundness (of title). |
| <i>Dwry</i> | A standardized fine of £3 |
| <i>Dofod</i> † | Household effects, from 'dofi', to domesticate. |
| <i>Dofyaeth</i> † | Hospitality, billets |
| <i>Dognfanag</i> † | From 'dogn', enough, 'manag, mynegi', to report Sufficient report A special kind of information on which a charge of theft could be based |
| <i>Ebedw</i> † | Lat 'obitus' Ascension fee, heriot |
| <i>Echwyn</i> | Gratuitous loan equals Roman 'commodatum'. MW used biblically=loan |
| <i>Eding</i> † | Heir apparent Eng 'Atheling' |
| <i>Eis ddy</i> † | See 'tyddyn' SW form |
| <i>Enllyn</i> | Lat 'obsonium' Food eaten with bread, relish, sauce |
| <i>Irw</i> | A land measure The Welsh acre |
| <i>Estyn</i> | OW to invest, MW to prolong |
| <i>Eitfedd</i> | MW heir, OW lineal descendant |
| <i>Ffol, scol</i> | Milk-can, bowl |
| <i>Ffyrnigrwydd.</i> | Ferocity, ferocious or cunning act |
| <i>Gafael</i> | MW hold, tenure OW a holding of land |
| <i>Galanas</i> | MW slaying OW also compensation for slaying, blood-fine |
| <i>Gen a meithrin.</i> | Birth and rearing (to bring forth and to rear); an 'arddelw' in theft cases |
| <i>Goddau, † odu</i> † | Intention, design |
| <i>Gofymad</i> | Lit questioning A land-suit |
| <i>Gogor (gogr) ac efran</i> † (? ebran) | A levy in kind in Merioneth 'Gogor' = winter food for cattle, provisions, but 'gogr' = sieve. 'Ebran' in MW = provender, but 'efran' appears to be connected with 'yfed', to drink Rendered as 'food and drink' Cf 'gogor ac hyl' |
| <i>Gogor (gogr) ac hyl</i> † (MW hylif). | A levy in kind in Merioneth Lit provisions and drink |
| <i>Golwg</i> | Sight |
| <i>Goresgyn</i> | To ascend, come into possession |
| <i>Gorffyn rhan</i> | End or final adjustment of partition |
| <i>Gorfodog</i> † | Surety in crime, 'obligor' |
| <i>Gorfodogaeth</i> † | Suretyship in crime, bail |
| <i>Gormes, ormes</i> | Intrusion, trespass, tyranny, invasion. |
| <i>Gosgordd y brenin</i> | The King's retinue |
| <i>Graddau tir</i> | The grades of land |
| <i>Gwad, gwadu</i> | Denial, to deny |
| <i>Gwaddol</i> | MW dowry OW a daughter's share in her father's movables |
| <i>Gwaed tir</i> | 'Blood-land' |
| <i>Gwaesafwr</i> † | Protector, pledger |
| <i>Gwallaw, gwallus</i> | Loose, faulty defective |
| <i>Gwanas</i> | Support, prop |
| <i>Gwaradog</i> † | Delusive, causing downward descent |
| <i>Gwarchadw (fr gwar-chod)</i> | Occupation, having custody |
| <i>Gwartheg difach.</i> | Lit cattle without surety, or cattle of defective lineage A term applied to the liability of maternal relatives of an unaffiliated son, committing murder |

