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THE PROSECUTION AND PUNISHMENT OF ANIMALS AND LIFELESS THINGS IN THE MIDDLE AGES AND MODERN TIMES.

The Prytaneum was the *Hotel de Ville* of Athens as of every Greek town. In it was the common hearth of the city, which represented the unity and vitality of the community. From its perpetual fire, colonists, like the American Indians, would carry sparks to their new homes, as a symbol of fealty to the mother city, and here in very early times the *prytanis* or chieftain probably dwelt. In the Prytaneum at Athens the statues of Eirene (Peace) and Hestia (Hearth) stood; foreign ambassadors, famous citizens, athletes, and strangers were entertained there at the public expense; the laws of the great law-giver Solon were displayed within it and before his day the chief archon made it his home.

One of the important features of the Prytaneum at Athens were the curious murder trials held in its immediate vicinity. Many Greek writers mention these trials, which appear to have comprehended three kinds of cases. In the first place, if a murderer was unknown or could not be found, he was nevertheless tried at this court.¹ Then inanimate things—such as stones, beams, pieces of iron, *etc.*,—which had caused the death of a man by falling upon him—were put on trial at the Prytaneum;² and lastly animals, which had similarly been the cause of death.³

Though all these trials were of a ceremonial character, they were carried on with due process of law. Thus, as in all murder trials at Athens, because of the religious feeling back of them that such crimes were against the gods as much as against men, they took place in the open air, that the judges might not be contaminated by the pollution supposed to exhale from the

¹ Aristotle, *Constitution of Athens*, 57, 4; Pollux, VIII, 120; cf. Plato, *Laws*, Bk. IX, 874; *etc.*

² Aristotle, *ibid.*; Demosthenes, 23, 76; Aeschines, 3, 244; Pollux, *ibid.*; Pausanias, I, 28, 10; cf. Plato, *op. cit.*, 873 E, 874 A; *etc.*

³ Aristotle, *ibid.*; Aeschines, *ibid.*; cf. Plato, *op. cit.*, 873 E.

prisoner by sitting under the same roof with him.⁴ We learn from the *Laws* of Plato, whose striking precepts were taken largely from existing Athenian laws, that the same judicial summons (*κλήσις*) before the King-archon, and the same proclamation (*πρόρρησις*) by that official in the market-place—warning the murderer to avoid the land of his victim and to keep away from all temples, altars, and agoras—which were proceedings common to all other murder trials, took place also in the case of unknown murderers.⁵ The theory was that the murderer had contracted impurity by his act and so was disqualified from the communion of both gods and men. The tainting of an altar or temple would keep others from communion with the gods by bringing uncleanness to the very places where men were wont to come to seek cleansing. Probably also the usual three investigations in three successive months were made,⁶ and the case brought to trial on one of the last three days of the fourth month.⁷ Then the King-archon would assign it to the proper court—there were five different homicide courts at Athens—and as usual would preside over the trial.⁸

The second case, the trial of things, was thus stated by Plato:

“And if any lifeless thing deprive a man of life, except in the case of a thunderbolt or other fatal dart sent from the gods—whether a man is killed by lifeless objects falling upon him, or his falling upon them, the nearest of kin shall appoint the nearest neighbor to be a judge and thereby acquit himself and the whole family of guilt. And he shall cast forth the guilty thing beyond the border.”

Thus we see that this case was an outgrowth from, or amplification of the first; for if the murderer could not be found, the thing that was used in the slaying, if it was known, was punished. A good example of the Greek view that one or the other was responsible is found in the second tetralogy of Antiphon. A boy was killed by a javelin while watching a youth practice

⁴ Antiphon, V. 11.

⁵ 874 A; cf. Demosth. 20, 158; Antiphon, V. 10; Aristotle, *l. c.*; etc.

⁶ Antiphon, VI, 42.

⁷ Pollux, VIII, 117.

⁸ Aristotle, *op. cit.* 57, 2.

in the gymnasium. The boy's father immediately accused the youth of accidental homicide. In a case like this the question to be decided was, Who was to blame? Evidently it was either the boy, the youth, or the javelin. If either of the first two, the case would have been referred to the court at the Palladium, where trials for unpremeditated homicide were held; but if the javelin, it would have been assigned to the Prytaneum. Nor must we think there was any lack of seriousness in the Greek point of view. We must remember that the great statesman, Pericles, and the famous sophist, Protagoras, once spent a whole day arguing just such a question.⁹

Of the third case, the trial of animals, we know but little, only the fact that such trials were held here. They probably were based on the same principle as those of inanimate things. Not that the Greeks were obsessed, at least in the historical period, with the idea that animals any more than things were morally responsible for their acts—though this was probably at the bottom of such trials, as it certainly was in the case of things; but rather they held the general notion that the moral equilibrium of the community had been disturbed by the murder and that somebody or something must be punished or else dire misfortune, in the form of plagues, drouths, and reverses in men's fortunes, would overtake the land.¹⁰ So the ideal legislation of Plato on this point was based upon the same idea which was at the bottom of all the murder laws of Athens,—that the *Erinyes* or avenging spirit of the dead man must be appeased. In substance this was merely another manifestation of the *lex talionis*, the oldest and deepest rooted of all human laws, axiomatic in all primitive societies, and traceable, as we shall see, even in those most advanced. Greek literature furnishes many examples of the idea of "blood for blood".¹¹ Whether the slaying was premeditated or not made no difference, for in either case a crime had been committed and a pollution had appeared in the community which must be removed.

⁹ Plutarch's *Pericles*, 36.

¹⁰ Cf. Antiphon, 1 A, Par. 10.

¹¹ E. g. Aeschylus, *Choephorae*, 398-404.

The Prytaneum court was in charge of the four tribe-kings or *phylo-basileis*, the representatives of the earliest gentile division of the Attic people, under the presidency of the King-archon, the democratic successor of the earlier kings.¹² The great antiquity of the court is shown by the fact that it was managed by these ancient officials all through Athenian history; after all political power had gradually been taken from them, this religious duty had been left to them as their last prerogative. Similarly the connection long predicated between the Prytaneum court and the very ancient festival of the *Diipolia* on the Acropolis, would also, if proven, show its antiquity. For at this festival down to the days of Pausanias and Porphyry, an axe—in commemoration of the traditional first slaying of an ox on the Acropolis—was ceremonially tried and acquitted each year. This peculiar commemorative ceremony goes back to the earliest times, and is probably to be explained as a survival of totemism.¹³ Also the animistic conception of nature which must have underlain such trials of things points to a great antiquity, as such ideas belong to the infancy of races as well as of individuals. It is not strange that a people like the Greeks, who saw something divine in every river, fountain and tree, should have endowed unfeeling objects with life. The strange thing is, not that such ideas should have developed in primitive times, but that they should have clung to the Greek imagination throughout the history of the race and have been countenanced by their greatest thinker in formulating laws for an ideal republic.

These trials, whatever their nature may have been in prehistoric times, were ceremonial in character throughout the historic period. The unknown murderer, and probably the thing and the animal as well, was solemnly heard and condemned.

¹² Aristotle, 57, 4; Pollux, VIII, 90 and 120.

¹³ The sacrifice was called τὰ βουφόνια; see Aristophanes, *Clouds*, 984; Bekker, *Anecd. gr.*, p. 221; the lexicographers Hesychius and Suidas, the *Etymologicum Magnum*, p. 210; etc. For the festival of the Diipolia, held in honor of Zeus Polieus, see above and also Scholia to Aristophanes, *Peace*, 419, and *Clouds*, 484-5; Bekker, 238, 21; *Corpus Inscriptionum Atticarum*, I, 55a, l. 7, etc. The totemistic origin of the festival is discussed by Farnell, *Cults of the Greek States*, Vol. I (1896), p. 88 sq.

Owing to the religious character of such trials no proper legal decision as in other homicide cases seems to have taken place. The usual proclamation against an unknown murderer was not made against any suspect by name, but the writ ran generally "against those who have done and slain".¹⁴ The tokens of the slaying, both animals and things, if found guilty, were "cast beyond the borders",¹⁵ in order to free the land of pollution.

Strangely enough no example of the trials of animals at this court have come down to us in Greek literature or inscriptions, notwithstanding the fact that the authors already mentioned make it certain that they were tried here. And in general it may be stated that such prosecutions were peculiar to Athens, for we find no certain evidence that they occurred anywhere else in the ancient world. Among the ancient Persians, there are, to be sure, indications which show that they treated animals as responsible beings. Thus in the religious laws of the Vendidad, if a mad dog was not muzzled and, without barking, wounded a man or sheep, it was decreed that it be punished for the wounding as if it had tried to commit murder with premeditation; this punishment took the form of a progressive mutilation corresponding with the number of persons or beasts bitten, beginning with the loss of the ears and ending with the amputation of the tail.¹⁶ In other words insanity could not be plead for the dog in exculpation of his deed. Similarly among the Hebrews, as is well known, an ox which gored a man or woman to death was to be stoned and its flesh could not be eaten.¹⁷ The owner was quit, unless it was shown that the beast had been accustomed to goring and had not been guarded. when both ox and owner were put to death. If a ransom was laid on the ox, it had to be paid, the amount exacted for goring a servant being stated

¹⁴ Demosthenes, 47, 69.

