ANCIENT LAW.

CHAPTER I.

ANCIENT CODES.

The most celebrated system of jurisprudence known to the world begins, as it ends, with a Code. From the commencement to the close of its history, the expositors of Roman Law consistently employed language which implied that the body of their system rested on the Twelve Decemviral Tables, and therefore on a basis of written law. Except in one particular, no institutions anterior to the Twelve Tables were recognised at Rome. The theoretical descent of Roman jurisprudence from a code, the theoretical ascription of English law to immemorial unwritten tradition, were the chief reasons why the development of their system differed from the development of ours.

Neither theory corresponded exactly with the facts, but each produced consequences of the utmost importance.

I need hardly say that the publication of the Twelve Tables is not the earliest point at which we can take up the history of law. The ancient Roman code belongs to a class of which almost every civilised nation in the world can show a sample, and which, so far as the Roman and Hellenic worlds were concerned, were largely diffused over them at epochs not widely distant from one another. They appeared under exceedingly similar circumstances, and were produced, to our knowledge, by very similar causes. Unquestionably, many jural phenomena lie behind these codes and preceded them in point of time. Not a few documentary records exist which profess to give us information concerning the early phenomena of law; but, until philology has effected a complete analysis of the Sanskrit literature, our best sources of knowledge are undoubtedly the Greek Homeric poems, considered of course not as a history of actual occurrences, but as a description, not wholly idealised, of a state of society known to the writer. However the fancy of the poet may have exaggerated certain features of the heroic age, the prowess of warriors and the potency of gods, there is no reason to believe that it has tampered with moral or metaphysical conceptions which were not yet the subjects of conscious

observation; and in this respect the Homeric literature is far more trustworthy than those relatively later documents which pretend to give an account of times similarly early, but which were compiled under philosophical or theological influences. If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself. The haste or the prejudice which has generally refused them all but the most superficial examination, must bear the blame of the unsatisfactory condition in which we find the science of jurisprudence. The inquiries of the jurist are in truth prosecuted much as inquiry in physics and physiology was prosecuted before observation had taken the place of assumption. Theories, plausible and comprehensive, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.

The earliest notions connected with the conception, now so fully developed, of a law or rule of life, are those contained in the Homeric words "Themis" and "Themistes." "Themis," it is well known, appears in the later Greek pantheon as the Goddess of Justice, but this is a modern and much developed idea, and it is in a very different sense that Themis is described in the Iliad as the assessor of Zeus. It is now clearly seen by all trustworthy observers of the primitive condition of mankind that, in the infancy of the race, men could only account for sustained or periodically recurring action by supposing a personal agent. Thus, the wind blowing was a person and of course a divine person; the sun rising, culminating, and setting was a person and a divine person; the earth yielding her increase was a person and divine. As, then, in the physical world, so in the moral. When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration. The divine agent, suggesting judicial awards to kings or to gods, the greatest of kings, was *Themis*. The peculiarity of the conception is brought out by the use of the plural. *Themistes*, Themises, the plural of Themis, are the awards themselves, divinely dictated to the judge. Kings are spoken of as if they had a store of "Themistes" ready to hand for use; but it must be distinctly understood that they are not laws, but judgments. "Zeus, or

the human king on earth," says Mr. Grote, in his History of Greece, "is not a law-maker, but a judge." He is provided with Themistes, but, consistently with the belief in their emanation from above, they cannot be supposed to be connected by any thread of principle; they are separate, isolated judgments.

Even in the Homeric poems we can see that these ideas are transient. Parities of circumstance were probably commoner in the simple mechanism of ancient society than they are now, and in the succession of similar cases awards are likely to follow and resemble each other. Here we have the germ or rudiment of a custom, a conception posterior to that of Themistes or judgments. However strongly we, with our modern associations, may be inclined to lay down *à priori* that the notion of a Custom must precede that of a judicial sentence, and that a judgment must affirm a Custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them. The Homeric word for a custom in the embryo is sometimes "Themis" in the singular—more often "Dike," the meaning of which visibly fluctuates between a "judgment" and a "custom" or "usage." Νόμος, a Law, so great and famous a term in the political vocabulary of the later Greek society, does not occur in Homer.

This notion of a divine agency, suggesting the

Themistes, and itself impersonated in Themis, must be kept apart from other primitive beliefs with which a superficial inquirer might confound it. The conception of the Deity dictating an entire code or body of law, as in the case of the Hindoo laws of Manu, seems to belong to a range of ideas more recent and more advanced. "Themis" and "Themistes" are much less remotely linked with that persuasion which clung so long and so tenaciously to the human mind, of a divine influence underlying and supporting every relation of life, every social institution. In early law, and amid the rudiments of political thought, symptoms of this belief meet us on all sides. A supernatural presidency is supposed to consecrate and keep together all the cardinal institutions of those times, the State, the Race, and the Family. Men, grouped together in the different relations which those institutions imply, are bound to celebrate periodically common rites and to offer common sacrifices; and every now and then the same duty is even more significantly recognised in the purifications and expiations which they perform, and which appear intended to deprecate punishment for involuntary or neglectful disrespect. Everybody acquainted with ordinary classical literature will remember the *sacra gentilicia*, which exercised so important an influence on the early Roman law of adoption and of wills. And to this hour the Hindoo

Customary Law, in which some of the most curious features of primitive society are stereotyped, makes almost all the rights of persons and all the rules of succession hinge on the due solemnisation of fixed ceremonies at the dead man's funeral, that is, at every point where a breach occurs in the continuity of the family.

Before we quit this stage of jurisprudence, a caution may be usefully given to the English student. Bentham, in his "Fragment on Government," and Austin, in his "Province of Jurisprudence Determined," resolve every law into a *command* of the lawgiver, an *obligation* imposed thereby on the citizen, and a *sanction* threatened in the event of disobedience; and it is further predicated of the *command*, which is the first element in a law, that it must prescribe, not a single act, but a series or number of acts of the same class or kind. The results of this separation of ingredients tally exactly with the facts of mature jurisprudence; and, by a little straining of language, they may be made to correspond in form with all law, of all kinds, at all epochs. It is not, however, asserted that the notion of law entertained by the generality is even now quite in conformity with this dissection; and it is curious that, the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a

compound of the elements which Bentham determined. It is certain that, in the infancy of mankind, no sort of legislature, not even a distinct author of law, is contemplated or conceived of. Law has scarcely reached the footing of custom; it is rather a habit. It is, to use a French phrase, "in the air." The only authoritative statement of right and wrong is a judicial sentence after the facts, not one presupposing a law which has been violated, but one which is breathed for the first time by a higher power into the judge's mind at the moment of adjudication. It is of course extremely difficult for us to realise a view so far removed from us in point both of time and of association, but it will become more credible when we dwell more at length on the constitution of ancient society, in which every man, living during the greater part of his life under the patriarchal despotism, was practically controlled in all his actions by a regimen not of law but of caprice. I may add that an Englishman should be better able than a foreigner to appreciate the historical fact that the "Themistes" preceded any conception of law, because, amid the many inconsistent theories which prevail concerning the character of English jurisprudence, the most popular, or at all events the one which most affects practice, is certainly a theory which assumes that adjudged cases and precedents exist antecedently to rules,

principles, and distinctions. The "Themistes" have too, it should be remarked, the characteristic which, in the view of Bentham and Austin, distinguishes single or mere commands from laws. A true law enjoins on all the citizens indifferently a number of acts similar in class or kind; and this is exactly the feature of a law which has most deeply impressed itself on the popular mind, causing the term "law" to be applied to mere uniformities, successions, and similitudes. A *command* prescribes only a single act, and it is to commands, therefore, that "Themistes" are more akin than to laws. They are simply adjudications on insulated states of fact, and do not necessarily follow each other in any orderly sequence.

The literature of the heroic age discloses to us law in the germ under the "Themistes" and a little more developed in the conception of "Dike." The next stage which we reach in the history of jurisprudence is strongly marked and surrounded by the utmost interest. Mr. Grote, in the second part and second chapter of his History, has fully described the mode in which society gradually clothed itself with a different character from that delineated by Homer. Heroic kingship depended partly on divinely given prerogative, and partly on the possession of supereminent strength, courage, and wisdom. Gradually, as the impression of the monarch's sacredness became weakened, and feeble members occurred in

the series of hereditary kings, the royal power decayed, and at last gave way to the dominion of aristocracies. If language so precise can be used of the revolution, we might say that the office of the king was usurped by that council of chiefs which Homer repeatedly alludes to and depicts. At all events from an epoch of kingly rule we come everywhere in Europe to an era of oligarchies; and even where the name of the monarchical functions does not absolutely disappear, the authority of the king is reduced to a mere shadow. He becomes a mere hereditary general, as in Lacedæmon, a mere functionary, as the King Archon at Athens, or a mere formal hierophant, like the *Rex Sacrificulus* at Rome. In Greece, Italy, and Asia Minor, the dominant orders seem to have universally consisted of a number of families united by an assumed relationship in blood, and, though they all appear at first to have laid claim to a quasi-sacred character, their strength does not seem to have resided in their pretended sanctity. Unless they were prematurely overthrown by the popular party, they all ultimately approached very closely to what we should now understand by a political aristocracy. The changes which society underwent in the communities of the further Asia occurred of course at periods long anterior in point of time to these revolutions of the Italian and Hellenic worlds; but their

elative place in civilisation appears to have been ne same, and they seem to have been exceedingly imilar in general character. There is some evidence hat the races which were subsequently united under he Persian monarchy, and those which peopled the eninsula of India, had all their heroic age and their ra of aristocracies; but a military and a religious ligarchy appear to have grown up separately, nor vas the authority of the king generally superseded. Contrary, too, to the course of events in the West, he religious element in the East tended to get the better of the military and political. Military and civil aristocracies disappear, annihilated or crushed nto insignificance between the kings and the sacerdotal order; and the ultimate result at which we arrive is, a monarch enjoying great power, but circumscribed by the privileges of a caste of priests. With these differences, however, that in the East aristocracies became religious, in the West civil or political, the proposition that a historical era of aristocracies succeeded a historical era of heroic kings may be considered as true, if not of all mankind, at all events of all branches of the Indo-European family of nations.

The important point for the jurist is that these aristocracies were universally the depositaries and administrators of law. They seem to have succeeded to the prerogatives of the king, with the important

difference, however, that they do not appear to have pretended to direct inspiration for each sentence. The connection of ideas which caused the judgments of the patriarchal chieftain to be attributed to superhuman dictation still shows itself here and there in the claim of a divine origin for the entire body of rules, or for certain parts of it, but the progress of thought no longer permits the solution of particular disputes to be explained by supposing an extra-human interposition. What the juristical oligarchy now claims is to monopolise the *knowledge* of the laws, to have the exclusive possession of the principles by which quarrels are decided. We have in fact arrived at the epoch of Customary Law. Customs or Observances now exist as a substantive aggregate, and are assumed to be precisely known to the aristocratic order or caste. Our authorities leave us no doubt that the trust lodged with the oligarchy was sometimes abused, but it certainly ought not to be regarded as a mere usurpation or engine of tyranny. Before the invention of writing, and during the infancy of the art, an aristocracy invested with judicial privileges formed the only expedient by which accurate preservation of the customs of the race or tribe could be at all approximated to. Their genuineness was, so far as possible, insured by confiding them to the recollection of a limited portion of the community.

The epoch of Customary Law, and of its custody by a privileged order, is a very remarkable one. The condition of jurisprudence which it implies has left traces which may still be detected in legal and popular phraseology. The law, thus known exclusively to a privileged minority, whether a caste, an aristocracy, a priestly tribe, or a sacerdotal college, is true unwritten law. Except this, there is no such thing as unwritten law in the world. English case-law is sometimes spoken of as unwritten, and there are some English theorists who assure us that if a code of English jurisprudence were prepared we should be turning unwritten law into written—a conversion, as they insist, if not of doubtful policy, at all events of the greatest seriousness. Now, it is quite true that there was once a period at which the English common law might reasonably have been termed unwritten. The elder English judges did really pretend to knowledge of rules, principles, and distinctions which were not entirely revealed to the bar and to the lay-public. Whether all the law which they claimed to monopolise was really unwritten, is exceedingly questionable; but at all events, on the assumption that there was once a large mass of civil and criminal rules known exclusively to the judges, it presently ceased to be unwritten law. As soon as the Courts at Westminster Hall began to base their judgments on cases recorded, whether in the year

books or elsewhere, the law which they administered became written law. At the present moment a rule of English law has first to be disentangled from the recorded facts of adjudged printed precedents, then thrown into a form of words varying with the taste, precision, and knowledge of the particular judge, and then applied to the circumstances of the case for adjudication. But at no stage of this process has it any characteristic which distinguishes it from written law. It is written case-law, and only different from code-law because it is written in a different way.

From the period of Customary Law we come to another sharply defined epoch in the history of jurisprudence. We arrive at the era of Codes, those ancient codes of which the Twelve Tables of Rome were the most famous specimen. In Greece, in Italy, on the Hellenised sea-board of Western Asia, these codes all made their appearance at periods much the same everywhere, not, I mean, at periods identical in point of time, but similar in point of the relative progress of each community. Everywhere, in the countries I have named, laws engraven on tablets and published to the people take the place of usages deposited with the recollection of a privileged oligarchy. It must not for a moment be supposed that the refined considerations now urged in favour of what is called codification had any part or place in

the change I have described. The ancient codes were doubtless originally suggested by the discovery and diffusion of the art of writing. It is true that the aristocracies seem to have abused their monopoly of legal knowledge; and at all events their exclusive possession of the law was a formidable impediment to the success of those popular movements which began to be universal in the western world. But, though democratic sentiment may have added to their popularity, the codes were certainly in the main a direct result of the invention of writing. Inscribed tablets were seen to be a better depositary of law, and a better security for its accurate preservation, than the memory of a number of persons however strengthened by habitual exercise.

The Roman code belongs to the class of codes I have been describing. Their value did not consist in any approach to symmetrical classifications, or to terseness and clearness of expression, but in their publicity, and in the knowledge which they furnished to everybody, as to what he was to do, and what not to do. It is, indeed, true that the Twelve Tables of Rome do exhibit some traces of systematic arrangement, but this is probably explained by the tradition that the framers of that body of law called in the assistance of Greeks who enjoyed the later Greek experience in the art of law-making. The fragments of the Attic Code of Solon show,

however, that it had but little order, and probably the laws of Draco had even less. Quite enough too remains of these collections, both in the East and in the West, to show that they mingled up religious, civil, and merely moral ordinances, without any regard to differences in their essential character; and this is consistent with all we know of early thought from other sources, the severance of law from morality, and of religion from law, belonging very distinctly to the *later* stages of mental progress.