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| <i>Gwasanaeth, casnat</i> † | Lit service The ploughman's 'erw' in co-tillage. |
| <i>Gwasgar dir</i> | Scattered lands |
| <i>Gwehelythau</i> | Lit lineages tribes Small tribal entities |
| <i>Gwelydd</i> † | Lit freeman The absolver |
| <i>Gweision bychan, gwasion bychan, wasston baghern</i> | Youths, military retainers |
| <i>Gwelitafod, wely tafod</i> | Tongue wound |
| <i>Gwely, gwelygord, † wele</i> | MW bed OW a clan association holding land jointly |
| <i>Gwelyog</i> † | Adjective from 'gwely' |
| <i>Gwemgaul</i> † <i>caeth, gweinyddol caeth.</i> | Domestic servant or bondman. |
| <i>Gwestfa</i> † | Levy in kind on free tribesmen = tunc |
| <i>Gwionom wuyonynn</i> † | To be innocent |
| <i>Gwir ulad</i> | Lit the truth of the country, verdict |
| <i>Gwobr, gobr</i> | Reward, fee, sometimes = 'amobyr' |
| <i>Gwobr estyn gobr</i> | Investiture fee |
| <i>Gwraig briod</i> | Married wife especially in laws one married with church ceremonies |
| <i>Gwrda</i> | 'Good man', gentleman |
| <i>Gwr dyfod</i> | 'The man who comes', first settler |
| <i>Gwr rhyd</i> | Free man |
| <i>Gwrthpryn, † wrthpriad</i> † | Return of price |
| <i>Gwrthyst</i> | Counter-witness |
| <i>Gwrthwan, † gwrthneu</i> † | Lit counterthrust to reject An objection to admissibility of witness |
| <i>Gwybyddiad</i> † | Lit 'knower' A class of witnesses who knew; 'eyewitness' |
| <i>Gwynwyr</i> † | Armed band of youths, bodyguard |
| <i>Gwyr gwaith</i> | Lit men of work Crown boon-tenants. |
| <i>Gwyr mal</i> | Lit men of coin Crown cash-tenants |
| <i>Gwystl, wystyl.</i> | Pledge, 'wadium' |
| <i>Haerllugrwydd</i> | Arrogance, impudence |
| <i>Hafod</i> | Summer farm summer grazing grounds. |
| <i>Halog-dy</i> | A polluted or forfeited house |
| <i>Hawl cyhvdedd, hawl gyhyd</i> | An unfree land-suit, claiming equity or equation, |
| <i>Hawlwyr</i> | Claimant creditor |
| <i>Henadur</i> | Elder, used in Triads to designate the fictitious seven elders |
| <i>Hynafgwyr v cenhedloedd</i> | The older men of the kinsmen |
| <i>Hynafwyr hynet, hynafgwyr or henaid gwlad</i> | Elders of the countryside |
| <i>Henwyrat, henuriad cymwd</i> | Elders of the 'cymwd' |
| <i>Lladrad</i> | Theft stolen property In marriage law a marriage without consent of kin |
| <i>Lladrad angynnyrchawl</i> | Theft absent i.e. where goods not found |
| <i>Lladrad cynnyrchawl</i> | Theft present, i.e. where goods produced. |
| <i>Lleduch</i> † | Mean descent |
| <i>Lledyr cyhoeddog</i> | Notorious or public thief |
| <i>Ltw</i> | Light, appearance sight, colour An information on which charge of theft could be based In MW sense of 'light' found only in compounds |
| <i>l loegr</i> | England |
| <i>Llog</i> | Lat 'locatio' Hire, hiring fee. MW. interest |

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| <i>Llw.</i> | Oath |
| <i>Llw gwelydd</i> † | Oath of a free man, i.e. absolver |
| <i>Llys</i> | Court |
| <i>Llystant</i> † | Rejection Principal grounds of objection to admissibility of witnesses |
| <i>Mab amhuedig</i> † | A son on sufferance or suspected |
| <i>Mab dioddef</i> | A doubted or waiting son |
| <i>Mach</i> † | Surety |
| <i>Mach cynnogyn</i> † | A debtor surety |
| <i>Machni</i> † | Suretyship |
| <i>Macwyard, † machwyst</i> † | Youths of the bodyguard |
| <i>Maenor, maenor</i> | MW manor OW territorial units |
| <i>Maer</i> | Lat 'major' One of the principal district officers 'Land-maer', an inferior unfree officer |
| <i>Maerdyf</i> | The lord's home-farm |
| <i>Magl, emakal</i> † | Lat 'macula' Lit a snare knot, bond The bond of agreement in co-tillage Cf Italian 'maglia' = a link |
| <i>Mamwys</i> | Maternity The right of a son of a 'Cymraes' and a foreigner |
| <i>Marchog</i> | A knight OW a horseman |
| <i>Marwedy</i> | Lit dead house OW escheat on account of intestacy |
| <i>Nai, newrnt, nay, nei, newnt</i> | A nephew or grandson = Lat 'nepos'. |
| <i>Nawdd</i> | Protection, precincts |
| <i>Nesaf iddo, nessaf iddi</i> | Nearest of kin Lit next to him |
| <i>Nod</i> | Marked Lat 'notum' |
| <i>Odyn</i> | Infn |
| <i>Ofer.</i> | Futile, useless |
| <i>Paeol, † bayol</i> † | A pail |
| <i>Pallog, † balawg.</i> † | Slip, from 'pallu' |
| <i>Pencenedl</i> | Clan or tribal chief |
| <i>Pencerdd</i> | Chief of Song |
| <i>Penraih.</i> | The supreme (king) |
| <i>Pentanfaen</i> | The fire back-stone |
| <i>Penteulu</i> | Head of household Commander of King's bodyguard |
| <i>Perchenogaeth.</i> | Belongings |
| <i>Priod</i> | Wedded |
| <i>Priodas</i> | A marriage (especially in church) |
| <i>Priodolder</i> | OW right of exclusive occupation MW. ownership |
| <i>Priodor, -awr</i> | One entitled to 'priodolder' |
| <i>Punt cyflog, ceflo</i> | Lit fee pound Probably equals 'tunc'. |
| <i>Pynfarch</i> † | Sumpter horse Source of revenue |
| <i>Rhaglaw, raglot</i> | The reeve MW a deputy. |
| <i>Rhauth, † rauth</i> | Body of compurgators |
| <i>Rhan, ran</i> | Division, share, partition. |
| <i>Rhandir, randir</i> | A land measure |
| <i>Rhenni, rhanni</i> | Ancestors |
| <i>Rhngyll, ringyll</i> | The beadle |
| <i>Rhodd y cenedl Rod o cenedl</i> | Gift of kin The highest form of marriage |
| <i>Rhodd, rod</i> | Gift. |