¹⁵ Aeschines, *l. c.*; Pollux, VIII, 120; Pausanias, VI, 11, 6; *etc.*

¹⁶ Fargard, XIII, vv. 31-34. (J. Darmesteter, *Le Zend-Avesta*, II, pp. 201-2).

¹⁷ *Exod.* XXI, 28-32. Other examples of anathemas against things and animals in the Old Testament are the cursing of the serpent in the Garden of Eden, *Gen.* III, 14-15; David's malediction against the mountains of Gilboa, *2 Sam.* I, 21; God's curse of Jericho, *Joshua*, VI, 1; and in the New Testament, Jesus' cursing of the barren fig-tree of Bethany, *Matth.* XXI, 19.

as thirty shekels of silver. Here, as in the Avestan writings, there are no certain indications of court proceedings. But the fact that in both accounts the penalty was increased with the number of injuries seems to show that adjudication must have been in the hands of judges. Among practically all the so-called Aryan nations of Ancient Europe—the Greeks,¹⁸ Romans,¹⁹ Teutons,²⁰ Celts²¹ and Slavs²²—an animal which did serious damage,—such as causing the death of a man—had to be given up to the injured party or his family. But there was no trial; and this surrendering of the animal was manifestly only for the sake of retaliation.²³ Later, in the Middle Ages, under the influence of the Roman church, this form of reprisal was transformed into a regular system of punishment, which shows that the ancient principle, according to which punishment succeeded vengeance in the case of human crimes, was, by analogy, extended to injuries committed by animals.

As for inanimate things, apart from the trial of the axe, which was tried for the first time at the altar of Zeus Polieus in the mythical days of Erechtheus²⁴ and continued annually thereafter at least to the second century A. D., we find no other example of such cases at the Athenian court. But that there were similar courts in other parts of the Greek world is evidenced by several examples, which show that the same primitive animistic conceptions of nature were characteristic of the Greek mind generally.²⁵ Before closing this part of the subject

¹⁸ Plutarch, *Solon*, 24; Xenophon, *Hellenica*, II, 4, 41.

¹⁹ *Institutiones* (of Justinian), ed. P. Krueger in the *Corpus juris civilis*, vol. I (Berlin, 1889), IV, 9; *Digesta*, ed. Mommsen, *Corpus juris civilis*, vol. I, IX, 1.

²⁰ *Lex Salica* (cod. I.), 36; *Lex Ripuariorum*, 46; cf. J. Grimm, *Deutsche Rechtsaltertümer* (1899), p. 664 sq.; Brunner, *Forschungen zur Geschichte des deutschen und französischen Rechtes* (1894), p. 513 sq.

²¹ *Ancient Laws and Institutes of Ireland*, (London 1865-79), I, 161; IV, 177, 179, 181. *Welsh Laws*, IV, 1, 17. (*Ancient Laws and Institutes of Wales*, London, 1841, p. 391.)

²² Maciejowski, *Slavische Rechtsgeschichte* (Stuttgart, 1835-39), IV, p. 333.

²³ Cf. Westermarck, *The Origin and Development of the Moral Ideas* (1906 and 1908), I, p. 256, and especially note I, for references.

²⁴ Pausanias, I, 28, 10.

²⁵ We know that other Greek states copied the laws of Athens; cf. Isocrates, *Panegy.* 40 k. 10; etc.

it might be well to mention two typical cases. Pausanias recounts how a former enemy of the famous athlete, Theagenes, used to come each night after his death to his bronze statue, which was set up in his home city on the island of Thasos, and whip it as if he were punishing the victor himself. Finally the statue checked his insolence by falling on him and killing him. In consequence it was prosecuted for murder by the man's sons. The Thasians tried the statue, found it guilty and cast it into the sea, *i. e.*, beyond their borders. Their lands becoming unfruitful they were advised by the Delphian oracle to bring back their exiles. When they had done this and still there was no respite from their evil they were told by the Pythia: "But you have forgotten your great Theagenes." They did not know how to recover the statue from the sea, but fortunately some fishermen caught it in their net and dragged it ashore. As soon as it was restored to its place in the marketplace, the dearth ceased.²⁶

The bronze ox made by Philesius of Eretria and set up in the Altis at Olympia as an offering by the Corcyraeans is another example. Pausanias tells how a small boy, while playing beneath it, stooped down, and on suddenly rising up, broke his head against its belly and soon after died of his injuries. The Eleans took counsel to remove the guilty image to try it, but the oracle bade them leave it alone and merely perform the purification for the bull which was customary for men when indicted for involuntary homicide.²⁷

We have indicated, then, that the Greeks held that a murder, whether committed by man, beast, or thing, must be properly expiated or else the *Erinyes* or Furies would be aroused and misfortune would befall the state.

If we turn now to the Middle Ages, we shall see that a very similar doctrine was taught about animals, the demons of

²⁶ VI, 11, 6-8; cf. Dio Chrysostom, *Orat.* XXXI, 618 R, 340 M, who here formulates the Thasian law, an almost exact duplicate of the Athenian. Cf. Eusebius, *Praep. evang.* V, 34, p. 231 c, d. and 232 a. The athlete Theagenes won at Olympia in boxing in Ol. 75 (=480 B. C.), and in the pancratium in Ol. 76, and is said to have won 1400 crowns in various Greek games; Paus VI, 11, 5.

²⁷ V, 27, 9-10.

the Christian theology replacing the Furies of mythology. Such trials were not confined to the Middle Ages alone, for there is abundance of evidence that down to very recent times on the continent of Europe among the most highly developed peoples animals have been considered as responsible beings and so amenable to law. Nor is the idea wholly eradicated yet, as we shall cite one example from the present century. Let us first briefly consider the criminal prosecutions of animals, and then cite a few examples from modern times of lifeless things which have been looked upon as intelligent and responsible agents and even brought before the bar of justice, as in ancient Athens.²⁸

Beginning with the ninth century we have records that domestic animals, such as swine, dogs, *etc.*, were tried in the ordinary criminal courts like men, and, if found guilty, were usually put to death. Such sentences manifestly followed the Hebrew mandate of *Exodus*, XXI, 28sq. On the other hand all wild animals of the noxious sort, such as rats, locusts, *etc.*, were tried in the ecclesiastical courts and their punishment was either death or excommunication and banishment by formal decree. In these latter cases the proceedings were more compli-

²⁸ A few of the best works on the subject of the prosecution and condemnation of animals may be appended; it will be seen that the subject has interested especially French writers on law:

In French: *P. Lebrun, Histoire critique des pratiques superstitieuses* (Rouen, 1702), vol. I, p. 243 sq.; Berriat-Saint-Prix; *Rapport et Recherches sur le Procès et Jugements relatifs aux Animaux*, In *Memoires de la Société Royale des Antiquaires de France* (Tome VIII, Paris, 1827, pp. 403-50); L. Ménabréa; *De L'Origine de la Forme et de L'Esprit des Jugements rendus au Moyen-Age contre les Animaux*, Chambéry, 1846; A. Sorel; *Procès contre les Animaux et Insectes suivis au Moyen-Age dans la Picardie et le Valois*; Compiègne, 1877; A. Chaboseau; *Procès contre les Animaux*, 1888; E. Robert; *Procès intentés aux Animaux*, Bull. de l'Assoc. générale des Étudiants de Montpellier, I (1888), pp. 169-181; *etc.*

In German: K. von Amira: *Thierstrafen und Thierprocesse*, Innsbruck, 1891; G. Tobler: *Thierprocesse in der Schweiz*; Berne (1893); A. H. Post, *Grundriss der ethnologischen Jurisprudenz*, II, p. 219 sq. (Oldenburg and Leipsic, 1894-95.)

In Italian: Carlo d'Addosio: *Bestie Delinquenti*, Naples, 1892; Pertile, *Gli animali in quidizio* (in *Atti del Reale Istituto Veneto di scienze, lettere ed arti*, ser. XI, vol. IV, (Venice, 1884-85).

In English: *Chamber's Book of Days*, I, p. 126-9; E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (London, 1906), including original documents, App. A-G, p. 259-312, and a bibliography of the subject, pp. 362-371; the author of the present paper is largely indebted for material to this book and to the first volume of the work of Westermarck already mentioned.

cated, and inasmuch as Mosaic sanction was wanting, they were conducted on the theory that the church had the right to excommunicate or exorcise anything, whether animate or not. Whether it had the power of enforcing its sentences did not seem to matter. Of course in these cases the Old Testament was learnedly quoted in the defense of such practices, especially such passages as the cursing of the serpent by God in *Genesis* (III, 14-15), or the mountains of Gilboa by David in 2nd *Samuel* (I, 21). It was felt by some that the lower animals had legal rights, for they had been created before man and God had provided for them in the ark. However, not all canonists were of this opinion; they argued that the authority of the church to punish animals for offences under the law pre-supposed a contract between God, who had made the law, and all creatures subjected to it; but since most animals had no intelligence, they said that no such compact had ever been made, and that consequently it was unjust to try legally and punish such ignorant creatures. Thus these objectors questioned the whole right of the church to anathematize animals or anything else beyond its pale, *i. e.*, whatever had not been baptized.