But, whatever to a modern eye are the singularities of these Codes, their importance to ancient societies was unspeakable. The question—and it was one which affected the whole future of each community—was not so much whether there should be a code at all, for the majority of ancient societies seem to have obtained them sooner or later, and, but for the great interruption in the history of jurisprudence created by feudalism, it is likely that all modern law would be distinctly traceable to one or more of these fountain-heads. But the point on which turned the history of the race was, at what period, at what stage of their social progress, they should have their laws put into writing. In the western world the plebeian or popular element in each State successfully assailed the oligarchical monopoly, and a code was nearly universally obtained *early* in the history of the Commonwealth. But, in the East, as I

have before mentioned, the ruling aristocracies tended to become religious rather than military or political, and gained, therefore, rather than lost in power; while in some instances the physical conformation of Asiatic countries had the effect of making individual communities larger and more numerous than in the West; and it is a known social law that the larger the space over which a particular set of institutions is diffused, the greater is its tenacity and vitality. From whatever cause, the codes obtained by Eastern societies were obtained, relatively, much later than by Western, and wore a very different character. The religious oligarchies of Asia, either for their own guidance, or for the relief of their memory, or for the instruction of their disciples, seem in all cases to have ultimately embodied their legal learning in a code; but the opportunity of increasing and consolidating their influence was probably too tempting to be resisted. Their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections, not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed. The Hindoo Code, called the Laws of Manu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is that it does not, as a whole, represent a set of rules

ever actually administered in Hindostan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, *ought* to be the law. It is consistent with human nature and with the special motives of their authors, that codes like that of Manu should pretend to the highest antiquity and claim to have emanated in their complete form from the Deity. Manu, according to Hindoo mythology, is an emanation from the supreme God; but the compilation which bears his name, though its exact date is not easily discovered, is, in point of the relative progress of Hindoo jurisprudence, a recent production.

Among the chief advantages which the Twelve Tables and similar codes conferred on the societies which obtained them, was the protection which they afforded against the frauds of the privileged oligarchy and also against the spontaneous depravation and debasement of the national institutions. The Roman Code was merely an enunciation in words of the existing customs of the Roman people. Relatively to the progress of the Romans in civilisation, it was a remarkably early code, and it was published at a time when Roman society had barely emerged from that intellectual condition in which civil obligation and religious duty are inevitably confounded. Now a barbarous society practising a body of customs, is exposed to some especial dangers which may be absolutely fatal to its progress in civilisation. The usages which a particular community is found to

have adopted in its infancy and in its primitive seats are generally those which are on the whole best suited to promote its physical and moral well-being; and, if they are retained in their integrity until new social wants have taught new practices, the upward march of society is almost certain. But unhappily there is a law of development which ever threatens to operate upon unwritten usage. The customs are of course obeyed by multitudes who are incapable of understanding the true ground of their expediency, and who are therefore left inevitably to invent superstitious reasons for their permanence. A process then commences which may be shortly described by saying that usage which is reasonable generates usage which is unreasonable. Analogy, the most valuable of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy. Prohibitions and ordinances, originally confined, for good reasons, to a single description of acts, are made to apply to all acts of the same class, because a man menaced with the anger of the gods for doing one thing, feels a natural terror in doing any other thing which is remotely like it. After one kind of food has been interdicted for sanitary reasons, the prohibition is extended to all food resembling it, though the resemblance occasionally depends on analogies the most fanciful. So again, a wise provision for ensuring general cleanliness dictates in time long

routines of ceremonial ablution; and that division into classes which at a particular crisis of social history is necessary for the maintenance of the national existence degenerates into the most disastrous and blighting of all human institutions—Caste. The fate of the Hindoo law is, in fact, the measure of the value of the Roman Code. Ethnology shows us that the Romans and the Hindoos sprang from the same original stock, and there is indeed a striking resemblance between what appear to have been their original customs. Even now, Hindoo jurisprudence has a substratum of forethought and sound judgment, but irrational imitation has engrafted in it an immense apparatus of cruel absurdities. From these corruptions the Romans were protected by their code. It was compiled while usage was still wholesome, and a hundred years afterwards it might have been too late. The Hindoo law has been to a great extent embodied in writing, but, ancient as in one sense are the compendia which still exist in Sanskrit, they contain ample evidence that they were drawn up after the mischief had been done. We are not of course entitled to say that if the Twelve Tables had not been published the Romans would have been condemned to a civilisation as feeble and perverted as that of the Hindoos, but thus much at least is certain, that *with* their code they were exempt from the very chance of so unhappy a destiny.

CHAPTER II.

LEGAL FICTIONS.

When primitive law has once been embodied in a Code, there is an end to what may be called its spontaneous development. Henceforward the changes effected in it, if effected at all, are effected deliberately and from without. It is impossible to suppose that the customs of any race or tribe remained unaltered during the whole of the long—in some instances the immense—interval between their declaration by a patriarchal monarch and their publication in writing. It would be unsafe too to affirm that no part of the alteration was effected deliberately. But from the little we know of the progress of law during this period, we are justified in assuming that set purpose had the very smallest share in producing change. Such innovations on the earliest usages as disclose themselves appear to have been dictated by feelings and modes of thought which, under our present mental conditions, we are unable to comprehend. A new era begins, however, with the Codes. Wherever, after this epoch, we trace the course of legal modification, we are able to attribute it to the conscious desire of improvement, or at all events of compassing objects

other than those which were aimed at in the primitive times.

It may seem at first sight that no general propositions worth trusting can be elicited from the history of legal systems subsequent to the codes. The field is too vast. We cannot be sure that we have included a sufficient number of phenomena in our observations, or that we accurately understand those which we have observed. But the undertaking will be seen to be more feasible, if we consider that after the epoch of codes the distinction between stationary and progressive societies begins to make itself felt. It is only with the progressive societies that we are concerned, and nothing is more remarkable than their extreme fewness. In spite of overwhelming evidence, it is most difficult for a citizen of Western Europe to bring thoroughly home to himself the truth that the civilisation which surrounds him is a rare exception in the history of the world. The tone of thought common among us, all our hopes, fears, and speculations, would be materially affected, if we had vividly before us the relation of the progressive races to the totality of human life. It is indisputable that much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment when external completeness was first given to them by their embodiment in some permanent record. One set of usages has occa-

sionally been violently overthrown and superseded by another; here and there a primitive code, pretending to a supernatural origin, has been greatly extended, and distorted into the most surprising forms, by the perversity of sacerdotal commentators; but, except in a small section of the world, there has been nothing like the gradual amelioration of a legal system. There has been material civilisation, but, instead of the civilisation expanding the law, the law has limited the civilisation. The study of races in their primitive condition affords us some clue to the point at which the development of certain societies has stopped. We can see that Brahminical India has not passed beyond a stage which occurs in the history of all the families of mankind, the stage at which a rule of law is not yet discriminated from a rule of religion. The members of such a society consider that the transgression of a religious ordinance should be punished by civil penalties, and that the violation of a civil duty exposes the delinquent to divine correction. In China this point has been passed, but progress seems to have been there arrested, because the civil laws are coextensive with all the ideas of which the race is capable. The difference between the stationary and progressive societies is, however, one of the great secrets which inquiry has yet to penetrate. Among partial explanations of it I venture to place the considerations urged at the end of the last

chapter. It may further be remarked that no one is likely to succeed in the investigation who does not clearly realise that the stationary condition of the human race is the rule, the progressive the exception. And another indispensable condition of success is an accurate knowledge of Roman law in all its principal stages. The Roman jurisprudence has the longest known history of any set of human institutions. The character of all the changes which it underwent is tolerably well ascertained. From its commencement to its close, it was progressively modified for the better, or for what the authors of the modification conceived to be the better, and the course of improvement was continued through periods at which all the rest of human thought and action materially slackened its pace, and repeatedly threatened to settle down into stagnation.

I confine myself in what follows to the progressive societies. With respect to them it may be laid down that social necessities and social opinion are always more or less in advance of Law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.

A general proposition of some value may be ad-

vanced with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted. The early history of one of them, Equity, is universally obscure, and hence it may be thought by some that certain isolated statutes, reformatory of the civil law, are older than any equitable jurisdiction. My own belief is that remedial Equity is everywhere older than remedial Legislation; but, should this be not strictly true, it would only be necessary to limit the proposition respecting their order of sequence to the periods at which they exercise a sustained and substantial influence in transforming the original law.

I employ the word "fiction" in a sense considerably wider than that in which English lawyers are accustomed to use it, and with a meaning much more extensive than that which belonged to the Roman "fictiones." Fictio, in old Roman law, is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse; such, for example, as an aver-

ment that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of these "fictiones" was, of course, to give jurisdiction, and they therefore strongly resembled the allegations in the writs of the English Queen's Bench and Exchequer, by which those Courts contrived to usurp the jurisdiction of the Common Pleas:—the allegation that the defendant was in custody of the king's marshal or that the plaintiff was the king's debtor, and could not pay his debt by reason of the defendant's default. But I now employ the expression "Legal Fiction" to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law, but they embrace much more, for I should speak both of the English Case law and of the Roman Responsa Prudentum as resting on fictions. Both these examples will be examined presently. The *fact* is in both cases that the law has been wholly changed; the *fiction* is that it remains what it always was. It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting at the same time that they do not offend the superstitious disrelish for change which is always present

At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them, the Fiction of Adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling-clothes, and taken its first steps towards civilisation. We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law. But at the same time it would be equally foolish to agree with those theorists who, discerning that fictions have had their uses, argue that they ought to be stereotyped in our system. There are several Fictions still exercising powerful influence on English jurisprudence which could not be discarded without a severe shock to the ideas, and considerable change in the language, of English practitioners; but there can be no doubt of the general truth that it is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order. Now, among other disadvantages, legal fictions are the greatest of obstacles to symmetrical classification. The rule of

law remains sticking in the system, but it is a mere shell. It has been long ago undermined, and a new rule hides itself under its cover. Hence there is at once a difficulty in knowing whether the rule which is actually operative should be classed in its true or in its apparent place, and minds of different casts will differ as to the branch of the alternative which ought to be selected. If the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions which, in spite of some recent legislative improvements, are still abundant in it.

The next instrumentality by which the adaptation of law to social wants is carried on I call Equity, meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles. The Equity whether of the Roman Prætors or of the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from Legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception

f a set of principles, invested with a higher sacred-ess than those of the original law and demanding pplication independently of the consent of any ex-ernal body, belongs to a much more advanced stage f thought than that to which legal fictions originally uggested themselves.

Legislation, the enactments of a legislature which, vhether it take the form of an autocratic prince or f a parliamentary assembly, is the assumed organ of he entire society, is the last of the ameliorating in-trumentalities. It differs from Legal Fictions just s Equity differs from them, and it is also distinguished rom Equity, as deriving its authority from an external ody or person. Its obligatory force is independent f its principles. The legislature, whatever be the ctual restraints imposed on it by public opinion, is in theory empowered to impose what obligations it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice. Legislation may be dictated by equity, if that last word be used to indicate some standard of right and wrong to which its enactments happen to be adjusted; but then these enactments are indebted for their binding force to the authority of the legis-lature and not to that of the principles on which the legislature acted; and thus they differ from rules of Equity, in the technical sense of the word, which pretend to a paramount sacredness entitling them at

once to the recognition of the courts even withou the concurrence of prince or parliamentary assembly It is the more necessary to note these differences because a student of Bentham would be apt to con found Fictions, Equity, and Statute Law under th single head of Legislation. They all, he would say involve *law-making*; they differ only in respect c the machinery by which the new law is produced That is perfectly true, and we must never forget it but it furnishes no reason why we should depriv ourselves of so convenient a term as Legislation in th special sense. Legislation and Equity are disjoine in the popular mind and in the minds of most law yers; and it will never do to neglect the distinctio between them, however conventional, when importar practical consequences follow from it.

It would be easy to select from almost any regu larly developed body of rules examples of *legal fiction* which at once betray their true character to th modern observer. In the two instances which proceed to consider, the nature of the expedient en ployed is not so readily detected. The first autho of these fictions did not perhaps intend to innovat certainly did not wish to be suspected of innovatin There are, moreover, and always have been, perso who refuse to see any fiction in the process, a conventional language bears out their refusal. examples, therefore, can be better calculated to illu

trate the wide diffusion of legal fictions, and the efficiency with which they perform their twofold office of transforming a system of laws and of concealing the transformation.

We in England are well accustomed to the extension, modification, and improvement of law by a machinery which, in theory, is incapable of altering one jot or one line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts comes before an English Court for adjudication, the whole course of the discussion between the judge and the advocates assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly

into a new language and a new train of thought. We now admit that the new decision *has* modified the law. The rules applicable have, to use the very inaccurate expression sometimes employed, become more elastic. In fact they have been changed. A clear addition has been made to the precedents, and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example. The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which we derive from the precedents, so that a change in their tenor is not easily detected unless it is violent and glaring. I shall not now pause to consider at length the causes which have led English lawyers to acquiesce in these curious anomalies. Probably it will be found that originally it was the received doctrine that somewhere, *in nubibus* or *in gremio magistratuum*, there existed a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances. The theory was at first much more thoroughly believed in than it is now, and indeed it may have had a better foundation. The judges of the thirteenth century may have really had at their command a mine of law

unrevealed to the bar and to the lay-public, for there is some reason for suspecting that in secret they borrowed freely, though not always wisely, from current compendia of the Roman and Canon laws. But that storehouse was closed as soon as the points decided at Westminster Hall became numerous enough to supply a basis for a substantive system of jurisprudence; and now for centuries English practitioners have so expressed themselves as to convey the paradoxical proposition that, except by Equity and Statute law, nothing has been added to the basis since it was first constituted. We do not admit that our tribunals legislate; we imply that they have never legislated; and yet we maintain that the rules of the English common law, with some assistance from the Court of Chancery and from Parliament, are coextensive with the complicated interests of modern society.