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| <i>Rhwym dadl.</i> | Bond of suit. |
| <i>Rhyddid.</i> | Freedom. |
| <i>Sarhad, saraad.</i> | Insult, honour-price. |
| <i>Symwd car.</i> | See 'car-gychwyn'. |
| <i>Taeog.</i> | 'Aillt', q.v. |
| <i>Taeog-tref.</i> | An unfree ville. |
| <i>Tafod.</i> | Tongue. |
| <i>Tafodiog.†</i> | Tongue-man. A class of conclusive witnesses. |
| <i>Tan.</i> | Fire, arson. |
| <i>Tarian.</i> | Shield. |
| <i>Teisbantyle.†</i> | A word of doubtful origin. Commonly rendered 'family representative'. Possible origin 'teis-ban', the pivot or cartilage, of the 'tyle', couch, i.e. the husband or head of family. |
| <i>Teithi.</i> | Full qualities. |
| <i>Telyn.</i> | Harp. |
| <i>Terfyn.</i> | Boundary. |
| <i>Terfysg.</i> | Tumult. |
| <i>Tir.</i> | Land. |
| <i>Tir-bwrdd.</i> | Board land of the lord. |
| <i>Tir caeth.</i> | Bond land. |
| <i>Tir cyfrif, trefgefery.†</i> | Class of unfree land, in which there was no succession. |
| <i>Tir cynnyf, cynyd, pryd, pryn.</i> | Purchased or acquired land. |
| <i>Tir gwelyog, truwelloghe.†</i> | Land held by a free or unfree 'gwely'. |
| <i>Tir rhyd.</i> | Free land. |
| <i>Tom.†</i> | MW. dirt. Special meaning in Laws appears to be derived from long-extinct word meaning 'draught', drawing. |
| <i>Tomawg.†</i> | Adjective from 'tom'. |
| <i>Tonawg.†</i> | Broken. Cf. 'ton', a breaker. |
| <i>Tref.</i> | A settlement, a ville. |
| <i>Tref y tad, tadawc.</i> | The paternal or ancestral settlement. |
| <i>Treis.</i> | Violence. |
| <i>Treth.</i> | Land dues, excluding 'twnc'. MW. tax. |
| <i>Twnc, tunc.†</i> | Commuted 'gwestfa'. |
| <i>Twrf cyfraithol.</i> | Lawful disturbance. |
| <i>Ty a tal.</i> | = 'ty a dal', house to hold, a site for a house, not MW. 'ty a tal', house and gable-end. |
| <i>Tyddyn.</i> | Homestead. |
| <i>Tyst, -ion.</i> | Witness, especially a court attestator. |
| <i>Tystiolaeth.</i> | Testimony. |
| <i>Tystiolaeth marwol.</i> | Dead testimony. |
| <i>Uchelwr.</i> | Head or high man. Gentleman of position. |
| <i>Wynebwerth,† -warth.</i> | Lit. face-value. Equals 'sarhad'. |
| <i>Wyrion.</i> | Lit. grandsons. A body of clansmen. |
| <i>Ymladd.</i> | Fighting. |
| <i>Ymwrthyn.†</i> | To oppose one another. Land-suit based on trespass. |
| <i>Ymwystlo.</i> | To give mutual pledges. Challenge of judge. |
| <i>Ynys Prydain.</i> | Isle of Britain. |
| <i>Ysgar, escar.</i> | Divorce, separation. |

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M A P S

NOTE ON MAPS

THE identification of some villes with those recorded in the Surveys is tentative.