These trials, like those of lifeless things and animals at Athens, were conducted with all due deference to legal forms and usages; but there was one fundamental difference between those of antiquity and those of the Middle Ages. Whereas the former were ceremonial in character, forming a part of the state ritual and religion, the latter were tragically real. The mode of procedure was somewhat as follows. If a town or district were annoyed by a scourge of any sort of animals, the court, either criminal or ecclesiastical as the case might be, would institute an investigation. If the grounds for bringing the animals to trial were found to be sufficient, an advocate would be named to defend them or to show cause why they should not be summoned. The summons would be served by a duly appointed court official who would go and in a loud and solemn voice read it at such places as the animals frequented. Three times the culprits were cited to appear; if they refused, judgment of course would go by default. Then the court would issue a warning for the ani-

mals to leave the district within a certain time; if they remained, recourse was had to the pronouncing of a solemn exorcism against them. Delays were frequent and long, especially in the church courts; the pronouncing of the exorcism would be put off on every pretext, as the judges seemed to feel their impotence in making the animals obey. And if the scourge increased, this was not attributed to the injustice of the sentence nor to the lack of authority of the court, but to the superior power, for the moment, of Satan and his minions.

Before discussing the basis of such legal actions, let us notice a few typical examples of these trials. In the year 1545 some wine-growers of the district of St. Julien, a little town in the southeastern part of France in the neighborhood of Mont Cenis, brought a complaint before François Bonnard, Doctor of Laws, against the ravages of a certain coleopterous insect now known to naturalists as *Rynchites auratus*, which is an ordinary sort of weevil or snout-beetle that infests vineyards. The defence of the insects was given over to the procurator Pierre Falcon and the advocate Claude Morel, while the plaintiffs were represented by Pierre Ducol. After the trial sentence was delayed, but a proclamation was issued the next year (May 9, 1546), which recommended public prayers to propitiate the divine wrath, and mass to be celebrated on three different days while the Host was borne in solemn procession around the vineyards. The insects then disappeared; but forty-one years later (April 13, 1587), they returned and were tried again. The proceedings of this second trial are said to have filled twenty-nine folia, which are still among the village archives.²⁹ The former procurator and advocate of the insects had died in the interim and so new ones had to be appointed. The case slowly dragged on until finally, as a sort of compromise, the authorities set apart a plot of ground outside the village for the sole use and benefit of the weevils in perpetuity. The advocate of the culprits, however, objected, but was overruled and the court, finding the spot well wooded and watered, ordered that the conveyance be duly

²⁹ They were entitled *De Actis scindicorum communitatis Santi Julliani agentium contra animalia bruta ad formam muscarum violantia coloris viridis communi voce appellata verpillions seu amblevins.*

engrossed and executed. Then an unforeseen difficulty arose; it was found that many years before a mine or quarry of ochreous earth had been worked on this ground, and, though no longer useful, someone had rights over it, which would, if exercised, be detrimental to the newcomers. Thus the contract so carefully prepared was found to be null and void, and the case was continued through the following summer. Before it was over the villagers must have spent a good deal of hard-earned money for the processions and ceremonies which were decreed throughout the trial. All that was accomplished was to show that not only the church had the right, by its anathema, to compel the insects to stop ravaging, but also that the insects had the legal right to live.³⁰

A still more famous case from French legal annals is one that was tried in the ecclesiastical court of Autun in 1522. For it was in this trial that the distinguished jurist Bartholomew Chassenée, who was later the first President of the *Parlement de Provence*, won his first laurels. Some rats were brought to trial before the bishop's vicar for having eaten and wantonly destroyed some barley crops in that district. The culprits were cited to appear on a certain day. As the rats failed to appear, their advocate Chassenée, trying by every means to find a loophole in the law for his clients, pleaded that the summons had been too local and of too individual a character, and that not some but all the rats of the diocese should be summoned. In consequence the curates of all the parishes under the bishop summoned every rat to appear on a certain day; but still no rats put in an appearance. Then Chassenée argued that, inasmuch as the rats were dispersed in many villages, great preparations for a migration had to be made and that this required time. So a delay in the proceedings was granted; but still no rats. Their absence this time was excused by their advocate on the ground that a summons implied full protection to the

³⁰ On this case see Chambers, I, p. 127; Evans, p. 37 sq; Ménabréa, who published some of the evidence as an appendix; cf. Frazer, *Pausanias's Description of Greece*, II, p. 372, who wrongly says that the trial lasted forty-two years; there were really two trials.

parties summoned while coming and going; but that his clients, though anxious to appear, were afraid of their natural enemies the cats, which belonged to the plaintiffs. He therefore demanded that the plaintiffs be bonded under penalty to keep their cats from frightening the rats. This plea seemed to the court to be valid, but the plaintiffs demurred, and in consequence the period for the appearance of the rats was adjourned *sine die* and judgment was given by default.³¹

In the year 1565 the people of the town of Arles in Provence indicted some grasshoppers before the *Tribunal de l'Officialité*. Maître Marin was appointed to defend the insects and performed his task with great zeal. He argued that, since his clients had been created, they were justified in eating what was necessary for their welfare. But the opposing counsel cited the serpent in the Garden of Eden and sundry other animals of Holy Writ which had incurred severe penalties. The grasshoppers were condemned and told to quit the region on pain of dire anathematization from the altar, which the church threatened to repeat until the last of the culprits had obeyed the sentence of the court.³²

One of the most amusing cases of the trial of a domestic animal was that of a sow together with her six pigs at Savigny-sur-Etang, in Bourgogne, France, in January, 1457. The charge against her was murdering and partly devouring an infant. The sow was found guilty and sentenced to death by hanging, though her offspring, partly because of their youth and innocence and the fact that their mother had set them a bad example, but chiefly because proof of their complicity was not forthcoming, were pardoned.³³

³¹ See Saint-Edme, *Dictionnaire de la Pénalité*; cf. Chassenée, *Consilia*; Chambers, I, 127-8; Evans, pp. 18-19; Frazer, II, p. 372; Chassenée treated the whole subject of insect prosecution in a book entitled *Consilium primum . . . De excommunicatione animalium insectorum*, 1531.

³² This account is taken from Westermarck, I, 254-5, who transcribed it from "Essays in the Study of Folk-Songs," p. 185 sq., by the Countess Martinengo-Cesaresco.

³³ *Memoires de la Societe Royale des Antiquaires de France*, Tome VIII (1827), pp. 441-5; Evans, p. 317; Chambers I, p. 128-9.

The trial of a cock at Basel, Switzerland, in 1474, for laying an egg is very celebrated. During the proceedings it was shown that cocks' eggs were of use in mixing certain magical preparations and that sorcerers were therefore eager to get them. The defendant's lawyer frankly admitted this, but contended that the laying of the egg in this particular case had been entirely unpremeditated and involuntary, and that consequently the occurrence was not punishable by law, and further, that his client was innocent since no records could be adduced to show that Satan had ever made a compact with any of the brute creation. The prosecutor replied that it was not a case of the devil making a compact with brutes, but that Satan actually entered into them on occasion; and he adduced the case of the Gadarene swine and the fact that these animals, though involuntary agents like the cock, had been punished. On this argument the cock was condemned and was actually burned at the stake before a great crowd of onlookers.³⁴

But such legal proceedings against animals were by no means confined to France and Switzerland, but occurred in almost every country of Europe. And not only were insects and rodents and cocks brought to the bar of justice to face charges, but all kinds of animals were condemned and put to death. The list of prisoners comprises a miscellaneous crew, including asses, beetles, bloodsuckers, bulls, caterpillars, cockchafers, cocks, cows, dogs, dolphins, eels, field mice, flies, goats, grasshoppers, horses, locusts, mice, moles, rats, serpents, sheep, slugs, snails, swine, termites, turtledoves, weevils, wolves, worms and nondescript vermin. Of these perhaps the commonest were pigs, which freely ran the streets of medieval towns, and which, following the example of their ancestors from Gadara, seemed most attractive to the devil and most easily possessed. Berriat-Saint-Prix, in his work on the subject of animal prosecution published in 1827, listed ninety-three cases of animals tried and condemned, from the beginning of the twelfth to the middle of the eighteenth century. Carlo d'Addosio in his book, which appeared in 1892,

³⁴ *Memoires*, VIII, 428; Johann Gross, *Kleine Baseler Chronik*; Evans, pp. 11-12, and 317; Chambers, I, p. 129 sq.

enlarged the number to one hundred and forty-four prosecutions resulting in excommunication or execution, and occurring between the years 824 and 1845. E. P. Evans in his work, which was published in 1906, has given a chronological list of one hundred and ninety-one such cases, occurring between 824, in which year moles were tried in the valley of Aosta, to 1906, when a dog was sentenced to death in Switzerland.³⁵ From a study of his tables it is seen that these cases have been distributed in the various centuries as follows: ninth century, 3; tenth and eleventh, 0; twelfth, 3; thirteenth, 2; fourteenth, 12; fifteenth, 36; sixteenth, 57; seventeenth, 56; eighteenth, 12; nineteenth, 9; twentieth, 1. They were tried in various countries, as follows: Belgium, Denmark, France, Germany, Italy, Portugal, Russia, Spain, Switzerland and Turkey. He also assigns two cases to England and one each to Scotland, Canada, and the United States. But that such trials were common in England during the Elizabethan age seems evident from a passage in Gratiano's invective against Shylock in Shakespeare's *Merchant of Venice*:

"Thy currish spirit
Govern'd a wolf, who, hang'd for human slaughter
Even from the gallows did his fell soul fleet."