A body of law bearing a very close and very instructive resemblance to our case-law in those particulars which I have noticed, was known to the Romans under the name of the Responsa Prudentum, the "answers of the learned in the law." The form of these Responses varied a good deal at different periods of the Roman jurisprudence, but throughout its whole course they consisted of explanatory glosses on authoritative written documents, and at first they were exclusively collections of opinions interpretative

of the Twelve Tables. As with us, all legal language adjusted itself to the assumption that the text of the old Code remained unchanged. There was the express rule. It overrode all glosses and comments, and no one openly admitted that any interpretation of it, however eminent the interpreter, was safe from revision on appeal to the venerable texts. Yet in point of fact, Books of Responses bearing the names of leading jurisconsults obtained an authority at least equal to that of our reported cases, and constantly modified, extended, limited, or practically overruled the provisions of the Decemviral law. The authors of the new jurisprudence during the whole progress of its formation professed the most sedulous respect for the letter of the Code. They were merely explaining it, deciphering it, bringing out its full meaning; but then, in the result, by piecing texts together, by adjusting the law to states of fact which actually presented themselves and by speculating on its possible application to others which might occur by introducing principles of interpretation derived from the exegesis of other written documents which fell under their observation, they educed a vast variety of canons which had never been dreamed of by the compilers of the Twelve Tables and which were in truth rarely or never to be found there. All these treatises of the jurisconsults claimed respect on the ground of their assumed conformity with the Code, but their comparative authority depended on

the reputation of the particular jurisconsults who gave them to the world. Any name of universally acknowledged greatness clothed a Book of Responses with a binding force hardly less than that which belonged to enactments of the legislature; and such a book in its turn constituted a new foundation on which a further body of jurisprudence might rest. The Responses of the early lawyers were not however published, in the modern sense, by their author. They were recorded and edited by his pupils, and were not therefore in all probability arranged according to any scheme of classification. The part of the students in these publications must be carefully noted, because the service they rendered to their teacher seems to have been generally repaid by his sedulous attention to the pupils' education. The educational treatises called Institutes or Commentaries, which are a later fruit of the duty then recognised, are among the most remarkable features of the Roman system. It was apparently in these Institutional works, and not in the books intended for trained lawyers, that the jurisconsults gave to the public their classifications and their proposals for modifying and improving the technical phraseology.

In comparing the Roman Responsa Prudentum with their nearest English counterpart, it must be carefully borne in mind that the authority by which this part of the Roman jurisprudence was expounded

We cannot doubt that the peculiarities which have been noted in the instrumentality by which the development of the Roman law was first effected, were the source of its characteristic excellence, its early wealth in principles. The growth and exuberance of principle was fostered, in part, by the competition among the expositors of the law, an influence wholly unknown where there exists a Bench, the depositaries intrusted by king or commonwealth with the prerogative of justice. But the chief agency, no doubt was the uncontrolled multiplication of cases for legal decision. The state of facts which caused genuine perplexity to a country client was not a whit more entitled to form the basis of the jurisconsult's Response, or legal decision, than a set of hypothetical circumstances propounded by an ingenious pupil. All combinations of fact were on precisely the same footing, whether they were real or imaginary. It was nothing to the jurisconsult that his opinion was overruled for the moment by the magistrate who adjudicated on his client's case, unless that magistrate happened to rank above him in legal knowledge or the esteem of his profession. I do not, indeed, mean it to be inferred that he would wholly omit to consider his client's advantage, for the client was in earlier times the great lawyer's constituent and at a later period his paymaster, but the main road to the rewards of ambition lay through the good opinion of

is order, and it is obvious that under such a system s I have been describing this was much more likely o be secured by viewing each case as an illustration f a great principle, or an exemplification of a broad ule, than by merely shaping it for an insulated orensic triumph. It is evident that powerful influence must have been exercised by the want of any distinct check on the suggestion or invention of possible questions. Where the data can be multiplied at pleasure, the facilities for evolving a general rule are immensely increased. As the law is administered among ourselves, the judge cannot travel out of the sets of facts exhibited before him or before his predecessors. Accordingly each group of circumstances which is adjudicated upon receives, to employ a Gallicism, a sort of consecration. It acquires certain qualities which distinguish it from every other case genuine or hypothetical. But at Rome, as I have attempted to explain, there was nothing resembling a Bench or Chamber of judges; and therefore no combination of facts possessed any particular value more than another. When a difficulty came for opinion before the jurisconsult, there was nothing to prevent a person endowed with a nice perception of analogy from at once proceeding to adduce and consider an entire class of supposed questions with which a particular feature connected it. Whatever were the practical advice given to the client, the

responsum treasured up in the note-books of listening pupils would doubtless contemplate the circumstances as governed by a great principle, or included in a sweeping rule. Nothing like this has ever been possible among ourselves, and it should be acknowledged that in many criticisms passed on the English law the manner in which it has been enunciated seems to have been lost sight of. The hesitation of our courts in declaring principles may be much more reasonably attributed to the comparative scantiness of our precedents, voluminous as they appear to him who is acquainted with no other system, than to the temper of our judges. It is true that in the wealth of legal principle we are considerably poorer than several modern European nations. But they, it must be remembered, took the Roman jurisprudence for the foundation of their civil institutions. They built the *débris* of the Roman law into their walls; but in the materials and workmanship of the residue there is not much which distinguishes it favourably from the structure erected by the English judicature.

The period of Roman freedom was the period during which the stamp of a distinctive character was impressed on the Roman jurisprudence; and through all the earlier part of it, it was by the Responses of the jurisconsults that the development of the law was mainly carried on. But as we approach the fall of the republic there are signs that the Responses are

assuming a form which must have been fatal to their farther expansion. They are becoming systematised and reduced into compendia. Q. Mucius Scævola, the Pontifex, is said to have published a manual of the entire Civil Law, and there are traces in the writings of Cicero of growing disrelish for the old methods, as compared with the more active instruments of legal innovation. Other agencies had in fact by this time been brought to bear on the law. The Edict, or annual proclamation of the Prætor, had risen into credit as the principal engine of law reform, and L. Cornelius Sylla, by causing to be enacted the great group of statutes called the *Leges Corneliæ*, had shown what rapid and speedy improvements can be effected by direct legislation. The final blow to the Responses was dealt by Augustus, who limited to a few leading jurisconsults the right of giving binding opinions on cases submitted to them, a change which, though it brings us nearer the ideas of the modern world, must obviously have altered fundamentally the characteristics of the legal profession and the nature of its influence on Roman law. At a later period another school of jurisconsults arose, the great lights of jurisprudence for all time. But Ulpian and Paulus, Gaius and Papinian, were not authors of Responses. Their works were regular treatises on particular departments of the law, more especially on the Prætor's Edict.

The *Equity* of the Romans and the Prætorian Edict by which it was worked into their system, will be considered in the next chapter. Of the Statute Law it is only necessary to say that it was scanty during the republic, but became very voluminous under the empire. In the youth and infancy of a nation it is a rare thing for the legislature to be called into action for the general reform of private law. The cry of the people is not for change in the laws, which are usually valued above their real worth, but solely for their pure, complete and easy administration; and recourse to the legislative body is generally directed to the removal of some great abuse, or the decision of some incurable quarrel between classes or dynasties. There seems in the minds of the Romans to have been some association between the enactment of a large body of statutes and the settlement of society after a great civil commotion. Sylla signalised his reconstitution of the republic by the Leges Corneliæ; Julius Cæsar contemplated vast additions to the Statute Law; Augustus caused to be passed the all-important group of Leges Juliæ; and among later emperors the most active promulgators of constitutions are princes who, like Constantine, have the concerns of the world to readjust. The true period of Roman Statute Law does not begin till the establishment of the empire. The enactments of the emperors, clothed at first in the pretence of popular

anction, but afterwards emanating undisguisedly rom the imperial prerogative, extend in increasing nassiveness from the consolidation of Augustus's ower to the publication of the Code of Justinian. t will be seen that even in the reign of the second mperor a considerable approximation is made to that ondition of the law and that mode of administering t with which we are all familiar. A statute law nd a limited board of expositors have arisen into eing; a permanent court of appeal and a collection f approved commentaries will very shortly be added; nd thus we are brought close on the ideas of our wn day.

CHAPTER III.

LAW OF NATURE AND EQUITY.

THE theory of a set of legal principles entitled their intrinsic superiority to supersede the older l very early obtained currency both in the Ron State and in England. Such a body of princip existing in any system, has in the foregoing chapt been denominated Equity, a term which, as will p sently be seen, was one (though only one) of designations by which this agent of legal change v known to the Roman jurisconsults. The jurisp dence of the Court of Chancery, which bears t name of Equity in England, could only be adequat discussed in a separate treatise. It is extreme complex in its texture, and derives its materials fr several heterogeneous sources. The early ecclesia tical chancellors contributed to it, from the Can Law, many of the principles which lie deepest in structure. The Roman law, more fertile than t Canon Law in rules applicable to secular dispute was not seldom resorted to by a later generation Chancery judges, amid whose recorded dicta v often find entire texts from the *Corpus Juris Civil*

imbedded, with their terms unaltered, though their origin is never acknowledged. Still more recently, and particularly at the middle and during the latter half of the eighteenth century, the mixed systems of jurisprudence and morals constructed by the publicists of the Low Countries appear to have been much studied by English lawyers, and from the chancellorship of Lord Talbot to the commencement of Lord Eldon's chancellorship these works had considerable effect on the rulings of the Court of Chancery. The system, which obtained its ingredients from these various quarters, was greatly controlled in its growth by the necessity imposed on it of conforming itself to the analogies of the common law, but it has always answered the description of a body of comparatively novel legal principles claiming to override the older jurisprudence of the country on the strength of an intrinsic ethical superiority.

The Equity of Rome was a much simpler structure, and its development from its first appearance can be much more easily traced. Both its character and its history deserve attentive examination. It is the root of several conceptions which have exercised profound influence on human thought, and through human thought have seriously affected the destinies of mankind.

The Romans described their legal system as consisting of two ingredients. "All nations," says the

Institutional Treatise published under the auth
the Emperor Justinian, "who are ruled by la
customs, are governed partly by their own pa
laws, and partly by those laws which are com
all mankind. The law which a people enacts is
the Civil Law of that people, but that which
reason appoints for all mankind is called the
Nations, because all nations use it." The part
law "which natural reason appoints for all mar
was the element which the Edict of the Prætor
supposed to have worked into Roman jurispru
Elsewhere it is styled more simply Jus Natur
the Law of Nature; and its ordinances are s
be dictated by Natural Equity (*naturalis æq*
as well as by natural reason. I shall atten
discover the origin of these famous phrases, I
Nations, Law of Nature, Equity, and to dete
how the conceptions which they indicate are r
to one another.

The most superficial student of Roman hi
must be struck by the extraordinary degree in
the fortunes of the republic were affected b
presence of foreigners, under different names, o
soil. The causes of this immigration are discer
enough at a later period, for we can readily u
stand why men of all races should flock to the mis
of the world; but the same phenomenon of a
population of foreigners and denizens meets u

the very earliest records of the Roman State. No doubt, the instability of society in ancient Italy, composed as it was in great measure of robber tribes, gave men considerable inducement to locate themselves in the territory of any community strong enough to protect itself and them from external attack, even though protection should be purchased at the cost of heavy taxation, political disfranchisement, and much social humiliation. It is probable, however, that this explanation is imperfect, and that it could only be completed by taking into account those active commercial relations which, though they are little reflected in the military traditions of the republic, Rome appears certainly to have had with Carthage and with the interior of Italy in pre-historic times. Whatever were the circumstances to which it was attributable, the foreign element in the commonwealth determined the whole course of its history, which, at all its stages, is little more than a narrative of conflicts between a stubborn nationality and an alien population. Nothing like this has been seen in modern times; on the one hand, because modern European communities have seldom or never received any accession of foreign immigrants which was large enough to make itself felt by the bulk of the native citizens, and on the other, because modern states, being held together by allegiance to a king or political superior, absorb considerable bodies of immigrant

settlers with a quickness unknown to the ancient world, where the original citizens of a commonwealth always believed themselves to be united by kinship in blood, and resented a claim to equality of privilege as a usurpation of their birthright. In the early Roman republic the principle of the absolute exclusion of foreigners pervaded the Civil Law no less than the constitution. The alien or denizen could have no share in any institution supposed to be coeval with the State. He could not have the benefit of Quiritarian law. He could not be a party to the *nexum* which was at once the conveyance and the contract of the primitive Romans. He could not sue by the Sacramental Action, a mode of litigation of which the origin mounts up to the very infancy of civilisation. Still, neither the interest nor the security of Rome permitted him to be quite outlawed. All ancient communities ran the risk of being overthrown by a very slight disturbance of equilibrium, and the mere instinct of self-preservation would force the Romans to devise some method of adjusting the rights and duties of foreigners, who might otherwise—and this was a danger of real importance in the ancient world—have decided their controversies by armed strife. Moreover, at no period of Roman history was foreign trade entirely neglected. It was therefore probably half as a measure of police and half in furtherance of commerce that jurisdiction was first

assumed in disputes to which the parties were either foreigners or a native and a foreigner. The assumption of such a jurisdiction brought with it the immediate necessity of discovering some principles on which the questions to be adjudicated upon could be settled, and the principles applied to this object by the Roman lawyers were eminently characteristic of the time. They refused, as I have said before, to decide the new cases by pure Roman Civil Law. They refused, no doubt because it seemed to involve some kind of degradation, to apply the law of the particular State from which the foreign litigant came. The expedient to which they resorted was that of selecting the rules of law common to Rome and to the different Italian communities in which the immigrants were born. In other words, they set themselves to form a system answering to the primitive and literal meaning of Jus Gentium, that is, Law common to all Nations. Jus Gentium was, in fact, the sum of the common ingredients in the customs of the old Italian tribes, for they were *all the nations* whom the Romans had the means of observing, and who sent successive swarms of immigrants to Roman soil. Whenever a particular usage was seen to be practised by a large number of separate races in common, it was set down as part of the Law common to all Nations, or Jus Gentium. Thus, although the conveyance of property was certainly accompanied by very different forms in

the different commonwealths surrounding Rome, t actual transfer, tradition, or delivery of the artic intended to be conveyed was a part of the ceremoni in all of them. It was, for instance, a part, thoug a subordinate part, in the Mancipation or conveyanc peculiar to Rome. Tradition, therefore, being in a probability the only common ingredient in the mode of conveyance which the jurisconsults had the mean of observing, was set down as an institution Juri Gentium, or rule of the Law common to all Nations A vast number of other observances were scrutinised with the same result. Some common characteristic was discovered in all of them, which had a common object, and this characteristic was classed in the Jus Gentium. The Jus Gentium was accordingly a collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes.