Names recorded in the original Surveys are spelt as they appeared to sound to Normans and Englishmen. The transcribers of the Surveys in the last century, being mostly ignorant of Welsh place-names, have frequently mistranscribed them from the original; e.g. in the Record of Caernarfon, 'Dinas Mawddwy' appears as 'Kyraskadwy', 'Llanberis' as 'Bourenethlan', 'Cwm-is-tir' as 'Gomms', &c. It has, therefore, been difficult to identify some places, and mistakes in identification may have occurred.

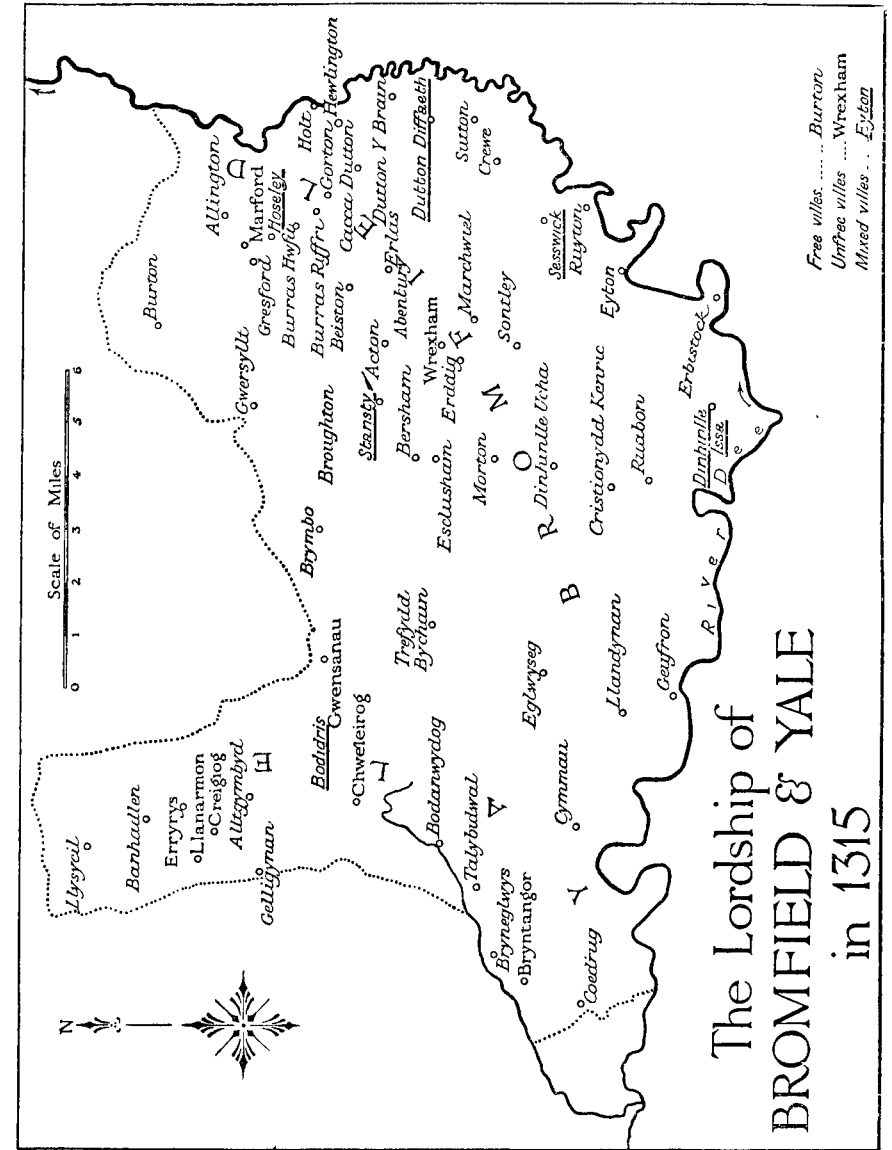
In addition, many names of villes now only survive in field-names and names of farm-houses; a few have disappeared altogether, some of which it has not been possible to trace out.