From Evans' tables we find no penalties inflicted in the tenth and eleventh centuries, while the greatest number occurred in the fifteenth, sixteenth and seventeenth; but, as he remarks, little can be argued from this, as medieval registries were poorly kept and most of them have disappeared.

From a study of the cases given by Evans we find that the animals condemned to death were killed in various ways. Many of them were burnt alive at the stake, a mode of punishment most frequent in the latter half of the seventeenth century. Sometimes the animal was merely singed and then strangled, after which the body was burned. Perhaps the best example of this mode of putting to death is the Basel cock already mentioned. Often the animal was buried alive. Thus we

³⁵ App. F., pp. 313-334; he adds several others in the text, which bring the number to beyond two hundred.

have the receipt of Phélippart, sergeant of high justice in the city of Amiens, France, "for sixteen soldi as payment for services rendered in March, 1463, in having buried in the earth two pigs which had torn and eaten with their teeth a little child in the faubourg of Amiens, who for this cause passed from life to death".³⁶ A pig was condemned to be buried alive (*enfoui tout vif*) at Saint Quentin on December 6, 1557, "for having devoured a child in *l'hostel de la Couronne*".³⁷ In 1456 two pigs were thus punished at Oppenheim on the Rhine for killing a child, and over three hundred years later, in the summer of 1796, the town bull of Beutelsbach in Würtemberg was buried in the presence of a great concourse, in order to cure a scourge of "murrain" which had attacked the cattle. A French veterinarian, quartered in the army of General Moreau, had advised that this be done.³⁸ Hanging was another common form of death. Thus, in 1394, a pig, which was found guilty of "having killed a child in the parish of Roumaygne, in the county of Mortaing," was sentenced to be hanged.³⁹

Sometimes the animal was tortured before suffering the death penalty, not with any idea of getting evidence, but because of a slavish desire to follow out the law to the letter. Thus at Falaise, in 1386, a sow was sentenced by the commune to be mangled in the face and maimed in the forelegs before being hanged, because it had torn the face and arms of a child before killing it. In order to make the travesty complete, the sow was dressed up as a human being and was then publicly executed in the village square. This case is a distinct application of the *lex talionis*.⁴⁰ Sometimes the animal was imprisoned before

³⁶ Quoted from Evans, p. 138.

³⁷ Evans, p. 138, who takes the account from Sorel, *op. cit.*; and from Lecoq, *Histoire de la Ville de Saint-Quentin*, p. 143.

³⁸ Evans, pp. 138-9.

³⁹ Evans, p. 141; cf. App. H. giving the receipt, dated 24 Sept. 1394, in which the hangman, Jean Micton, acknowledged receiving fifty sous tournois from the Viscount de Mortaing; cf. *Memoires*, VIII, p. 427 sq.

⁴⁰ See *Memoires*, VIII, p. 437; Evans, pp. 139-40; in Appendix G he gives the receipt, dated Jan. 9, 1386, in which the hangman acknowledges 10 sous and 10 deniers from the Viscount de Falaise and 10 sous for a new glove; cf. *Statistique de Falaise*, vol. 1 (1827), p. 63.

being put to death. In this way a pig was kept in prison at Pont-de-l'arche from June 23 to July 17, 1408, for having murdered a child, and was then hanged.⁴¹ We read of a dog, which belonged to a drummer in an Austrian garrison town, biting a municipal councillor in the calf of the leg; suit for damages was brought against the drummer, but he refused to accept responsibility for his dog, and in consequence the latter had to spend a year in the "*Narrenkötterlein*"—which was a kind of iron cage or pillory set up in the marketplace, where blasphemers and other wrongdoers were confined.⁴²

Men detected in the crime of bestiality—euphemistically called in medieval law books *offensa cujus nominatio crimen est*—were regularly put to death with the animal. Thus Guilielmus Benedictinus, a writer on law at the end of the fourteenth century, says *punitur etiam pecus et ambo comburuntur*. The crime seems to have been common, for Ayrault, in his *Ordre Judiciaire*, which appeared in 1606, said he had often seen beasts put to death for it. In the year 1565 at Montpellier a man and a mule were burnt alive for this offence; as the mule objected, his feet were first cut off.⁴³ Our own Cotton Mather records that on June 6, 1662, at New Haven, Conn., a man by the name of Potter, sixty years old, a church member for twenty years and noted for piety, being "devout in worship, gifted in prayer, forward in edifying discourse among the religious, and zealous in reforming the sins of other people," was hanged for this crime together with a cow, two heifers, three sheep, and two sows.⁴⁴ Of course such legislation was based on the well-known passages in the Mosaic law.⁴⁵

⁴¹ *Memoires*, VIII, p. 428; Evans, p. 143; in App. J, he gives the receipt of the prison keeper acknowledging receiving from the sheriff 19 sous, 6 deniers, for food for prisoners, among which the pig is mentioned; 2 deniers per day were required for its keep, the same amount as for a man.

⁴² See M. A. von Lilienberg, *Metamorphosis Telae Judicariae*, 8th ed. (Nuremberg, 1712); quoted by Evans, p. 175.

⁴³ *Memoires*, VIII, p. 429; Evans, p. 146.

⁴⁴ *Magnalia Christi Americana*, VI (1702); Evans, pp. 148-9.

⁴⁵ *Exod.*, XXII, 19; *Leviticus*, XX, 15-16; Evans has collected several similar examples, pp. 147 sq.

The Russians, true to their historic mode of punishment, have been known to banish animals. Thus, toward the end of the seventeenth century, we read of a he-goat being exiled to Siberia.⁴⁶ We also know that animals, in accordance with the legislation of the Old Testament about witches, have been persecuted for witchcraft. Though pigs were most commonly possessed, we find examples of cats, dogs, goats, wolves, birds, and, it might be added, skunks, which were so possessed; for the devil did not seem over particular as to what animal he chose for habitation, if only it were black.⁴⁷

In the latter half of the seventeenth century, when criminal trials of animals were still at their height, they aroused the ridicule of the great French dramatist Racine. In his *Les Plaideurs*, which appeared in 1668 and was the poet's one attempt in the comic sock, he ridiculed the mania of an old judge named Dandin for pronouncing sentences, and also the fondness of the Comtesse de Pimbesche for law-suits. The scene is laid in a village of Basse-Normandie; a dog is on trial for stealing a capon. Dandin declares he will "close his eyes to bribe and his ears to brigue." Petit Jean is the prosecuting lawyer, and L'Intime, the secretary, defends the animal. Their addresses to the court are very florid in style and full of erudite quotations from ancient authors, especially from the *Politics* of Aristotle. The dog is found guilty and sentenced to the gallows. But L'Intime has by no means exhausted all his resources, for finally he brings into court a litter of puppies and appeals to the judge's compassion by crying:

"Venez, famille desolée;
Venez, pauvres enfants qu'on veut rendre orphelins;
Venez, faire parler vos esprits enfantins."

The puppies answer through their advocate:

"Oui, messieurs, vous voyez ici notre misère;
Nous sommes orphelins, rendez-nous notre père,
Notre père, par qui nous fumes engendrés;
Notre père, qui nous . . ."

⁴⁶ Meiners, *Vergleichung des ältern und neuern Russlands*, p. 291; cf. von Amira, p. 573; Evans, pp. 175 and 331.

⁴⁷ Evans, pp. 165-6.

But Dandin interrupts:

“Tirez, tirez, tirez.”

The dogs continue:

“Notre père, messieurs . . .”

Dandin again cries out:

“Tirez donc, quels vacarmes!

Ils ont pissé partout.”

But L'Intime answers for them that it is only their tears:

“Monsieur, voyez nos larmes.”