The circumstances of the origin of the Jus Gentium are probably a sufficient safeguard against the mistake of supposing that the Roman lawyers had any special respect for it. It was the fruit in part of their disdain for all foreign law, and in part of their disinclination to give the foreigner the advantage of their own indigenous Jus Civile. It is true that we, at the present day, should probably take a very different view of the Jus Gentium, if we were performing the operation which was effected by the

Roman jurisconsults. We should attach some vague superiority or precedence to the element which we had thus discerned underlying and pervading so great a variety of usage. We should have a sort of respect for rules and principles so universal. Perhaps we should speak of the common ingredient as being of the essence of the transaction into which it entered, and should stigmatise the remaining apparatus of ceremony, which varied in different communities, as adventitious and accidental. Or it may be, we should infer that the races which we were comparing once obeyed a great system of common institutions of which the Jus Gentium was the reproduction, and that the complicated usages of separate commonwealths were only corruptions and depravations of the simpler ordinances which had once regulated their primitive state. But the results to which modern ideas conduct the observer are, as nearly as possible, the reverse of those which were instinctively brought home to the primitive Roman. What we respect or admire, he disliked or regarded with jealous dread. The parts of jurisprudence which he looked upon with affection were exactly those which a modern theorist leaves out of consideration as accidental and transitory; the solemn gestures of the mancipation; the nicely adjusted questions and answers of the verbal contract; the endless formalities of pleading and

procedure. The Jus Gentium was merely a system forced on his attention by a political necessity. He loved it as little as he loved the foreigners from whose institutions it was derived and for whose benefit it was intended. A complete revolution in his ideas was required before it could challenge his respect, but so complete was it when it did occur that the true reason why our modern estimate of the Jus Gentium differs from that which has just been described, is that both modern jurisprudence and modern philosophy have inherited the matured views of the later jurisconsults on this subject. There did come a time when, from an ignoble appendage of the Jus Civile, the Jus Gentium came to be considered a great though as yet imperfectly developed model to which all law ought as far as possible to conform. This crisis arrived when the Greek theory of a Law of Nature was applied to the practical Roman administration of the Law common to all Nations.

The Jus Naturale, or Law of Nature, is simply the Jus Gentium or Law of Nations seen in the light of a peculiar theory. An unfortunate attempt to discriminate them was made by the jurisconsult Ulpian, with the propensity to distinguish characteristic of a lawyer, but the language of Gaius, a much higher authority, and the passage quoted before from the Institutes, leave no room for doubt, that the expressions were practically convertible. The difference be-

ween them was entirely historical, and no distinction n essence could ever be established between them. t is almost unnecessary to add that the confusion etween Jus Gentium, or Law common to all Nations, nd *international law* is entirely modern. The classical expression for international law is Jus Feciale, or the law of negotiation and diplomacy. It is, however, unquestionable that indistinct impressions as to the meaning of Jus Gentium had considerable share in producing the modern theory that the relations of independent states are governed by the Law of Nature.

It becomes necessary to investigate the Greek conceptions of Nature and her law. The word φύσις which was rendered in the Latin *natura* and our *nature*, denoted beyond all doubt originally the material universe, but it was the material universe contemplated under an aspect which—such is our intellectual distance from those times—it is not very easy to delineate in modern language. Nature signified the physical world regarded as the result of some primordial element or law. The oldest Greek philosophers had been accustomed to explain the fabric of creation as the manifestation of some single principle which they variously asserted to be movement, fire, moisture, or generation. In its simplest and most ancient sense, Nature is precisely the physical universe looked upon in this way as the

manifestation of a principle. Afterwards, the late Greek sects, returning to a path from which th greatest intellects of Greece had meanwhile strayed added the *moral* to the *physical* world in the con ception of Nature. They extended the term till i embraced not merely the visible creation, but th thoughts, observances, and aspirations of mankind. Still, as before, it was not solely the moral phenomena of human society which they understood by *Nature*, but these phenomena considered as resolvable into some general and simple laws.

Now, just as the oldest Greek theorists supposed that the sports of chance had changed the material universe from its simple primitive form into its present heterogeneous condition, so their intellectual descendants imagined that but for untoward accident the human race would have conformed itself to simpler rules of conduct and a less tempestuous life. To live according to *nature* came to be considered as the end for which man was created, and which the best men were bound to compass. To live according to *nature* was to rise above the disorderly habits and gross indulgences of the vulgar to higher laws of action which nothing but self-denial and self-command would enable the aspirant to observe. It is notorious that this proposition—live according to nature—was the sum of the tenets of the famous Stoic philosophy. Now on the subju-

ation of Greece that philosophy made instantaneous rogress in Roman society. It possessed natural ascinations for the powerful class who, in theory at east, adhered to the simple habits of the ancient talian race, and disdained to surrender themselves o the innovations of foreign fashion. Such persons egan immediately to affect the Stoic precepts of ife according to nature—an affectation all the more rateful, and, I may add, all the more noble, from its ontrast with the unbounded profligacy which was eing diffused through the imperial city by the illage of the world and by the example of its most uxurious races. In the front of the disciples of the ew Greek school, we might be sure, even if we did ot know it historically, that the Roman lawyers igured. We have abundant proof that, there being ubstantially but two professions in the Roman republic, the military men were generally identified with the party of movement, but the lawyers were universally at the head of the party of resistance.

The alliance of the lawyers with the Stoic philosophers lasted through many centuries. Some of the earliest names in the series of renowned jurisconsults are associated with Stoicism, and ultimately we have the golden age of Roman jurisprudence fixed by general consent at the era of the Antonine Cæsars, the most famous disciples to whom that philosophy has given a rule of life. The long

diffusion of these doctrines among the members of particular profession was sure to affect the art wh they practised and influenced. Several positic which we find in the remains of the Roman ju consults are scarcely intelligible, unless we use Stoic tenets as our key; but at the same time i a serious, though a very common, error to meas the influence of Stoicism on Roman law by count up the number of legal rules which can be c fidently affiliated on Stoical dogmas. It has o been observed that the strength of Stoicism res not in its canons of conduct, which were often pulsive or ridiculous, but in the great though va principle which it inculcated of resistance to pas Just in the same way the influence on jurisprud of the Greek theories, which had their most dis expression in Stoicism, consisted not in the n ber of specific positions which they contribute Roman law, but in the single fundamental ass tion which they lent to it. After Nature become a household word in the mouths o Romans. the belief gradually prevailed amon Roman lawyers that the old Jus Gentium w fact the lost code of Nature, and that the P in framing an Edictal jurisprudence on the ciples of the Jus Gentium was gradually resto type from which law had only departed to deter The inference from this belief was immediate

was the Prætor's duty to supersede the Civil Law as much as possible by the Edict, to revive as far as might be the institutions by which Nature had governed man in the primitive state. Of course there were many impediments to the amelioration of law by this agency. There may have been prejudices to overcome even in the legal profession itself, and Roman habits were far too tenacious to give way at once to mere philosophical theory. The indirect methods by which the Edict combated certain technical anomalies, show the caution which its authors were compelled to observe, and down to the very days of Justinian there was some part of the old law which had obstinately resisted its influence. But on the whole, the progress of the Romans in legal improvement was astonishingly rapid as soon as stimulus was applied to it by the theory of Natural Law. The ideas of simplification and generalisation had always been associated with the conception of Nature; simplicity, symmetry, and intelligibility came therefore to be regarded as the characteristics of a good legal system, and the taste for involved language, multiplied ceremonials, and useless difficulties disappeared altogether. The strong will and unusual opportunities of Justinian were needed to bring the Roman law to its existing shape, but the ground-plan of the system had been sketched long before the imperial reforms were effected.

What was the exact point of contact between old Jus Gentium and the Law of Nature? I th that they touch and blend through Æquitas Equity in its original sense; and here we seen come to the first appearance in jurisprudence of famous term Equity. In examining an expre which has so remote an origin and so long a his as this, it is always safest to penetrate, if pos to the simple metaphor or figure which at shadowed forth the conception. It has gene been supposed that Æquitas is the equivalent c Greek ἰσότης, *i. e.* the principle of equal or pr tionate distribution. The equal division of nu or physical magnitudes is doubtless closely ent with our perceptions of justice; there are few ciations which keep their ground in the mi stubbornly or are dismissed from it with suc culty by the deepest thinkers. Yet in tracir history of this association, it certainly does no to have suggested itself to very early th but is rather the offspring of a comparative philosophy. It is remarkable too that the "equ of laws on which the Greek democracies themselves—that equality which, in the b drinking song of Callistratus, Harmodius ar stogiton are said to have given to Athen little in common with the "equity" of the F The first was an equal administration of ci

among the citizens, however limited the class of citizens might be; the last implied the applicability of a law, which was not civil law, to a class which did not necessarily consist of citizens. The first excluded a despot; the last included foreigners, and for some purposes slaves. On the whole, I should be disposed to look in another direction for the germ of the Roman "Equity." The Latin word "æquus" carries with it more distinctly than the Greek "ἴσος" the sense of *levelling*. Now its levelling tendency was exactly the characteristic of the Jus Gentium, which would be most striking to a primitive Roman. The pure Quiritarian law recognised a multitude of arbitrary distinctions between classes of men and kinds of property; the Jus Gentium, generalised from a comparison of various customs, neglected the Quiritarian divisions. The old Roman law established, for example, a fundamental difference between "Agnatic" and "Cognatic" relationship, that is, between the Family considered as based upon common subjection to patriarchal authority and the Family considered (in conformity with modern ideas) as united through the mere fact of a common descent. This distinction disappears in the "law common to all nations," as also does the difference between the archaic forms of property, Things "Mancipi" and Things "nec Mancipi." The neglect of demarcations and boundaries seems to

me, therefore, the feature of the Jus Gentium
was depicted in Æquitas. I imagine that the
was at first a mere description of that cor
levelling or removal of irregularities which we
wherever the prætorian system was applied
cases of foreign litigants. Probably no colc
ethical meaning belonged at first to the expre
nor is there any reason to believe that the p
which it indicated was otherwise than extı
distasteful to the primitive Roman mind.

On the other hand, the feature of the Jus Ge
which was presented to the apprehension of a
by the word Equity, was exactly the first an
vividly realised characteristic of the hypot
state of nature. Nature implied symmetrical
first in the physical world, and next in the
and the earliest notion of order doubtless ir
straight lines, even surfaces, and measured di
The same sort of picture or figure would be
sciously before the mind's eye, whether it st
form the outlines of the supposed natural s
whether it took in at a glance the actual adm
tion of the "law common to all nations;" anc
know of primitive thought would lead us to c
that this ideal similarity would do much to en
the belief in an identity of the two conceptior
then, while the Jus Gentium had little or no an
credit at Rome, the theory of a Law of Natu

in surrounded with all the prestige of philosophical authority, and invested with the charms of association with an elder and more blissful condition of the race. It is easy to understand how the difference in the point of view would affect the dignity of the term which at once described the operation of the old principles and the results of the new theory. Even to modern ears it is not at all the same thing to describe a process as one of "levelling" and to call it the "correction of anomalies," though the metaphor is precisely the same. Nor do I doubt that, when once Æquitas was understood to convey an allusion to the Greek theory, associations which grew out of the Greek notion of ἰσότης began to cluster round it. The language of Cicero renders it more than likely that this was so, and it was the first stage of a transmutation of the conception of Equity, which almost every ethical system which has appeared since those days has more or less helped to carry on.

Something must be said of the formal instrumentality by which the principles and distinctions associated, first with the Law common to all Nations, and afterwards with the Law of Nature, were gradually incorporated with the Roman law. At the crisis of primitive Roman history which is marked by the expulsion of the Tarquins, a change occurred which has its parallel in the early annals of many ancient

states, but which had little in common with
passages of political affairs which we now term
lutions. It may best be described by saying
the monarchy was put into commission. The p
heretofore accumulated in the hands of a singl
son were parcelled out among a number of el
functionaries, the very name of the kingly
being retained and imposed on a personage l
subsequently as the Rex Sacrorum or Rex S
culus. As part of the change, the settled du
the supreme judicial office devolved on the P
at the time the first functionary in the commonv
and together with these duties was transferr
undefined supremacy over law and legislation
always attached to ancient sovereigns, and w
not obscurely related to the patriarchal and
authority they had once enjoyed. The circum
of Rome gave great importance to the more inc
portion of the functions thus transferred, as w
establishment of the republic began that se
recurrent trials which overtook the state, in th
culty of dealing with a multitude of person
not coming within the technical description of
nous Romans, were nevertheless permanently
within Roman jurisdiction. Controversies b
such persons, or between such persons and nati
citizens, would have remained without the pal
remedies provided by Roman law, if the Præ

not undertaken to decide them, and he must soon have addressed himself to the more critical disputes which in the extension of commerce arose between Roman subjects and avowed foreigners. The great increase of such cases in the Roman Courts about the period of the first Punic War is marked by the appointment of a special Prætor, known subsequently as the Prætor Peregrinus, who gave them his undivided attention. Meantime, one precaution of the Roman people against the revival of oppression, had consisted in obliging every magistrate whose duties had any tendency to expand their sphere, to publish, on commencing his year of office, an Edict or proclamation in which he declared the manner in which he intended to administer his department. The Prætor fell under the rule with other magistrates; but as it was necessarily impossible to construct each year a separate system of principles, he seems to have regularly republished his predecessor's Edict with such additions and changes as the exigency of the moment or his own views of the law compelled him to introduce. The Prætor's proclamation, thus lengthened by a new portion every year, obtained the name of the Edictum Perpetuum, that is, the *continuous* or *unbroken* edict. The immense length to which it extended, together perhaps with some distaste for its necessarily disorderly texture, caused the practice of increasing it to be stopped in

the year of Salvius Julianus, who occupied the magistracy in the reign of the Emperor Hadrian. The edict of that Prætor embraced therefore the whole body of equity jurisprudence, which it probably disposed in new and symmetrical order, and the perpetual edict is therefore often cited in Roman law merely as the Edict of Julianus.