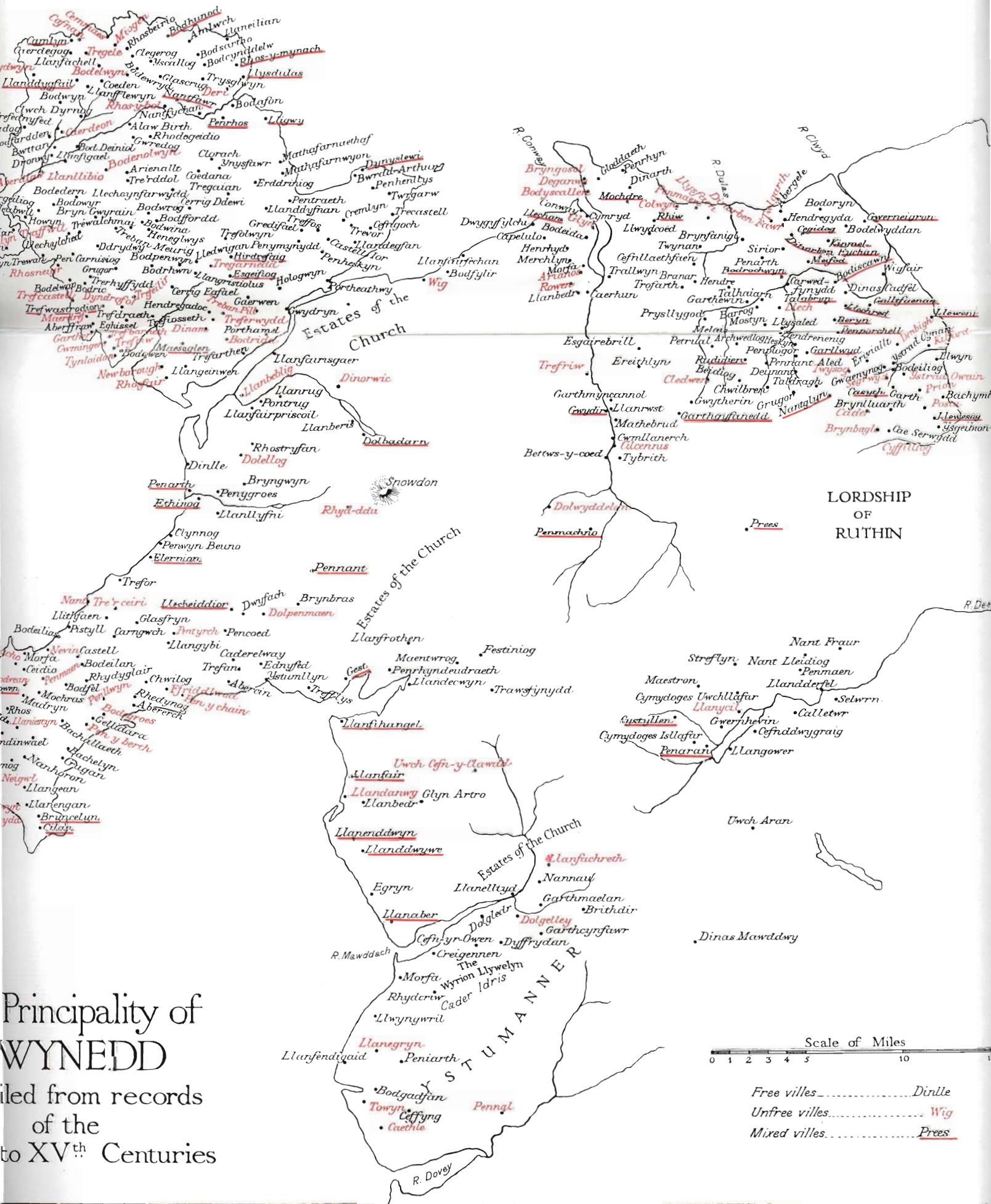
The Record of Caernarfon, in particular, also contains many mistakes as to location, e.g. it enters Rhoscolyn (in Holyhead Island) as in Cymwd Menai, i. e. on the Straits.

Many of the villes are not villages in any sense of the word. Particularly in Merioneth they represent areas only, e.g. Streflyn, Maestron, &c., where there are not and never have been any 'villages'.

The point (.) indicating locality, therefore, must be taken, not as marking the inhabited village, but as marking some more or less central point in the area of the ville. It is impossible, unfortunately, after this lapse of time, to ascertain the boundary lines of the various villes; at least without the devotion of an amount of time incommensurate with the value of any results obtainable.

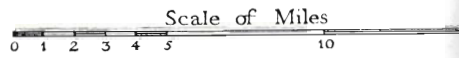
It is particularly desired, therefore, that the tentative nature of the maps should be recognized; they are as accurate as it has been possible to make them.





Principality of
WYNNEDD
 compiled from records
 of the
 to XVth Centuries

LORDSHIP
 OF
 RUTHIN



Free viles Dindle
 Unfree viles Wig
 Mixed viles Prees