The good judge can stand no more; he is a father himself and has bowels of compassion; and besides he is a public officer and is chary of putting the state to the expense of bringing up the puppies, and so lets the father off:

“Ouf! je me sens déjà pris de compassion.

Ce que c'est qu' à propos toucher la passion!

Je suis bien empêché. La vérité me presse;

Le crime est avéré, lui-même il le confesse.

Mais, s'il est condamné, l'embarras est égal.

Voilà bien des enfants réduits à l'hospital.”⁴⁸

This play, full of Aristophanic burlesque, caricatured the judicial abuses of the day much in the same way that Cervantes ridiculed the institution of chivalry in *Don Quixote*; but it was not equally successful, for we have records of at least thirteen trials of animals in the next century, eight of which took place in France; and in the nineteenth, nine are known—one in Denmark against vermin; two in France against locusts and one against a dog; one each in Slavonia against a pig, locusts, and grasshoppers; and one in Spain against a wolf. Even in the present century we know of one case in the village of Délémont, Switzerland, where in 1906 a dog was put to death.⁴⁹

⁴⁸ Act III, Scene III, end.

⁴⁹ See the *New York Herald* and *Echo de Paris* for May 4th, quoted by Evans, App. F, p. 334, and note 1; a man named Marger was killed by one Scherrer and his son with the help of their dog; the three murderers were tried and the man and his son were sentenced to life imprisonment, while the dog as chief culprit was killed! It is also said that animals are still tried and punished by the mountaineers of Kentucky and Tennessee.

A survival of ecclesiastical exorcism in our own country may be cited. Evans alludes to the serving of writs of ejectment on rats, or the sending to them of a friendly letter of advice to quit a certain house, a custom which still lives on in both Europe and America.⁵⁰ He says such letters are generally rubbed over with grease so that the rats will not fail to find them, and are then thrust into their holes. Thus in the *Journal of American Folk Lore*, for January-March, 1892, a Mr. W. W. Newell, in an article on "*Conjuring Rats*," gives a specimen of such a letter dated from Maine, October 31, 1888, and addressed to "Messrs. Rats and Co." The writer of the note expresses an interest in their welfare, but asks them to leave; if they refuse, he threatens to use "Rough on Rats." This is certainly an up-to-date remnant of the once formidable anathema of the church.

That the Greek church as well as the Roman has uttered similar anathemas against animals, though it did not try them in its ecclesiastical courts, is shown by the following incident mentioned by Evans.⁵¹ A swarm of locusts in recent years devastated the Gallipoli region of European Turkey; the Christian inhabitants there petitioned the monks of the neighboring "Holy Mountain" of Athos to carry the girdle of St. Basil, the founder of Eastern monasticism, through the fields to scare them off. This was done and the locusts left, miraculously, in the opinion of the people, but really because there was nothing left for them to eat. The same writer adds that the Mohammedans similarly exorcise locusts by reading passages from the Koran in the fields which have been devastated.

Of course outside of Europe and beyond the influence of the church, semi-barbarous tribes in various parts of the world furnish many examples of the feeling that animals are responsible for their acts and should be punished like men. A few typical examples will show how general this feeling is. Among the Kookies of Chittagong, Eastern Bengal, if a man is killed by a tiger, his family is socially disgraced until the offending tiger is killed and eaten. If it cannot be found, the atone-

⁵⁰ Pages 129-30.

⁵¹ Page 136.

ment is effected vicariously by the slaying of another tiger.⁵² Similarly among the Bogos, a pastoral tribe of Northern Abyssinia nominally Christian, an ox or any domestic animal which has caused the death of a man, must be slain.⁵³ The Malagasy of Madagascar never kill a crocodile except in retaliation. They believe the wanton destruction of one of these animals will surely be followed by the loss of a human life.⁵⁴ Similarly, the Dyaks of Borneo never attack an alligator unless it has destroyed one of their tribe. In this case revenge is the sacred duty of the victim's relatives, and the man-eating alligator is supposed to be pursued by a righteous Nemesis; when one is caught, it must be the guilty one, for the fates would not permit an innocent one to suffer.⁵⁵ The native code of Malacca puts to death a buffalo or head of cattle for goring a man so that he die, and the owner is not responsible.⁵⁶ Among the Mambettu of Central Africa animals are not only exposed to the blood-feud, but are punished for various offences.⁵⁷ In Mohammedan East Africa recently a dog is known to have been publicly scourged for entering a mosque,⁵⁸ and among the Maori of New Zealand pigs are known to have been put to death for straying over a sacred place.⁵⁹ It is said that even in Montenegro in the Balkans in recent years oxen, horses, and pigs have been tried for homicide and put to death unless redeemed by their owner.⁶⁰ However, this may be merely a custom similar to our own of impounding stray animals, which are either sold or killed if not redeemed by a certain date.

⁵² Macrae, *Asiatic Researches*, 7, 189 sq.; cf. A. Bastian, *Völkerstämme am Brahmaputra*, p. 35; mentioned by Frazer, II, p. 371, and Tylor, *Primitive Culture*, I, pp. 286-7.

⁵³ W. Munzinger, *Sitten und Recht der Bogos*, p. 83; Cf. Frazer, II, p. 371.

⁵⁴ Sibree, *The Great African Island*, p. 267; cf. Westermarck, pp. 252-3.

⁵⁵ Perham, *Sea Dyak Religion* (in *Journal of the Straits' Branch of the Royal Asiatic Society*, No. 10, p. 221 sq.); cf. Frazer, *Golden Bough*, II, 390; Westermarck, p. 252.

⁵⁶ Newbold, *British Settlements in the Straits of Malacca*, II, p. 257.

⁵⁷ Casati, *Ten Years in Ecuatoria*, I, 176.

⁵⁸ Von Amira, p. 30.

⁵⁹ Polack, *Manners and Customs of the New Zealanders*, I, p. 240.

⁶⁰ Evans, p. 155.

An excellent example from the modern folk lore of both England and Germany may be cited, which shows how far the primitive fancy that animals and inert things are responsible may go in highly cultured lands. The custom alluded to is known in England as the "Telling of the Bees." Thus on the death of the master or mistress of an English farm, the bees are told of the calamity. In Germany the idea is worked out still further; for there the sad message is not only given to each hive, but to every animal in the stalls; and every sack of corn and other grain must be touched and everything in the house be shaken, in order that they may know of the death.⁶¹ In connection with the treatment of bees as rational creatures, it may be added that in 864, the Council of the historic town of Worms, in which Luther was tried, decreed that some bees which had killed a man by stinging, should be suffocated in their hives before any more honey was made, else the contents of the hive would be tainted and unfit for use.⁶²

Before leaving this part of the subject let us for a moment consider what the judicial basis may have been for the trials of animals in medieval and modern courts.

The famous Italian scholar and theologian, Thomas Aquinas (1225-1274), in his great work *Summa theologica*, seems to have been the first great thinker to raise the question whether it was right or not to curse irrational creatures—*utrum liceat irrationabiles creaturas adjurare*. He says curses and blessings can only be pronounced against things susceptible of receiving therefrom good or bad impressions and therefore only against rational beings. The only ground, then, for including animals is, that through them as agents, rational beings, *i. e.*, men, are aimed at. So David cursed the mountains of Gilboa not because they could feel the power of the anathema, but because they had been the scene of the massacre of Israelites; and Jesus cursed the barren fig-tree of Bethany because with its leafage and lack of fruit it symbolized the Jews, who in their

⁶¹ Wuttke, *Volksaberglaube*, p. 210; cf. Tylor, *op. cit.*, I, p. 287.

⁶² Evans, p. 9.

rites were punctilious, but in their lives cared little for righteousness. In this way God sends blights to destroy the harvests—but only the harvesters are aimed at. Aquinas, therefore, maintained this maxim which was followed by many jurists of the Middle Ages; *nec enim potest animal iniuriam fecisse quod sensu caret*. If, then, we regard such animals as the creatures of God employed by him to carry out his purposes, it would be blasphemy to curse them; if we regard them merely as brutes, such cursing would be vain and unlawful—*odiosum et vanum et per consequens illicitum*. To uphold animal responsibility, then, he had to fall back on entirely different grounds: *viz.*, that brutes are not the agents of God but the instruments of Satan “instigated by the powers of hell and therefore proper to be cursed.” On this ground alone the church had the right to excommunicate and punish them with death, for it is not the animals but the Devil through them that is aimed at. So Chas-senée, in the work already mentioned (I, par. 75), states that the anathema of the church is not to be pronounced against animals *per se*, but hurled at the devil through them, inasmuch as they are used by Satan to our detriment.⁶³ This idea, then, that animals are diabolical incarnations, seems to have been the church basis for these curious trials of the Middle Ages; and it was helped on by the fact that the Old Testament frequently mentions animals, adders, dragons, leviathans, scorpions, *etc.*, as such incarnations.⁶⁴

So much, then, for the theological basis for these medieval trials. But all sorts of other explanations of them apart from religion have been offered by churchmen and scholars from the twelfth century down to our time. It will be instructive to review some of the more noteworthy.⁶⁵

⁶³ This is also the opinion of von Amira, p. 169, who suggests that the maledictions did not refer to ordinary animals, but to the human soul or devil in disguise. Westermarck, II, 506 sq., shows how Christianity strengthened the anthropocentric doctrine that man's salvation was everything by teaching the opposite of kindness towards animals; cf. *I Corinth.*, IX, 9, *etc.*

⁶⁴ Cf. Evans, pp. 53-55.