Perhaps the first inquiry which occurs to an Englishman who considers the peculiar mechanism of the Edict is, what were the limitations by which these extensive powers of the Prætor were restrained? How was authority so little definite to be reconciled with a settled condition of society and of law? The answer can only be supplied by careful observation of the conditions under which our own English law is administered. The Prætor, it should be recollected, was a jurisconsult himself, or a person entirely in the hands of advisers who were jurisconsults, and it is probable that every Roman lawyer waited impatiently for the time when he should fill or control the great judicial magistracy. In the interval, his tastes, feelings, prejudices, and degree of enlightenment were inevitably those of his own order, and the qualifications which he ultimately brought to office were those which he had acquired in the practice and study of his profession. An English Chancellor goes through precisely the same training, and carries to the woolsack the same qualifications. It is certain when

assumes office that he will have, to some extent, modified the law before he leaves it; but until he has quitted his seat, and the series of his decisions in the Law Reports has been completed, we cannot discover how far he has elucidated or added to the principles which his predecessors bequeathed to him. The influence of the Prætor on Roman jurisprudence differed only in respect of the period at which its amount was ascertained. As was before stated, he was in office but for a year, and his decisions rendered during his year, though of course irreversible as regarded the litigants, were of no ulterior value. The most natural moment for declaring the changes he proposed to effect, occurred therefore at his entrance on the prætorship; and hence, when commencing his duties, he did openly and avowedly that which in the end his English representative does insensibly and sometimes unconsciously. The checks on his apparent liberty are precisely those imposed on an English judge. Theoretically there seems to be hardly any limit to the powers of either of them, but practically the Roman Prætor, no less than the English Chancellor, was kept within the narrowest bounds by the prepossessions imbibed from early training, and by the strong restraints of professional opinion, restraints of which the stringency can only be appreciated by those who have personally experienced them. It may be added that the lines within which movement is

permitted, and beyond which there is to be no travelling, were chalked with as much distinctness in the one case as in the other. In England the judge follows the analogies of reported decisions on insulated groups of facts. At Rome, as the intervention of the Prætor was at first dictated by simple concern for the safety of the state, it is likely that in the earliest times it was proportioned to the difficulty which it attempted to get rid of. Afterwards, when the taste for principle had been diffused by the Responses, he no doubt used the Edict as the means of giving a wider application to those fundamental principles which he and the other practising jurisconsults, his contemporaries, believed themselves to have detected underlying the law. Latterly he acted wholly under the influence of Greek philosophical theories, which at once tempted him to advance and confined him to a particular course of progress.

The nature of the measures attributed to Salvius Julianus has been much disputed. Whatever they were, their effects on the Edict are sufficiently plain. It ceased to be extended by annual additions, and henceforward the equity jurisprudence of Rome was developed by the labours of a succession of great jurisconsults who fill with their writings the interval between the reign of Hadrian and the reign of Alexander Severus. A fragment of the wonderful system which they built up survives in the

Pandects of Justinian, and supplies evidence that their works took the form of treatises on all parts of Roman law, but chiefly that of commentaries on the Edict. Indeed, whatever be the immediate subject of a jurisconsult of this epoch, he may always be called an expositor of Equity. The principles of the Edict had, before the epoch of its cessation, made their way into every part of Roman jurisprudence. The Equity of Rome, it should be understood, even when most distinct from the Civil Law, was always administered by the same tribunals. The Prætor was the chief equity judge as well as the great common law magistrate, and as soon as the Edict had evolved an equitable rule the Prætor's court began to apply it in place of or by the side of the old rule of the Civil Law, which was thus directly or indirectly repealed without any express enactment of the legislature. The result, of course, fell considerably short of a complete fusion of law and equity, which was not carried out till the reforms of Justinian. The technical severance of the two elements of jurisprudence entailed some confusion and some inconvenience, and there were certain of the stubborner doctrines of the Civil Law with which neither the authors nor the expositors of the Edict had ventured to interfere. But at the same time there was no corner of the field of jurisprudence which was not more or less swept over by the influence of Equity. It sup-

plied the jurist with all his materials for generalisation, with all his methods of interpretation, with his elucidations of first principles, and with that great mass of limiting rules which are rarely interfered with by the legislator, but which seriously control the application of every legislative act.

The period of jurists ends with Alexander Severus. From Hadrian to that emperor the improvement of law was carried on, as it is at the present moment in most continental countries, partly by approved commentaries and partly by direct legislation. But in the reign of Alexander Severus the power of growth in Roman Equity seems to be exhausted, and the succession of jurisconsults comes to a close. The remaining history of the Roman law is the history of the imperial constitutions, and, at the last, of attempts to codify what had now become the unwieldy body of Roman jurisprudence. We have the latest and most celebrated experiment of this kind in the *Corpus Juris* of Justinian.

It would be wearisome to enter on a detailed comparison or contrast of English and Roman Equity, but it may be worth while to mention two features which they have in common. The first may be stated as follows. Each of them tended, and all such systems tend, to exactly the same state in which the old common law was when Equity first interfered with it. A time always comes at which

the moral principles originally adopted have been carried out to all their legitimate consequences, and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal. Such an epoch was reached at Rome in the reign of Alexander Severus; after which, though the whole Roman world was undergoing a moral revolution, the Equity of Rome ceased to expand. The same point of legal history was attained in England under the chancellorship of Lord Eldon, the first of our equity judges who, instead of enlarging the jurisprudence of his court by indirect legislation, devoted himself through life to explaining and harmonising it. If the philosophy of legal history were better understood in England, Lord Eldon's services would be less exaggerated on the one hand and better appreciated on the other than they appear to be among contemporary lawyers. Other misapprehensions too, which bear some practical fruit, would perhaps be avoided. It is easily seen by English lawyers that English Equity is a system founded on moral rules; but it is forgotten that these rules are the morality of past centuries—not of the present—that they have received nearly as much application as they are capable of, and that, though of course they do not differ largely from the ethical creed of our own day, they are not necessarily

on a level with it. The imperfect theories of the subject which are commonly adopted have generated errors of opposite sorts. Many writers of treatises on Equity, struck with the completeness of the system in its present state, commit themselves expressly or implicitly to the paradoxical assertion that the founders of the chancery jurisprudence contemplated its present fixity of form when they were settling its first bases. Others, again, complain—and this is a grievance frequently observed upon in forensic arguments—that the moral rules enforced by the Court of Chancery fall short of the ethical standard of the present day. They would have each Lord Chancellor perform precisely the same office for the jurisprudence which he finds ready to his hand, which was performed for the old common law by the fathers of English equity. But this is to invert the order of the agencies by which the improvement of the law is carried on. Equity has its place and its time; but I have pointed out that another instrumentality is ready to succeed it when its energies are spent.

Another remarkable characteristic of both English and Roman Equity is the falsehood of the assumptions upon which the claim of the equitable to superiority over the legal rule is originally defended. Nothing is more distasteful to men, either as individuals or as masses, than the admission of their

moral progress as a substantive reality. This unwillingness shows itself, as regards individuals, in the exaggerated respect which is ordinarily paid to the doubtful virtue of consistency. The movement of the collective opinion of a whole society is too palpable to be ignored, and is generally too visibly for the better to be decried; but there is the greatest disinclination to accept it as a primary phenomenon, and it is commonly explained as the recovery of a lost perfection—the gradual return to a state from which the race has lapsed. This tendency to look backward instead of forward for the goal of moral progress produced anciently, as we have seen, on Roman jurisprudence effects the most serious and permanent. The Roman jurisconsults, in order to account for the improvement of their jurisprudence by the Prætor, borrowed from Greece the doctrine of a Natural state of man—a Natural society—anterior to the organisation of commonwealths governed by positive laws. In England, on the other hand, a range of ideas especially congenial to Englishmen of that day, explained the claim of Equity to override the common law by supposing a general right to superintend the administration of justice which was assumed to be vested in the king as a natural result of his paternal authority. The same view appears in a different and a quainter form in the old doctrine that Equity flowed from the king's conscience—the

improvement which had in fact taken place in the moral standard of the community being thus referred to an inherent elevation in the moral sense of the sovereign. The growth of the English constitution rendered such a theory unpalatable after a time; but as the jurisdiction of the Chancery was then firmly established, it was not worth while to devise any formal substitute for it. The theories found in modern manuals of Equity are very various, but all are alike in their untenability. Most of them are modifications of the Roman doctrine of a natural law, which is indeed adopted in terms by those writers who begin a discussion of the jurisdiction of the Court of Chancery by laying down a distinction between natural justice and civil.

CHAPTER IV.

THE MODERN HISTORY OF THE LAW OF NATURE.

It will be inferred from what has been said that the theory which transformed the Roman jurisprudence had no claim to philosophical precision. It involved, in fact, one of those "mixed modes of thought" which are now acknowledged to have characterised all but the highest minds during the infancy of speculation, and which are far from undiscoverable even in the mental efforts of our own day. The Law of Nature confused the Past and the Present. Logically, it implied a state of Nature which had once been regulated by natural law; yet the jurisconsults do not speak clearly or confidently of the existence of such a state, which indeed is little noticed by the ancients except where it finds a poetical expression in the fancy of a golden age. Natural law, for all practical purposes, was something belonging to the present, something entwined with existing institutions, something which could be distinguished from them by a competent observer. The test which separated the ordinances of Nature

from the gross ingredients with which they were mingled was a sense of simplicity and harmony; yet it was not on account of their simplicity and harmony that these finer elements were primarily respected, but on the score of their descent from the aboriginal reign of Nature. This confusion has not been successfully explained away by the modern disciples of the jurisconsults, and in truth modern speculations on the Law of Nature betray much more indistinctness of perception and are vitiated by much more hopeless ambiguity of language than the Roman lawyers can be justly charged with. There are some writers on the subject who attempt to evade the fundamental difficulty by contending that the code of Nature exists in the future and is the goal to which all civil laws are moving, but this is to reverse the assumptions on which the old theory rested, or rather perhaps to mix together two inconsistent theories. The tendency to look not to the past but to the future for types of perfection was brought into the world by Christianity. Ancient literature gives few or no hints of a belief that the progress of society is necessarily from worse to better.

But the importance of this theory to mankind has been very much greater than its philosophical deficiencies would lead us to expect. Indeed, it is not easy to say what turn the history of thought, and therefore of the human race, would have taken, if the

belief in a law natural had not become universal in the ancient world.

There are two special dangers to which law, and society which is held together by law, appear to be liable in their infancy. One of them is that law may be too rapidly developed. This occurred with the codes of the more progressive Greek communities, which disembarrassed themselves with astonishing facility from cumbrous forms of procedure and needless terms of art, and soon ceased to attach any superstitious value to rigid rules and prescriptions. It was not for the ultimate advantage of mankind that they did so, though the immediate benefit conferred on their citizens may have been considerable. One of the rarest qualities of national character is the capacity for applying and working out the law, as such, at the cost of constant miscarriages of abstract justice, without at the same time losing the hope or the wish that law may be conformed to a higher ideal. The Greek intellect, with all its mobility and elasticity, was quite unable to confine itself within the strait waistcoat of a legal formula; and, if we may judge them by the popular courts of Athens, of whose working we possess accurate knowledge, the Greek tribunals exhibited the strongest tendency to confound law and fact. The remains of the Orators and the forensic commonplaces preserved by Aristotle in his Treatise on Rhetoric, show

that questions of pure law were constantly argued on every consideration which could possibly influence the mind of the judges. No durable system of jurisprudence could be produced in this way. A community which never hesitated to relax rules of written law whenever they stood in the way of an ideally perfect decision on the facts of particular cases, would only, if it bequeathed any body of judicial principles to posterity, bequeath one consisting of the ideas of right and wrong which happened to be prevalent at the time. Such a jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted. It would amount at best to a philosophy marked with the imperfections of the civilisation under which it grew up.

Few national societies have had their jurisprudence menaced by this peculiar danger of precocious maturity and untimely disintegration. It is certainly doubtful whether the Romans were ever seriously threatened by it, but at any rate they had adequate protection in their theory of Natural Law. For the Natural Law of the jurisconsults was distinctly conceived by them as a system which ought gradually to absorb civil laws, without superseding them so long as they remained unrepealed. There was no such impression of its sanctity abroad, that an appeal to it would be likely to overpower

mind of a judge who was charged with the superintendence of a particular litigation. The value and serviceableness of the conception arose from its keeping before the mental vision a type of perfect law, and from its inspiring the hope of an indefinite approximation to it, at the same time that it never tempted the practitioner or the citizen to deny the obligation of existing laws which had not yet been adjusted to the theory. It is important too to observe that this model system, unlike many of those which have mocked men's hopes in later days, was not entirely the product of imagination. It was never thought of as founded on quite untested principles. The notion was that it underlay existing law and must be looked for through it. Its functions were in short remedial, not revolutionary or anarchical. And this, unfortunately, is the exact point at which the modern view of a Law of Nature has often ceased to resemble the ancient.

The other liability to which the infancy of society is exposed has prevented or arrested the progress of far the greater part of mankind. The rigidity of primitive law, arising chiefly from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form. There were one or two races

exempted by a marvellous fate from this calamity and grafts from these stocks have fertilised a few modern societies; but it is still true that, over the larger part of the world, the perfection of law has always been considered as consisting in adherence to the groundplan supposed to have been marked out by the original legislator. If intellect has in such cases been exercised on jurisprudence, it has uniformly prided itself on the subtle perversity of the conclusions it could build on ancient texts, without discoverable departure from their literal tenour. I know no reason why the law of the Romans should be superior to the laws of the Hindoos, unless the theory of Natural Law had given it a type of excellence different from the usual one. In this one exceptional instance, simplicity and symmetry were kept before the eyes of a society whose influence on mankind was destined to be prodigious from other causes, as the characteristics of an ideal and absolutely perfect law. It is impossible to overrate the importance to a nation or profession of having a distinct object to aim at in the pursuit of improvement. The secret of Bentham's immense influence in England during the past thirty years is his success in placing such an object before the country. He gave us a clear idea of reform. English lawyers of the last century were probably too acute to be blinded by the paradox and commonplace that English law was the perfection

human reason, but they acted as if they believed it for want of any other principle to proceed upon. Bentham made the good of the community take precedence of every other object, and thus gave escape to a current which had long been trying to find its way outwards.

It is not an altogether fanciful comparison if we call the assumptions we have been describing the ancient counterpart of Benthamism. The Roman theory guided men's efforts in the same direction as the theory put into shape by the Englishman; its practical results were not widely different from those which would have been attained by a sect of law-reformers who maintained a steady pursuit of the general good of the community. It would be a mistake, however, to suppose it a conscious anticipation of Bentham's principles. The happiness of mankind is, no doubt, sometimes assigned, both in the popular and in the legal literature of the Romans, as the proper object of remedial legislation, but it is very remarkable how few and faint are the testimonies to this principle compared with the tributes which are constantly offered to the overshadowing claims of the Law of Nature. It was not to anything resembling philanthropy but to their sense of simplicity and harmony—of what they significantly termed "elegance"—that the Roman jurisconsults freely surrendered themselves. The coincidence of their labours

with those which a more precise philosophy would have counselled has been part of the good fortune of mankind.