⁶⁵ Cf. Westermarck, I, p. 255 sq., from whom I have taken many of the following explanations.

The Italian canonist Gratian, who lived in the century before Aquinas, in referring to a statement of Saint Augustine about putting animals to death,⁶⁶ gave his belief that they were killed not on account of their crimes but in order that the hateful act might be forgotten.⁶⁷ Ayrault, at the end of the sixteenth century, explained such punishment as a symbolic act intended to inspire the horror of crime in the minds of men.⁶⁸ This theory has been revived in the last century by several investigators. Thus Ménabréa believed that the church at the beginning of the Middle Ages was eager to revive in the people a sentiment for justice, since through sad experience they had come to know right only as synonymous with might.⁶⁹ Thonissen, on this theory, also explained the trials of animals at Athens.⁷⁰ But the facts are scarcely explained by any such "moral" theory. For, as we have seen, the criminal prosecution of animals was not peculiar to the Middle Ages; we have found it among many primitive peoples, and can, therefore, be sure that such a widespread desire to point a moral lesson could not have been the basis of such notions. It was the belief of Leibnitz, that such trials were for the purpose of deterring other animals from committing similar injuries.⁷¹ Some have thought that the punishment was meted out, not in order to intimidate other animals, but men who were responsible for such acts.⁷² Still others have solved the problem by simply referring it to an extension of the Mosaic law about killing beasts.⁷³ But such

⁶⁶ *Quaestiones in Leviticum*, 74 (ad Levit., XX, 16).

⁶⁷ Thus he says, in reference to bestiality: "Non propter culpam, sed propter memoriam facti pecus occiditur, ad quod mulier accesserit; *Decretum Gratiani* (written about 1150, and edited by Migne, *Patrologiae cursus*, Paris, 1855, vol. 187), II, 15, 1, 4.

⁶⁸ *Des procès faits au cadaver, aux cendres, à la mémoire, aux bestes brutes*; Angers, 1591; fol. 24.

⁶⁹ His work appeared in 1846; this is also the opinion of Tissot, *Le droit pénal*, Paris, 1860, I, 19 sq.

⁷⁰ *Le droit pénal de la république Athenienne* (1875), p. 414.

⁷¹ *Essais de Theodicée sur la bonté de Dieu*, Amsterdam, 1712, pp. 182 sq.; also Lessona, quoted by d'Addosio, p. 145; Lessona (*ibid.*) also expresses the idea that the animal was killed because it was dangerous.

⁷² So Du Boys (author of *Histoire du droit criminel des peuples modernes*, Paris, 1854-60), quoted by d'Addosio, p. 139.

⁷³ So von Amira, pp. 4 and 47 sq.

a solution does not explain the comparatively late appearance of the practice (our records only go back to the ninth century), nor the fact that other punishments besides death were often inflicted.⁷⁴

A theory that has attracted much attention in recent years is the one propounded by the Swiss jurist, Edouard Osenbrüggen.⁷⁵ He argues that as only human beings can commit crimes and be responsible for them, since they alone are rational, animals, if so treated, must have undergone a kind of personification in men's minds. In support of his "personification" theory he says—what is well known to be the truth—that in medieval times domestic animals were regarded just as much a part of the household and entitled to the same legal protection as the human inmates. Thus in the Frankish capitularies beasts of burden were included in the king's ban and enjoyed the peace guaranteed by the king, *Ut jumenta pacem habent similiter per bannum regis*. And he points out that the *Wergeld*—in Teutonic law the fine paid for manslaughter by the offender, who thereby became free of the danger of punishment—extended to beasts as well as to women and serfs. In old Germanic law the competence of animals as witnesses was even allowed in the courts; in the case of night burglary, for instance, where other witnesses were not available, the injured householder could bring in his cat or dog or rooster as silent witnesses of the crime.⁷⁶ Osenbrüggen concludes, then, that beasts were vested, by an act of personification, with human rights and responsibilities. The cock burned at the stake in Basel in 1474 was, according to his theory, merely the personification of a heretic.

It must be admitted that personification has had much to do with all primitive legislation, and so influenced medieval law.

⁷⁴ See A. Pertile, *op. cit.*, Ser. VI, vol. IV, p. 148.

⁷⁵ His work entitled, *Studien zur deutschen und schweizerischen Rechtsgeschichte*, appeared at Schaffhausen in 1868; see pp. 139-149; cf. Evans, p. 10, for a discussion of the theory.

⁷⁶ Evans, p. 11. Similarly in old French law a man accused of committing murder in his own house could appear in court with a cat, dog or cock, and swear in their presence that he was innocent; Michelet, *Origines du droit français*, pp. 76 and 279; cf. Chambers, I, 129.

We may further say that it is still a potent factor in influencing present day laws. Traces of it in a very attenuated form can be found even in recent English legal procedure. Thus a ship is the most persistent example of the notion of attributing personality to things. "She" is still personified not only in ordinary conversation, but before courts of justice. In maritime cases of recent date judges have pronounced that the proceeding is not against the owner but "against the vessel for an offence committed by the vessel."⁷⁷ But such a principle of personification as Osenbrüggen assumes, cannot, as Evans points out, explain the cases of anathematization and excommunication of vermin, nor the capital punishment of domestic animals which have occurred from the early Middle Ages down to our time. Nor can it have been the origin of such trials as we are discussing. Evans takes the example of the Basel cock, adduced by Osenbrüggen as the personification of a heretic, and shows that the real reason for such a trial and penalty was quite different. This particular cock was suspected of laying an egg, a thing which was manifestly out of harmony with its nature, and therefore the act aroused the superstitious fears of the people that the cock was the instrument of Satan. It was believed that the offspring of such a birth, known as the *cockatrice*, was diabolical in its nature and was used by Satan in furthering his designs. The cock, therefore, was not a heretic nor the personification of one, but merely a dangerous instrument of the Evil One, and had to be gotten rid of before it could do further harm.

Evans finds the origin of the medieval judicial prosecutions of animals by the church, "in the common superstition of the age, which has left such a tragical record of itself in the incredibly absurd and atrocious annals of witchcraft. The same ancient code that condemned a homicidal ox to be stoned, declared that a witch should not be suffered to live, and although the Jewish law-giver may have regarded the former enactment chiefly as a police regulation designed to protect persons against

⁷⁷ O. W. Holmes, *The Common Law* (1882), p. 29.

unruly cattle, it was, like the decree of death against witches, genetically connected with the Hebrew cult and had therefore an essentially religious character."⁷⁸ He points out that the two Jewish laws about stoning oxen (*Exod.* XXI, 28 sq.) and the condemnation of witches (*Ibid.* XXII, 19; cf. *Levit.* XX, 27 and *Deut.* XVIII 10-11) were constantly adduced by the medieval courts as their authority for punishing both classes of delinquents, though in applying them the church jurists were actuated by quite different motives than those of the Hebrew lawgivers. And he adds that the ecclesiastical authorities were interested in keeping up the superstitious belief that the devil was incarnate in every evil power of nature as well as in animals.

Lastly let us briefly review the explanation accepted by Westermarck, in his great work on the *Origin and Development of Moral Ideas*, which appeared the same year in which Evans' book was published.⁷⁹ This solution seems the simplest and most conformable to all the facts concerning the criminal prosecution of animals not only in Europe during the Middle Ages but in ancient Athens and among the barbarous peoples of all ages. While he believes that the excommunications and maledictions of the church are to be regarded in the light of magical means of getting rid of scourges rather than as mere punishments, he thinks the condemnation of animals by the church tribunals had its origin far back of the Middle Ages in the ancient European custom already mentioned. We have seen that among several early peoples of Europe animals which had caused injuries were given over to the injured party or his kinsmen for the sake of retaliation. In course of time, as at Athens, and later in the medieval church, they were criminally prosecuted as a result of the same feelings of revenge; in the final analysis, therefore, such prosecution was nothing more than a manifestation of the primitive *lex talionis*. The animal had to suffer because indignation had been aroused by its injurious act and because it was regarded as responsible

⁷⁸ Evans, pp. 12-13.

⁷⁹ Pages 255 and 257 sq.

for it.⁸⁰ He shows how in early records the punishment of animals is frequently called an act of justice by canonists,⁸¹ and he gives several examples of animals being treated as men. Thus in Salic law a beast is called *auctor criminis*.⁸² In the trial of the sow at Savigny in 1457, already mentioned, youth was a ground for acquittal; and the repetition of a crime by an animal tended to aggravate its punishment.⁸³ An old Irish law states that when a bee has blinded a man's eye, the whole hive must pay the fine and "the many become accountable for the crime of one, although they all have not attacked".⁸⁴ He remarks that if the cultured mind feels anger at the deed of a mischievous animal, how much more easy is it for an ignorant man and for a savage to exaggerate the feeling. The savage, in his rage, obliterates all distinctions between man and beast, and treats the latter in all respects as the equal of the former, and so endows him with human intelligence and feeling.

But it is not only savages who hold such beliefs. The Koran teaches that animals will share in the general resurrection.⁸⁵ The Zoroastrian law about mad dogs being held responsible has already been mentioned; in another part of the Vendidad we read that a dog has the characters of eight different sorts of people.⁸⁶ We have also seen that animals in the Middle Ages were sometimes admitted as witnesses in court. Nor is it only ordinary people who look upon brutes as intelligent. Porphyry says all philosophers, who have tried to find out the truth about animals, acknowledge that they possess reason to a certain extent.⁸⁷ In the sixteenth century a Christian writer named Benoît maintained that animals often speak,⁸⁸ which is an idea

⁸⁰ Following Post, *Die Grundlagen des Rechts* (Oldenburg, 1884), p. 359; cf. K. Friedrichs, *Mensch und Person* (in *Das Ausland*, LXIV, 1891, pp. 300, 315); and d'Addosio, p. 146 sq.

⁸¹ So von Amira, p. 9.

⁸² *Lex Salica* (Hessels); coll. 209-12; 215.

⁸³ Pertile, *op. cit.*, p. 148.

⁸⁴ *Ancient Laws of Ireland*, IV, 179.

⁸⁵ VI, 38; cf. Sell, *Faith of Islam*, p. 223.

⁸⁶ Fargard, XIII, 44 sq.

⁸⁷ *De Abstin.*, III, 6.

⁸⁸ Quoted by d'Addosio, p. 214.

as old as Homer. And in the next century a man named Rorarius published a book in which he tried to prove that animals used their reason even better than men.⁸⁹ About the same time Johann Crell, in his *Ethica Christiana*, expressed the idea that brutes possess faculties analogous to reason and free-will, and deserve rewards and punishments, and so are penalized by both God and man. From this course of reasoning Westermarck concludes that "the beast or insect was retaliated upon for the simple reason that it was regarded as a rational being." Of course in the Middle Ages, the church might not be cognizant of the operation of such a principle, and consequently would turn, in seeking grounds for their trials of animals, to the Mosaic code, which contained a concrete and authoritative statement of a very primitive custom.

Because of our modern theories of crime and its punishment, based on anthropological, sociological and psychiatric investigations, which were wholly unknown until a few years ago, the distinction between man and beast, so far as moral responsibility for their acts is concerned, tends to be obliterated. Lombroso⁹⁰ has shown beyond doubt that in the animal world, as in that of man, there are individuals which are born criminals, which act contrary to all the social instincts of their species, and which with downright premeditation prey upon their fellows. If the medieval canon had known such facts as these, he would have seized upon them to further the designs of the church and its system; he would have transferred his theory which he based on the authority of the Old Testament, to one based on science.

But what modern criminologist would make use of such facts? Who would now think of trying such a delinquent beast or applying retributive justice to it even though it were guilty? Our modern attitude shows what a tremendous change has taken place in the history of criminology. Revenge, retribution, the *lex talionis*, are fast receding in our laws which govern human beings. A suspected criminal is given every chance to

⁸⁹ The title is: *Quod animalia bruta ratione utantur melius homine.*

⁹⁰ *Il Delitto negli Animali*, Archivio di Psichiatria, Turin, 1881, vol. II.

clear himself and is never pronounced guilty until proven so; every legal delay is for his advantage, and if he is at last shown to be guilty and deserving of capital punishment, the carrying out of the penalty is now private and humane. What a difference when compared with the medieval idea of torture, of the individual subservience to an institution! If there has been such a change in the treatment of human criminals, there has been a revolution in the treatment of animals.

Our modern penal codes, based no longer entirely on revenge, but more and more on the careful results of scientific investigation, are still in the inchoate stage. The problem of the origin and nature of crime and its penalty is yet to be solved. But one thing is certain: where the old law-giver used to treat brutes as men responsible for their misdeeds, nowadays the tendency is to treat criminal men as brutes, on the theory that they are largely automata in their natures, and so to plead on their behalf some inherent defect for which they are not wholly to be blamed, or perhaps some extenuating circumstance which will tend to exculpate them.

The other notion, that lifeless things are likewise responsible agents like animals and men, can be evidenced from every stratum of human society from the lowest to the highest. After adducing a few examples of it among barbarous and half-civilized peoples of today, let us consider briefly its presence among some of the foremost nations of modern Europe.

The simple *lex talionis* is carried out scrupulously among the Kookies of India who have already been mentioned. If a man meets his death by falling from a tree, the tree spirit has caused the mishap, and in requital the kinsmen of the victim must assemble and hew it down and scatter the chips to the winds "for having"—as they say—"caused the death of their brother".⁹¹ The Indians of British Guiana, when injured by falling upon a rock or by its falling upon them, blame the rock.⁹² The North American Indians, when struck by an arrow in battle "will tear it from the wound, break and bite it with their

⁹¹ Macrae, Bastian and Tylor, *l. c.*; see note 52 *supra*.

⁹² See E. F. Im Thurn, *Among the Indians of Guiana* (1883), p. 354.

teeth, and dash it on the ground”⁹³ Among certain aboriginal tribes of Australia, a spear or any weapon of an enemy, which has been the cause of killing a friend, is burnt by the kinsmen of the deceased as a deserved punishment.⁹⁴ Just so according to ancient Anglo-Saxon law a sword or other object by which a man was slain, was not regarded as *gesund*, until the crime had been expiated, and so it could not be used; no cutler would sharpen it until he had a certificate that it was free of taint.⁹⁵ According to Ripuarian law, people were forbidden to use anything that had been *auctor interfectionis*.⁹⁶ In Norway in recent times such objects as sickles and axes, with which men had been killed, have been seen lying about unused.⁹⁷ There was once a municipal law of Schleswig, which made a house-builder responsible, if any one were killed by the falling of a beam or piece of timber. He must pay the sum of nine marks, or give the timber to the victim’s kinsman. If he persisted in building it into the structure, the houseowner might have to atone for the homicide by giving up the whole house.⁹⁸ Similarly, according to the Laws of Alfred in England, when men worked together in a forest and one inadvertently let a tree fall and kill one of his companions, the tree belonged to the dead man’s kinsmen, if it was taken away within thirty days.⁹⁹

A recent king of Cochin China is reported to have put one of his ships which had sailed badly, in the pillory like an ordinary criminal.¹⁰⁰ In China it is said that fifteen wooden idols were

⁹³ Robertson, *History of America*, I, 351 sq.

⁹⁴ J. Dawson, *Australian Aborigines*, p. 53; cf. *Journal of the Anthropological Institute*, 7 (1878), p. 289; Frazer, II, p. 371.

⁹⁵ Quoted by Evans, p. 187.

⁹⁶ *Lex Ripuariorum*, LXX, 1.

⁹⁷ Liebrecht, *Zur Volkskunde*, p. 313.

⁹⁸ H. Brunner, *Deutsche Rechtsgeschichte* (1887-92), II, p. 557, note 31; cf. Evans, pp. 187-8.

⁹⁹ *Laws of Alfred*, II, 13. Of course the object was given up to the kinsmen not as compensation for the loss suffered, but as an object on which they might wreak their vengeance; see Pollock and Maitland, *History of English Law Before the Time of Edward I*, (1898), II, 474; cf. Westermarck, I, p. 263. Thus among the aborigines of Western Australia, if a person has been slain by a native wooden spear, his countrymen burn it, so that the victim’s soul, supposed to be imprisoned in the point of it, may be released; see Salvado, *Mémoires historiques sur l’Australie*, p. 260 sq.

¹⁰⁰ Bastian, *Östl. Asien*, I, p. 51, quoted by Tylor, I, p. 286.

recently tried and beheaded for causing the death of an army officer. The family of the deceased complained to the viceroy of Fouchow, who had the offenders removed from the temple and tried; they were then decapitated and thrown into a pond in the presence of a great crowd.¹⁰¹

Reverting to Europe, we have a most curious example from Russia. Prince Dimitri, the son of Ivan IV (the Terrible), while a child was assassinated on May 15, 1591, in the town of Uglich, the appanage of his widowed mother, whither he had been taken to live. The town bell rang the signal of insurrection and for this grave political offence it was banished to Tobolsk in Siberia by the Russian government. After a long period of confinement there, the bell was partly purged of its guilt by being reconsecrated and hung up in a church tower. But not until three hundred and one years later—in 1892—was it fully pardoned and restored to Uglich.¹⁰²

In the Scotch Islands it is said to be the custom still to beach a boat from which a fisherman has been drowned, cursing it and leaving it to decay, thus prohibiting it from sailing the high seas with its innocent sisters. Even glaciers have been excommunicated for the damage they have done to mountain valleys, as is attested by an article entitled "*L'excommunication des Glaciers*," appearing in the *Revue des Traditions Populaires* (Vol. V, 1890). And it is well known that until very recent times the peasants of Alpine villages believed that the heights above were inhabited by evil spirits.¹⁰³

The most interesting example of the childish disposition to punish inanimate objects is to be found in the institution of *deodand* in English law. By it personal chattels, which had caused the death of a man, had to be given up to God—that is, forfeited to the king and applied to pious uses, being distributed in alms by the high almoner.¹⁰⁴ Blackstone distinguishes care-

¹⁰¹ Evans, pp. 174-5.