Turning to the modern history of the law of nature, we find it easier to convince ourselves of the vastness of its influence than to pronounce confidently whether that influence has been exerted for good or for evil. The doctrines and institutions which may be attributed to it are the material of some of the most violent controversies debated in our time, as will be seen when it is stated that the theory of Natural Law is the source of almost all the specific ideas as to law, politics, and society which France during the last hundred years has been the instrument of diffusing over the western world. The part played by jurists in French history, and the sphere of jural conceptions in French thought, have always been remarkably large. It was not indeed in France but in Italy, that the juridical science of modern Europe took its rise, but of the schools founded by emissaries of the Italian universities in all parts of the continent, and attempted (though vainly) to set up in our island, that established in France produced the greatest effect on the fortunes of the country. The lawyers of France immediately formed a strict alliance with the kings of the houses of Capet and Valois, and it was as much through their assertion of royal prerogative, and through their interpretation of the rules of feudal succession, as by the power of

sword, that the French monarchy at last grew together out of the agglomeration of provinces and dependencies. The enormous advantage which their understanding with the lawyers conferred on the French kings in the prosecution of their struggle with the great feudatories, the aristocracy, and the church, can only be appreciated if we take into account the ideas which prevailed in Europe far down into the middle ages. There was, in the first place, a great enthusiasm for generalisation and a curious admiration for all general propositions, and consequently, in the field of law, an involuntary reverence for every general formula which seemed to embrace and sum up a number of the insulated rules which were practised as usages in various localities. Such general formulas it was, of course, not difficult for practitioners familiar with the Corpus Juris or the Glosses to supply in almost any quantity. There was, however, another cause which added yet more considerably to the lawyers' power. At the period of which we are speaking, there was universal vagueness of ideas as to the degree and nature of the authority residing in written texts of law. For the most part, the peremptory preface, *Ita scriptum est*, seems to have been sufficient to silence all objections. Where a mind of our own day would jealously scrutinise the formula which had been quoted, would inquire its source, and would (if necessary) deny that the body

of law to which it belonged had any authority to supersede local customs, the elder jurist would not probably have ventured to do more than question the applicability of the rule, or at best cite some counter-proposition from the Pandects or the Canon Law. It is extremely necessary to bear in mind the uncertainty of men's notions on this most important side of juridical controversies, not only because it helps to explain the weight which the lawyers threw into the monarchical scale, but on account of the light which it sheds on several curious historical problems. The motives of the author of the Forged Decretals and his extraordinary success are rendered more intelligible by it. And, to take a phenomenon of small interest, it assists us, though only partially, to understand the plagiarisms of Bracton. That an English writer of the time of Henry III. should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman Law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence; but still there is something to lessen our surprise when we comprehend the state of opinion at the period as to the obligatory force of written texts, apart from all consideration of the source whence they were derived.

When the kings of France had brought their long struggle for supremacy to a successful close, an epoch which may be placed roughly at the accession of the branch of Valois-Angoulême to the throne, the situation of the French jurists was peculiar, and continued to be so down to the outbreak of the revolution. On the one hand, they formed the best instructed and nearly the most powerful class in the nation. They had made good their footing as a privileged order by the side of the feudal aristocracy, and they had assured their influence by an organisation which distributed their profession over France in great chartered corporations possessing large defined powers and still larger indefinite claims. In all the qualities of the advocate, the judge, and the legislator, they far excelled their compeers throughout Europe. Their juridical tact, their ease of expression, their fine sense of analogy and harmony, and (if they may be judged by the highest names among them) their passionate devotion to their conceptions of justice, were as remarkable as the singular variety of talent which they included, a variety covering the whole ground between the opposite poles of Cujas and Montesquieu, of D'Aguesseau and Dumoulin. But, on the other hand, the system of laws which they had to administer stood in striking contrast with the habits of mind which they had cultivated. The France which had been in great part constituted by their efforts was smitten with the

curse of an anomalous and dissonant jurisprudence beyond every other country in Europe. One great division ran through the country and separated it into *Pays de Droit Écrit* and *Pays de Droit Coutumier*, the first acknowledging the written Roman law as the basis of their jurisprudence, the last admitting it only so far as it supplied general forms of expression, and courses of juridical reasoning, which were reconcileable with the local usages. The sections thus formed were again variously subdivided. In the *Pays de Droit Coutumier* province differed from province, county from county, municipality from municipality, in the nature of its customs. In the *Pays de Droit Écrit* the stratum of feudal rule which overlay the Roman law was of the most miscellaneous composition. No such confusion as this ever existed in England. In Germany it did exist, but was too much in harmony with the deep political and religious divisions of the country to be lamented or even felt. It was the special peculiarity of France that an extraordinary diversity of laws continued without sensible alteration while the central authority of the monarchy was constantly strengthening itself, while rapid approaches were being made to complete administrative unity, and while a fervid national spirit had been developed among the people. The contrast was one which fructified in many singular results, and among them we must rank the

which it produced on the minds of the French lawyers. Their speculative opinions and their intellectual bias were in the strongest opposition to their interests and professional habits. With the keenest sense and the fullest recognition of those perfections of jurisprudence which consist in simplicity and uniformity, they believed, or seemed to believe, that the vices which actually invested French law were ineradicable; and in practice they often resisted the reformation of abuses with an obstinacy which was not shown by many among their less enlightened countrymen. But there was a way to reconcile these contradictions. They became passionate enthusiasts for Natural Law. The Law of Nature overleapt all provincial and municipal boundaries; it disregarded all distinctions between noble and burgess, between burgess and peasant; it gave the most exalted place to lucidity, simplicity, and system; but it committed its devotees to no specific improvement, and did not directly threaten any venerable or lucrative technicality. Natural law may be said to have become the common law of France, or, at all events, the admission of its dignity and claims was the one tenet which all French practitioners alike subscribed to. The language of the præ-revolutionary jurists in its eulogy is singularly unqualified, and it is remarkable that the writers on the Customs, who often made it their duty to speak disparagingly of the pure Roman law,

speak even more fervidly of Nature and her rules than the civilians who professed an exclusive respec for the Digest and the Code. Dumoulin, the highes of all authorities on old French Customary Law, ha some extravagant passages on the Law of Nature and his panegyrics have a peculiar rhetorical tur which indicates a considerable departure from th caution of the Roman jurisconsults. The hypothes of a Natural Law had become not so much a theo guiding practice as an article of speculative fai and accordingly we shall find that, in the transf mation which it more recently underwent, its weak parts rose to the level of its strongest in the este of its supporters.

The eighteenth century was half over when most critical period in the history of Natural I was reached. Had the discussion of the theory of its consequences continued to be exclusively employment of the legal profession, there would sibly have been an abatement of the respect whi commanded; for by this time the *Esprit des Loi* appeared. Bearing in some exaggerations the n of the excessive violence with which its au mind had recoiled from assumptions usually su to pass without scrutiny, yet showing in som biguities the traces of a desire to compromise existing prejudice, the book of Montesquieu, w its defects, still proceeded on that Historical M

before which the Law of Nature has never maintained its footing for an instant. Its influence on thought ought to have been as great as its general popularity; but, in fact, it was never allowed time to put it forth, for the counter-hypothesis which it seemed destined to destroy passed suddenly from the forum to the street, and became the key-note of controversies far more exciting than are ever agitated in the courts or the schools. The person who launched it on its new career was that remarkable man who, without learning, with few virtues, and with no strength of character, has nevertheless stamped himself ineffaceably on history by the force of a vivid imagination, and by the help of a genuine and burning love for his fellow-men, for which much will always have to be forgiven him. We have never seen in our own generation—indeed the world has not seen more than once or twice in all the course of history—a literature which has exercised such prodigious influence over the minds of men, over every cast and shade of intellect, as that which emanated from Rousseau between 1749 and 1762. It was the first attempt to re-erect the edifice of human belief after the purely iconoclastic efforts commenced by Bayle, and in part by our own Locke, and consummated by Voltaire; and besides the superiority which every constructive effort will always enjoy over one that is merely destructive, it possessed

the immense advantage of appearing amid an
but universal scepticism as to the soundness of
foregone knowledge in matters speculative. Now,
all the speculations of Rousseau, the central figu
whether arrayed in an English dress as the sig
tary of a social compact, or simply stripped nake
all historical qualities, is uniformly Man, in a
posed state of nature. Every law or institu
which would misbeseem this imaginary being u
these ideal circumstances is to be condemne
having lapsed from an original perfection; e
transformation of society which would give
closer resemblance to the world over which
creature of Nature reigned, is admirable and w
to be effected at any apparent cost. The the
still that of the Roman lawyers, for in the
tasmagoria with which the Natural Conditi
peopled, every feature and characteristic elud
mind except the simplicity and harmony whic
sessed such charms for the jurisconsult; b
theory is, as it were, turned upside down. It
the Law of Nature, but the State of Nature
is now the primary subject of contemplation
Roman had conceived that by careful observ
existing institutions parts of them could be
out which either exhibited already, or c
judicious purification be made to exhibit, the
of that reign of nature whose reality he

affirmed. Rousseau's belief was that a perfect social order could be evolved from the unassisted consideration of the natural state, a social order wholly irrespective of the actual condition of the world and wholly unlike it. The great difference between the views is that one bitterly and broadly condemns the present for its unlikeness to the ideal past; while the other, assuming the present to be as necessary as the past, does not affect to disregard or censure it. It is not worth our while to analyse with any particularity that philosophy of politics, art, education, ethics, and social relation which was constructed on the basis of a state of nature. It still possesses singular fascination for the looser thinkers of every country, and is no doubt the parent, more or less remote, of almost all the prepossessions which impede the employment of the Historical Method of inquiry, but its discredit with the higher minds of our day is deep enough to astonish those who are familiar with the extraordinary vitality of speculative error. Perhaps the question most frequently asked nowadays is not what is the value of these opinions, but what were the causes which gave them such overshadowing prominence a hundred years ago. The answer is, I conceive, a simple one. The study which in the last century would best have corrected the misapprehensions into which an exclusive attention to legal antiquities is apt to betray was the

study of religion. But Greek religion, as then unde stood, was dissipated in imaginative myths. T Oriental religions, if noticed at all, appeared to lost in vain cosmogonies. There was but one bo of primitive records which was worth studying— early history of the Jews. But resort to this prevented by the prejudices of the time. One of few characteristics which the school of Rousseau in common with the school of Voltaire was an u disdain of all religious antiquities; and, more t all, of those of the Hebrew race. It is well kn that it was a point of honour with the reasone that day to assume not merely that the institu called after Moses were not divinely dictated, even that they were codified at a later date thar attributed to them, but that they and the Pentateuch were a gratuitous forgery, executed the return from the Captivity. Debarred, ther from one chief security against speculative del the philosophers of France, in their eagern escape from what they deemed a superstition priests, flung themselves headlong into a super of the lawyers.

But though the philosophy founded on the thesis of a state of nature has fallen low in esteem, in so far as it is looked upon under its and more palpable aspect, it does not follow its subtler disguises it has lost plausibility

larity, or power. I believe, as I have said, that it is still the great antagonist of the Historical Method; and whenever (religious objections apart) any mind is seen to resist or contemn that mode of investigation, it will generally be found under the influence of a prejudice or vicious bias traceable to a conscious or unconscious reliance on a non-historic, natural, condition of society or the individual. It is chiefly, however, by allying themselves with political and social tendencies that the doctrines of Nature and her law have preserved their energy. Some of these tendencies they have stimulated, others they have actually created, to a great number they have given expression and form. They visibly enter largely into the ideas which constantly radiate from France over the civilised world, and thus become part of the general body of thought by which its civilisation is modified. The value of the influence which they thus exercise over the fortunes of the race is of course one of the points which our age debates most warmly, and it is beside the purpose of this treatise to discuss it. Looking back, however, to the period at which the theory of the state of nature acquired the maximum of political importance, there are few who will deny that it helped most powerfully to bring about the grosser disappointments of which the first French Revolution was fertile. It gave birth, or intense stimulus, to the vices of mental habit all but

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universal at the time, disdain of positive law, i patience of experience, and the preference of *à pr* to all other reasoning. In proportion too as philosophy fixes its grasp on minds which h thought less than others and fortified themselves w smaller observation, its tendency is to become tinctly anarchical. It is surprising to note ! many of the *Sophismes Anarchiques* which Dun published for Bentham, and which embody Bentha exposure of errors distinctively French, are der from the Roman hypothesis in its French trans mation, and are unintelligible unless referred t On this point too it is a curious exercise to cor the *Moniteur* during the principal eras of the R lution. The appeals to the Law and State of Na become thicker as the times grow darker.

There is a single example which very strik illustrates the effects of the theory of natural la modern society, and indicates how very far are effects from being exhausted. There cannot, I ceive, be any question that to the assumption Law Natural we owe the doctrine of the fundam equality of human beings. That "all men are e is one of a large number of legal propositions in progress of time, have become political. Th man jurisconsults of the Antonine era lay dow "omnes homines naturâ æquales sunt," but ir eyes this is a strictly juridical axiom. They

to affirm that, under the hypothetical Law of Nature, and in so far as positive law approximates to it, the arbitrary distinctions which the Roman Civil Law maintained between classes of persons cease to have a legal existence. The rule was one of considerable importance to the Roman practitioner, who required to be reminded that, wherever Roman jurisprudence was assumed to conform itself exactly to the code of Nature, there was no difference in the contemplation of the Roman tribunals between citizen and foreigner, between freeman and slave, between Agnate and Cognate. The jurisconsults who thus expressed themselves most certainly never intended to censure the social arrangements under which civil law fell somewhat short of its speculative type; nor did they apparently believe that the world would ever see human society completely assimilated to the economy of nature. But when the doctrine of human equality makes its appearance in a modern dress it has evidently clothed itself with a new shade of meaning. Where the Roman jurisconsult had written "æquales sunt," meaning exactly what he said, the modern civilian wrote "all men are equal" in the sense of "all men ought to be equal." The peculiar Roman idea that natural law coexisted with civil law and gradually absorbed it, had evidently been lost sight of, or had become unintelligible, and the words which had at most conveyed a theory concerning the origin, com-

position, and development of human institutions, w beginning to express the sense of a great stand wrong suffered by mankind. As early as the beginr of the fourteenth century, the current language c cerning the birth-state of men, though visibly inter to be identical with that of Ulpian and his conter raries, has assumed an altogether different form meaning. The preamble to the celebrated ordin of King Louis Hutin, enfranchising the serfs of royal domains, would have sounded strangel Roman ears. "Whereas, according to natural everybody ought to be born free; and by some u and customs which, from long antiquity, have introduced and kept until now in our realm, anc adventure by reason of the misdeeds of their p cessors, many persons of our common people fallen into servitude, therefore, We," &c. This enunciation not of a legal rule but of a pc dogma; and from this time the equality of r spoken of by the French lawyers just as if it political truth which happened to have been pre among the archives of their science. Like all deductions from the hypothesis of a Law Natur like the belief itself in a Law of Nature, it w guidly assented to and suffered to have little in on opinion and practice until it passed out possession of the lawyers into that of the men of the eighteenth century and of the publi

sat at their feet. With them it became the most distinct tenet of their creed, and was even regarded as a summary of all the others. It is probable, however, that the power which it ultimately acquired over the events of 1789 was not entirely owing to its popularity in France, for in the middle of the century it passed over to America. The American lawyers of the time, and particularly those of Virginia, appear to have possessed a stock of knowledge which differed chiefly from that of their English contemporaries in including much which could only have been derived from the legal literature of continental Europe. A very few glances at the writings of Jefferson will show how strongly his mind was affected by the semi-juridical, semi-popular opinions which were fashionable in France, and we cannot doubt that it was sympathy with the peculiar ideas of the French jurists which led him and the other colonial lawyers who guided the course of events in America to join the specially French assumption that "all men are born equal" with the assumption, more familiar to Englishmen, that all men are born free, in the very first lines of their Declaration of Independence. The passage was one of great importance to the history of the doctrine before us. The American lawyers, in thus prominently and emphatically affirming the fundamental equality of human beings, gave an impulse to political movements in their own country,

and in a less degree in Great Britain, which is f from having yet spent itself; but besides this th returned the dogma they had adopted to its home France, endowed with vastly greater energy and e joying much greater claims on general reception a respect. Even the more cautious politicians of the fi Constituent Assembly repeated Ulpian's proposit as if it at once commended itself to the instincts a intuitions of mankind; and of all the "principle 1789" it is the one which has been least strenuou assailed, which has most thoroughly leavened moc opinion, and which promises to modify most de the constitution of societies and the politics of st

The grandest function of the Law of Nature discharged in giving birth to modern Internati Law and to the modern Law of War, but this of its effects must here be dismissed with consi tion very unequal to its importance.

Among the postulates which form the found of International Law, or of so much of it as re the figure which it received from its original a tects, there are two or three of preeminent im ance. The first of all is expressed in the pc that there is a determinable Law of Nature. tius and his successors took the assumption d from the Romans, but they differed widely the Roman jurisconsults and from each ot their ideas as to the mode of determination.

ambition of almost every Publicist who has flourished since the revival of letters has been to provide new and more manageable definitions of Nature and of her law, and it is indisputable that the conception in passing through the long series of writers on Public Law has gathered round it a large accretion, consisting of fragments of ideas derived from nearly every theory of ethics which has in its turn taken possession of the schools. Yet it is a remarkable proof of the essentially historical character of the conception that, after all the efforts which have been made to evolve the code of nature from the necessary characteristics of the natural state, so much of the result is just what it would have been if men had been satisfied to adopt the dicta of the Roman lawyers without questioning or reviewing them. Setting aside the Conventional or Treaty Law of Nations, it is surprising how large a part of the system is made up of pure Roman law. Wherever there is a doctrine of the jurisconsults affirmed by them to be in harmony with the Jus Gentium, the Publicists have found a reason for borrowing it, however plainly it may bear the marks of a distinctively Roman origin. We may observe too that the derivative theories are afflicted with the weakness of the primary notion. In the majority of the Publicists, the mode of thought is still "mixed." In studying these writers, the great difficulty is

always to discover whether they are discussing l
or morality—whether the state of international
lations they describe is actual or ideal—whet
they lay down that which is, or that which, in th
opinion, ought to be.

The assumption that Natural Law is binding
states *inter se* is the next in rank of those wh
underlie International Law. A series of assertion
admissions of this principle may be traced up to
very infancy of modern juridical science, and at
sight it seems a direct inference from the teachir
the Romans. The civil condition of society h
distinguished from the natural by the fact that in
first there is a distinct author of law, while in
last there is none, it appears as if the mome
number of *units* were acknowledged to obey no
mon sovereign or political superior they were th
back on the ulterior behests of the Law Na
States are such units; the hypothesis of their
pendence excludes the notion of a common law
and draws with it, therefore, according to a c
range of ideas, the notion of subjection to the pri
order of nature. The alternative is to consic
dependent communities as not related to each
by any law, but this condition of lawlessness
actly the vacuum which the Nature of the ju
sults abhorred. There is certainly apparent
for thinking that if the mind of a Roman
rested on any sphere from which civil la

banished, it would instantly fill the void with the ordinances of Nature. It is never safe, however, to assume that conclusions, however certain and immediate in our own eyes, were actually drawn at any period of history. No passage has ever been adduced from the remains of Roman law which, in my judgment, proves the jurisconsults to have believed natural law to have obligatory force between independent commonwealths; and we cannot but see that to citizens of the Roman empire, who regarded their sovereign's dominions as conterminous with civilisation, the equal subjection of states to the Law of Nature, if contemplated at all, must have seemed at most an extreme result of curious speculation. The truth appears to be that modern International Law, undoubted as is its descent from Roman law, is only connected with it by an irregular filiation. The early modern interpreters of the jurisprudence of Rome, misconceiving the meaning of Jus Gentium, assumed without hesitation that the Romans had bequeathed to them a system of rules for the adjustment of international transactions. This "Law of Nations" was at first an authority which had formidable competitors to strive with, and the condition of Europe was long such as to preclude its universal reception. Gradually, however, the western world arranged itself in a form more favourable to the theory of the civilians; circumstances destroyed the credit of rival

doctrines; and at last, at a peculiarly felicitous cc juncture, Ayala and Grotius were able to obtain fo the enthusiastic assent of Europe, an assent which been over and over again renewed in every variet solemn engagement. The great men to whom triumph is chiefly owing attempted, it need scarcel said, to place it on an entirely new basis, and it is questionable that in the course of this displacem they altered much of its structure, though far of it than is commonly supposed. Having adop from the Antonine jurisconsults the position that Jus Gentium and the Jus Naturæ were ident Grotius, with his immediate predecessors and his mediate successors, attributed to the Law of Na an authority which would never perhaps have l claimed for it, if "Law of Nations" had not in age been an ambiguous expression. They laid d unreservedly that Natural Law is the code of st and thus put in operation a process which has tinued almost down to our own day, the proce engrafting on the international system rules w are supposed to have been evolved from the assisted contemplation of the conception of Na There is too one consequence of immense prac importance to mankind which, though not unk during the early modern history of Europe, never clearly or universally acknowledged till doctrines of the Grotian school had prevailed

the society of nations is governed by Natural Law, the atoms which compose it must be absolutely equal. Men under the sceptre of Nature are all equal, and accordingly commonwealths are equal if the international state be one of nature. The proposition that independent communities, however different in size and power, are all equal in the view of the law of nations, has largely contributed to the happiness of mankind, though it is constantly threatened by the political tendencies of each successive age. It is a doctrine which probably would never have obtained a secure footing at all if International Law had not been entirely derived from the majestic claims of Nature by the Publicists who wrote after the revival of letters.

On the whole, however, it is astonishing, as I have observed before, how small a proportion the additions made to International Law since Grotius's day bear to the ingredients which have been simply taken from the most ancient stratum of the Roman Jus Gentium. Acquisition of territory has always been the great spur of national ambition, and the rules which govern this acquisition, together with the rules which moderate the wars in which it too frequently results, are merely transcribed from the part of the Roman Law which treats of the modes of acquiring property *jure gentium*. These modes of acquisition were obtained by the elder jurisconsults, as I have attempted to

explain, by abstracting a common ingredient fr
the usages observed to prevail among the vari
tribes surrounding Rome; and, having been cla
on account of their origin in the "law commor
all nations," they were thought by the later law
to fit in, on the score of their simplicity, with
more recent conception of a Law Natural. They
made their way into the modern Law of Nations,
the result is that those parts of the internati
system which refer to *dominion*, its nature, its
tations, the modes of acquiring and securing it
pure Roman Property Law—so much, that is to
of the Roman Law of Property as the Antonine
consults imagined to exhibit a certain congruity
the natural state. In order that these chapte
International Law may be capable of application
necessary that sovereigns should be related to
other like the members of a group of Roman
prietors. This is another of the postulates wh
at the threshold of the International Code, an
also one which could not possibly have beer
scribed to during the first centuries of m
European history. It is resolvable into the
proposition that "sovereignty is territorial," *i.*
it is always associated with the proprietorshi
limited portion of the earth's surface, and that
reigns *inter se* are to be deemed not *paramou*
absolute, owners of the state's territory."

Many contemporary writers on International Law tacitly assume that the doctrines of their system, founded on principles of equity and common sense, were capable of being readily reasoned out in every stage of modern civilisation. But this assumption, while it conceals some real defects of the international theory, is altogether untenable so far as regards a large part of modern history. It is not true that the authority of the Jus Gentium in the concerns of nations was always uncontradicted; on the contrary, it had to struggle long against the claims of several competing systems. It is again not true that the territorial character of sovereignty was always recognised, for long after the dissolution of the Roman dominion the minds of men were under the empire of ideas irreconcileable with such a conception. An old order of things, and of views founded on it, had to decay—a new Europe, and an apparatus of new notions congenial to it, had to spring up—before two of the chiefest postulates of International Law could be universally conceded.

It is a consideration well worthy to be kept in view, that during a large part of what we usually term modern history no such conception was entertained as that of "*territorial sovereignty.*" Sovereignty was not associated with dominion over a portion or subdivision of the earth. The world had

lain for so many centuries under the shado
Imperial Rome as to have forgotten that distı
tion of the vast spaces comprised in the en
which had once parcelled them out into a numb
independent commonwealths, claiming immunity
extrinsic interference, and pretending to equali
national rights. After the subsidence of the
barian irruptions, the notion of sovereignty
prevailed seems to have been twofold. On th
hand it assumed the form of what may be c
"*tribe*-sovereignty." The Franks, the Burgund
the Vandals, the Lombards, and Visigoths
masters, of course, of the territories which
occupied, and to which some of them have giv
geographical appellation; but they based no
of right upon the fact of territorial possession
indeed attached no importance to it whatever.
appear to have retained the traditions which
brought with them from the forest and the st
and to have still been in their own view a patria
society, a nomad horde, merely encamped for the
upon the soil which afforded them sustenance.
of Transalpine Gaul, with part of Germany, had
become the country *de facto* occupied by the F
—it was France; but the Merovingian line of
tains, the descendants of Clovis, were not Kin
France, they were Kings of the Franks. Terri
titles were not unknown, but they seem at fir

have come into use only as a convenient mode of designating the ruler of a *portion* of the tribe's possessions; the king of a *whole* tribe was king of his people, not of his people's lands. The alternative to this peculiar notion of sovereignty appears to have been—and this is the important point—the idea of universal dominion. When a monarch departed from the special relation of chief to clansmen, and became solicitous, for purposes of his own, to invest himself with a novel form of sovereignty, the precedent which suggested itself for his adoption was the domination of the Emperors of Rome. To parody a common quotation, he became "*aut Cæsar aut nullus.*" Either he pretended to the full prerogative of the Byzantine Emperor, or he had no political status. In our own age, when a new dynasty is desirous of obliterating the prescriptive title of a deposed line of sovereigns, it takes its designation from the *people*, instead of the *territory*. Thus we have Emperors and Kings of the French, and a King of the Belgians. At the period of which we have been speaking, under similar circumstances, a different alternative presented itself. The Chieftain who would no longer call himself King of the tribe must claim to be Emperor of the world. Thus, when the hereditary Mayors of the Palace had ceased to compromise with the monarchs they had long since virtually dethroned, they soon became

unwilling to call themselves Kings of the Frank
title which belonged to the displaced Merovings;
they could not style themselves Kings of France
such a designation, though apparently not unkn
was not a title of dignity. Accordingly they c
forward as aspirants to universal empire. T
motive has been greatly misapprehended. It
been taken for granted by recent French writers
Charlemagne was far before his age, quite as r
in the character of his designs as in the en
with which he prosecuted them. Whether it be
or not that anybody is at any time before his a
is certainly true that Charlemagne, in aiming
unlimited dominion, was emphatically taking the
course which the characteristic ideas of his ag
mitted him to follow. Of his intellectual emi
there cannot be a question, but it is proved l
acts and not by his theory.

These singularities of view were not altered c
partition of the inheritance of Charlemagne a
his three grandsons. Charles the Bald, Lew
Lothair were still theoretically—if it be pro
use the word—Emperors of Rome. Just a
Cæsars of the Eastern and Western Empires ha
been *de jure* emperor of the whole world w
facto control over half of it, so the three Ca
gians appear to have considered their power as l
but their title as unqualified. The same spec
universality of sovereignty continued to be ass

with the Imperial throne after the second division on the death of Charles the Fat, and, indeed, was never thoroughly dissociated from it so long as the empire of Germany lasted. Territorial sovereignty—the view which connects sovereignty with the possession of a limited portion of the earth's surface—was distinctly an offshoot, though a tardy one, of *feudalism*. This might have been expected *a priori*, for it was feudalism which for the first time linked personal duties, and by consequence personal rights, to the ownership of land. Whatever be the proper view of its origin and legal nature, the best mode of vividly picturing to ourselves the feudal organisation is to begin with the basis; to consider the relation of the tenant to the patch of soil which created and limited his services—and then to mount up, through narrowing circles of super-feudation, till we approximate to the apex of the system. Where that summit exactly was during the later portion of the dark ages it is not easy to decide. Probably, wherever the conception of tribe sovereignty had really decayed, the topmost point was always assigned to the supposed successor of the Cæsars of the West. But before long, when the actual sphere of Imperial authority had immensely contracted, and when the emperors had concentrated the scanty remains of their power upon Germany and North Italy, the highest feudal superiors in all the outlying portions of the former Carlovingian empire found themselves practically without a supreme head.