¹⁰² Evans, p. 175; he wrongly makes Dimitri the son of Ivan II.

¹⁰³ See Whymper, *Ascent of the Matterhorn*; the older name of Mont Blanc was Mont Maudit—"the accursed mountain."

¹⁰⁴ The thing, in the words of Coke, "was forfeited to God, that is, to

fully between things causing death which are in motion and those which are at rest. Thus he says:

“Where a thing not in motion is the occasion of a man’s death, that part only which is the immediate cause is forfeited; as, if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is deodand; but, whenever the thing is in motion, not only that part which immediately gives the wound (as the wheel which runs over the body), but all things which move with it and help make the wound more dangerous (as the cart and the loading, which increase the pressure of the wheel), are forfeited.”¹⁰⁵

He also says:

“If a horse, or ox, or other animal, of his own motion, kill as well an infant as an adult, or if a cart run over him, they shall in either case be forfeited as deodands.”

But he says there is no deodand where an infant is killed by falling from a horse or cart not in motion; but if an adult person is thus killed, the object is deodand. He explains this curious distinction by saying that the child has not yet arrived at the age of discretion, and so is presumed to be incapable of sin, and consequently no deodand is needed to purchase propitiatory masses for its soul; “but every adult who died in actual sin, stood in need of such atonement, according to the humane superstition of the founders of English law”.¹⁰⁶ He combats the opinion of Sir Matthew Hale,¹⁰⁷ who argued that the infant was not able to take care of itself and consequently was blameless, by asking why the owner of the horse or cart should save his forfeiture on account of the imbecility of a child, which fact should have served only to make him the more cautious to prevent such an accident.

Bracton¹⁰⁸ had made the same distinction between things

the King, God’s Lieutenant on earth, to be distributed in works of charity for the appeasing of God’s wrath”; *Third Part of the Institutes of the Laws of England*, p. 57.

¹⁰⁵ *Commentaries on the Laws of England*, Bk. I, Ch. 8, Par. 301; adapted to the present state of the law by R. M. Kerr, 4 vols., London, 1876; cf. also William Draper Lewis: *Blackstone’s Commentaries* (1902).

¹⁰⁶ Par. 300.

¹⁰⁷ 1609-76; see his *Historia Placitorum Coronae*, 1736 (= *The History of the Pleas of the Crown*, London, 1800, I, 422); cf. Coke, *op. cit.*, p. 57, and Stephen, *History of the Criminal Law of England*, 1883, III, 78.

¹⁰⁸ Henry de Bracton (Bratton or Bretton), the author of *De legibus*

in motion and those at rest; he said *omnia quae movent ad mortem sunt Deodanda*. Thus there is a difference between a horse which throws a man and a horse from which a man tumbles; also between a tree that falls on a man and a tree against which a man is thrown. The same distinction was also observed by Britton, the early summarizer of English law.¹⁰⁹

No deodands were exacted in England for accidents on the high seas, since these were beyond the jurisdiction of the common law.¹¹⁰ But if a man fell from a ship or boat in fresh water, *i. e.*, in port, and was drowned, this came within the scope of the law and the vessel and cargo became deodand.¹¹¹

Blackstone's notion that the greater penalty was exacted for things in motion because such accidents were due partly to the negligence of the owner seems wrong.¹¹² For in many cases it could be shown that the owner was not only entirely innocent of negligence, but that he himself was the victim of the accident. Nor was his notion of the origin of the institution of deodand any more correct. True to his own church sympathies he says it was "originally devised, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church".¹¹³ But the church, even if it waxed fat on deodands, can have had little to do with the origin of such a custom. The real object of such legislation was, of course, expiatory at bottom, and the atoning for manslaughter in such cases was in full accord with the elementary concepts of justice prevailing in Europe during the Middle Ages under the domination of the

et consuetudinibus Angliae, published in part in 1567 and entire in 1569; this was the first systematic treatment of English law; see fol. 136b, vol. II, 400 sq.

¹⁰⁹ His work was written in French, probably in the 13th century; it was first published in London about 1530; Selden and others thought it was an abridgment of Bracton.

¹¹⁰ So James Stephen, *op. cit.*, III, 78. But Coke, p. 58, says it was on account of the danger to which the vessel is exposed "upon the raging waves in respect of the wind and tempest." Cf. also Bracton, fol. 122, vol. II, 286 sq., for the law.

¹¹¹ Blackstone, Par. 301.

¹¹² *Ibid.*

¹¹³ Par. 300.

church; and the church would and did foster the custom as a device to appease the wrath of God in order to avert famine and other calamities. Punishment was not meted out by the Christian church to things because of their crimes; it was merely a retribution exacted to avert calamity. And often the forfeiture did not depend at all on the guilt of the owner of the chattel. The property of a suicide, for instance, always became deodand and the relatives of the victim were deprived of it, though they had had nothing to do with the unfortunate act and had already suffered sufficiently from its occurrence. There was no idea of punishing the family, but only to provide a suitable atonement for the crime. The case was very much like that in ancient Greece—where the moral equilibrium had been disturbed and had to be evened up. In so doing the rights of the suicide's family were utterly ignored.

Tylor shows the inadequacy of the explanation of deodand offered by Dr. Reed. The latter had maintained that the intent was not to punish the cart or ox as a criminal, "but to inspire the people with a sacred regard to the life of a man".¹¹⁴ This is a very similar explanation to that offered by Ménabréa and others to explain the medieval process against animals. The truth is that the English laws of deodand were of slow growth and quite unrelated to the teaching of the church. In brief it may be said that they grew upon the basis of Jewish and Anglo-Saxon legislation. Of course they became powerful instruments in the hands of the king, the head of the English church.

The trials of deodand never took place before ecclesiastical courts, but always before criminal courts. The jury consisted of twelve men,¹¹⁵ who investigated the occurrence and evaluated the instrument if it was proven to have caused the death. Its nature and value were then stated in the indictment by the jury, as, *e. g.*, the stroke causing death dealt by a penknife might be valued at six-pence, and this was the amount the king could demand. The instrument, as in ancient Gothic law, was forfeited or accursed.¹¹⁶

¹¹⁴ *Op. cit.*, I, pp. 286-7, quoting Reed, *Essays*, III, p. 113.

¹¹⁵ Blackstone, Par. 301.

¹¹⁶ Par. 301, note e.

Such jury trials in course of time became unpopular; the judges could connive, and such forfeitures would often become mitigated by their finding that some thing or part of a thing of trifling value had been the occasion of the death. Thus the pious object of the forfeiture would be lost sight of. And, besides, the king might, and often did, farm out his right to deodands and forfeitures in general as a royal franchise to the lords of the manors and to other subjects; and so in this way the original design of the institution was utterly perverted.¹¹⁷ But with all such drawbacks, and with the inherent senselessness of such legislation, the English laws of deodand were not finally abrogated until the year 1846 in the reign of Victoria.¹¹⁸

Deodand was recognized also in Scotland, but only as escheat, *i. e.*, the object confiscated was given to the king but not for pious purposes. It prevailed in Western Europe generally more than in Central or Eastern Europe. The German States seem to have introduced it from France, but with essential modifications.¹¹⁹ We find jury trials of this sort recorded even in our own law annals. Thus we read of an inquest held on January 31, 1637, over the body of a planter, who, "by the fall of a tree had his bloud bulke broken":

"And furthermore the jurors aforesaid, upon their oath aforesaid, say that the said tree moved to the death of the said John Bryant; and therefore find the said tree forfeited to the Lord Proprietor."¹²⁰

Deodand was almost the last vestige in Anglo-Saxon countries—if we except certain traces still lingering in maritime law—of the application in an age of enlightenment of a penal principle which tried stones, beams, and pieces of iron in ancient Athens, and which excommunicated animals in the Middle Ages and sent them to the stake and to the scaffold.

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¹¹⁷ Par. 302.

¹¹⁸ See Stephen, *op. cit.*, III, 78; Pollock and Maitland, *op. cit.*, II, 473.

¹¹⁹ Evans, p. 19.

¹²⁰ See *Archives of Maryland*, edited in 1887, by W. H. Browne and Miss Harrison; quoted by Evans, p. 187.