Gradually they habituated themselves to the situation, and the fact of immunity put at last o sight the theory of dependence; but there are r symptoms that this change was not quite easil complished; and, indeed, to the impression that ir nature of things there must necessarily be a ci nating domination somewhere, we may, no d refer the increasing tendency to attribute se superiority to the See of Rome. The completi the first stage in the revolution of opinion is ma of course, by the accession of the Capetian dyna France. Before that epoch arrived, several o holders of the great territorial fiefs into whicl Carlovingian empire was now split up, had beg call themselves Kings, instead of Dukes or Counts the important change occurred when the feudal p of a limited territory surrounding Paris began, the accident of his uniting an unusual numb suzerainties in his own person, to call himself *K France*, at the same time that he usurped fro earlier house their dynastic title of *Kings of the F* Hugues Capet and his descendants were kir quite a new sense, sovereigns standing in the relation to the soil of France as the baron to his (the tenant to his freehold. The form of the mor in France had visible effects in hastening cl which were elsewhere proceeding in the same dire The kingship of our Anglo-Saxon regal hous midway between the chieftainship of a tribe

territorial supremacy; but the superiority of the Norman monarchs, imitated from that of the King of France, was distinctly a territorial sovereignty. Every subsequent dominion which was established or consolidated was formed on the latter model. Spain, Naples, and the principalities founded on the ruins of municipal freedom in Italy, were all under rulers whose sovereignty was territorial. Few things, I may add, are more curious than the gradual lapse of the *Venetians* from one view to the other. At the commencement of its foreign conquests, the republic regarded itself as an antitype of the Roman commonwealth, governing a number of subject provinces. Move a century onwards, and you find that it wishes to be looked upon as a corporate sovereign, claiming the rights of a feudal suzerain over its possessions in Italy and the Ægean.

During the period through which the popular ideas on the subject of sovereignty were undergoing this remarkable change, the system which stood in the place of what we now call International Law was heterogeneous in form and inconsistent in the principles to which it appealed. Over so much of Europe as was comprised in the Romano-German empire, the connexion of the confederate states was regulated by the complex and as yet incomplete mechanism of the Imperial constitution; and, surprising as it may seem to us, it was a favourite notion of German lawyers that the relations of commonwealths, whether inside

or outside the empire, ought to be regulated not
the *Jus Gentium*, but by the pure Roman jurisp
dence, of which Cæsar was still the centre. T
doctrine was less confidently repudiated in the c
lying countries than we might have supposed ant
dently; but substantially, through the rest of Eur
feudal subordinations furnished a substitute fc
public law; and when those were undetermined
ambiguous, there lay behind, in theory at leas
supreme regulating force in the authority of the l
of the Church. It is certain, however, that
feudal and ecclesiastical influences were rapidly
caying during the fifteenth, and even the fourte
century; and if we closely examine the current
texts of wars, and the avowed motives of allia
it will be seen that, step by step with the disp
ment of the old principles, the views afterwards
monised and consolidated by Ayala and Grotius
making considerable progress, though it was
and but slow. Whether the fusion of all the sc
of authority would ultimately have evolved a sy
of international relations, and whether that sy
would have exhibited material differences fro
fabric of Grotius, is not now possible to decid
as a matter of fact the Reformation annihilat
its potential elements except one. Beginni
Germany, it divided the princes of the empir
gulf too broad to be bridged over by the Im
supremacy, even if the Imperial superior had

neutral. He, however, was forced to take colour with the church against the reformers; the Pope was, as a matter of course, in the same predicament; and thus the two authorities to whom belonged the office of mediation between combatants became themselves the chiefs of one great faction in the schism of the nations. Feudalism, already enfeebled and discredited as a principle of public relations, furnished no bond whatever which was stable enough to countervail the alliances of religion. In a condition, therefore, of public law which was little less than chaotic, those views of a state system to which the Roman jurisconsults were supposed to have given their sanction alone remained standing. The shape, the symmetry, and the prominence which they assumed in the hands of Grotius are known to every educated man; but the great marvel of the Treatise "De Jure Belli et Pacis," was its rapid, complete, and universal success. The horrors of the Thirty Years' War, the boundless terror and pity which the unbridled license of the soldiery was exciting, must, no doubt, be taken to explain that success in some measure, but they do not wholly account for it. Very little penetration into the ideas of that age is required to convince one that, if the ground plan of the international edifice which was sketched in the great book of Grotius had not appeared to be theoretically perfect, it would have been discarded by jurists and neglected by statesmen and soldiers.

It is obvious that the speculative perfection of Grotian system is intimately connected with t conception of territorial sovereignty which we h been discussing. The theory of International L assumes that commonwealths are, relatively to e other, in a state of nature ; but the component at of a natural society must, by the fundamental sumption, be insulated and independent of e other. If there be a higher power connecting th however slightly and occasionally, by the clain common supremacy, the very conception of a c mon superior introduces the notion of positive L and excludes the idea of a law natural. It foll therefore, that if the universal suzerainty of an perial head had been admitted even in bare the the labours of Grotius would have been idle. is this the only point of junction between mo public law and those views of sovereignty of w I have endeavoured to describe the development have said that there are entire departments of i national jurisprudence which consist of the Rc Law of Property. What then is the inference ? is, that if there had been no such change as I described in the estimate of sovereignty—if s reignty had not been associated with the propri ship of a limited portion of the earth, had nc other words become territorial—three parts of Grotian theory would have been incapable of a cation.

CHAPTER V.

PRIMITIVE SOCIETY AND ANCIENT LAW.

THE necessity of submitting the subject of jurisprudence to scientific treatment has never been entirely lost sight of in modern times, and the essays which the consciousness of this necessity has produced have proceeded from minds of very various calibre, but there is not much presumption, I think, in asserting that what has hitherto stood in the place of a science has for the most part been a set of guesses, those very guesses of the Roman lawyers which were examined in the two preceding chapters. A series of explicit statements, recognising and adopting these conjectural theories of a natural state, and of a system of principles congenial to it, has been continued with but brief interruption from the days of their inventors to our own. They appear in the annotations of the Glossators who founded modern jurisprudence, and in the writings of the scholastic jurists who succeeded them. They are visible in the dogmas of the canonists. They are thrust into prominence by those civilians of marvellous erudition, who flourished at the revival of ancient letters.

Grotius and his successors invested them not with brilliancy and plausibility than with pra importance. They may be read in the introdu chapters of our own Blackstone, who has transc them textually from Burlamaqui, and whereve manuals published in the present day for the ance of the student or the practitioner begir any discussion of the first principles of l always resolves itself into a restatement c Roman hypothesis. It is however from the dis with which these conjectures sometimes clothe selves, quite as much as from their native forr we gain an adequate idea of the subtlety with they mix themselves in human thought. The L theory of the origin of Law in a Social C scarcely conceals its Roman derivation, and ir only the dress by which the ancient views we dered more attractive to a particular gener the moderns; but on the other hand the tl Hobbes on the same subject was purposely to repudiate the reality of a law of nature ceived by the Romans and their disciple these two theories, which long divided the r politicians of England into hostile camps, each other strictly in their fundamental ass of a non-historic, unverifiable, condition of Their authors differed as to the characteristi præ-social state, and as to the nature of the

action by which men lifted themselves out of it into that social organisation with which alone we are acquainted, but they agreed in thinking that a great chasm separated man in his primitive condition from man in society, and this notion we cannot doubt that they borrowed, consciously or unconsciously, from the Romans. If indeed the phenomena of law be regarded in the way in which these theorists regarded them—that is, as one vast complex whole—it is not surprising that the mind should often evade the task it has set to itself by falling back on some ingenious conjecture which (plausibly interpreted) will seem to reconcile everything, or else that it should sometimes abjure in despair the labour of systematization.

From the theories of jurisprudence which have the same speculative basis as the Roman doctrine two of much celebrity must be excepted. The first of them is that associated with the great name of Montesquieu. Though there are some ambiguous expressions in the early part of the *Esprit des Lois*, which seem to show its writer's unwillingness to break quite openly with the views hitherto popular, the general drift of the book is certainly to indicate a very different conception of its subject from any which had been entertained before. It has often been noticed that, amidst the vast variety of examples which, in its immense width of survey, it sweeps together from supposed systems of juris-

prudence, there is an evident anxiety to t
into especial prominence those manners and ins
tions which astonish the civilised reader by
uncouthness, strangeness, or indecency. Th
ference constantly suggested is, that laws ar
creatures of climate, local situation, accident, o
posture—the fruit of any causes except those
appear to operate with tolerable constancy.
tesquieu seems, in fact, to have looked on the r
of man as entirely plastic, as passively reproduci
impressions, and submitting implicitly to the im
which it receives from without. And here no
lies the error which vitiates his system as a s
He greatly underrates the stability of human r
He pays little or no regard to the inherited q
of the race, those qualities which each gen
receives from its predecessors, and transmi
slightly altered to the generation which foll
It is quite true, indeed, that no complete acco
be given of social phenomena, and consequ
laws, till due allowance has been made fo
modifying causes which are noticed in the *Es*
Lois; but their number and their force ap
have been overestimated by Montesquieu.
of the anomalies which he parades have sin
shown to rest on false report or erroneous c
tion, and of those which remain not a few p
permanence rather than the variableness c

nature, since they are relics of older stages of the race which have obstinately defied the influences that have elsewhere had effect. The truth is that the stable part of our mental, moral, and physical constitution is the largest part of it, and the resistance it opposes to change is such that, though the variations of human society in a portion of the world are plain enough, they are neither so rapid nor so extensive that their amount, character, and general direction cannot be ascertained. An approximation to truth may be all that is attainable with our present knowledge, but there is no reason for thinking that it is so remote, or (what is the same thing) that it requires so much future correction, as to be entirely useless and uninstructive.

The other theory which has been adverted to is, the historical theory of Bentham. This theory which is obscurely (and, it might even be said, timidly) propounded in several parts of Bentham's works is quite distinct from that analysis of the conception of law which he commenced in the "Fragment on Government," and which was more recently completed by Mr. John Austin. The resolution of a law into a command of a particular nature, imposed under special conditions, does not affect to do more than protect us against a difficulty—a most formidable one certainly—of language. The whole question remains open as to the motives of societies in

imposing these commands on themselves, as to
connexion of these commands with each other
the nature of their dependence on those which
ceded them, and which they have superseded.
tham suggests the answer that societies modify
have always modified, their laws according to
fications of their views of general expediency.
difficult to say that this proposition is false,
certainly appears to be unfruitful. For that
seems expedient to a society, or rather to th
verning part of it, when it alters a rule of
surely the same thing as the object, whatever
be, which it has in view when it makes the c
Expediency and the greatest good are nothing
than different names for the impulse which p
the modification; and when we lay down expe
as the rule of change in law or opinion, all
by the proposition is the substitution of an e
term for a term which is necessarily implied w
say that a change takes place.

There is such wide-spread dissatisfactio
existing theories of jurisprudence, and so ge
conviction that they do not really solve the q
they pretend to dispose of, as to justify the s
that some line of inquiry, necessary to a
result, has been incompletely followed or al
omitted by their authors. And indeed ther
remarkable omission with which all these

tions are chargeable, except perhaps those of Montesquieu. They take no account of what law has actually been at epochs remote from the particular period at which they made their appearance. Their originators carefully observed the institutions of their own age and civilisation, and those of other ages and civilisations with which they had some degree of intellectual sympathy, but, when they turned their attention to archaic states of society which exhibited much superficial difference from their own, they uniformly ceased to observe and began guessing. The mistake which they committed is therefore analogous to the error of one who, in investigating the laws of the material universe, should commence by contemplating the existing physical world as a whole, instead of beginning with the particles which are its simplest ingredients. One does not certainly see why such a scientific solecism should be more defensible in jurisprudence than in any other region of thought. It would seem antecedently that we ought to commence with the simplest social forms in a state as near as possible to their rudimentary condition. In other words, if we followed the course usual in such inquiries, we should penetrate as far up as we could in the history of primitive societies. The phenomena which early societies present us with are not easy at first to understand, but the difficulty of grappling with them bears no proportion to the

perplexities which beset us in considering the b
entanglement of modern social organisation.
difficulty arising from their strangeness an
couthness, not from their number and comp
One does not readily get over the surprise
they occasion when looked at from a modern
of view; but when that is surmounted they a
enough and simple enough. But, even if the
more trouble than they do, no pains would be
in ascertaining the germs out of which has ass
been unfolded every form of moral restraint
controls our actions and shapes our conduct
present moment.

The rudiments of the social state, so far as t
known to us at all, are known through testir
three sorts—accounts by contemporary obser
civilisations less advanced than their own,
cords which particular races have preserved c
ing their primitive history, and ancient law. T
kind of evidence is the best we could have ex
As societies do not advance concurrently, bu
ferent rates of progress, there have been ep
which men trained to habits of methodical
tion have really been in a position to watch
scribe the infancy of mankind. Tacitus made
of such an opportunity; but the *Germany*
most celebrated classical books, has not induce
to follow the excellent example set by its aut

the amount of this sort of testimony which we possess is exceedingly small. The lofty contempt which a civilised people entertains for barbarous neighbours has caused a remarkable negligence in observing them, and this carelessness has been aggravated at times by fear, by religious prejudice, and even by the use of these very terms—civilisation and barbarism—which convey to most persons the impression of a difference not merely in degree but in kind. Even the *Germany* has been suspected by some critics of sacrificing fidelity to poignancy of contrast and picturesqueness of narrative. Other histories too, which have been handed down to us among the archives of the people to whose infancy they relate, have been thought distorted by the pride of race or by the religious sentiment of a newer age. It is important then to observe that these suspicions, whether groundless or rational, do not attach to a great deal of archaic law. Much of the old law which has descended to us was preserved merely because it was old. Those who practised and obeyed it did not pretend to understand it; and in some cases they even ridiculed and despised it. They offered no account of it except that it had come down to them from their ancestors. If we confine our attention, then, to those fragments of ancient institutions which cannot reasonably be supposed to have been tampered with, we are able to gain a clear conception of certain

great characteristics of the society to whicl
originally belonged. Advancing a step furth
can apply our knowledge to systems of law
like the Code of Manu, are as a whole of sus
authenticity; and, using the key we have ob
we are in a position to discriminate those por
them which are truly archaic from those whi
been affected by the prejudices, interests, or ig
of the compiler. It will at least be ackno
that, if the materials for this process are su
and if the comparisons be accurately execu
methods followed are as little objectionable a
which have led to such surprising results
parative philology.

The effect of the evidence derived from c
tive jurisprudence is to establish that view
primeval condition of the human race which
as the Patriarchal Theory. There is no c
course, that this theory was originally base
Scriptural history of the Hebrew patriarchs
Asia; but, as has been explained already,
nexion with Scripture rather militated th
wise against its reception as a complete the
the majority of the inquirers who till rec
dressed themselves with most earnestness to
gation of social phenomena, were either
by the strongest prejudice against Hebrew
or by the strongest desire to construct the

without the assistance of religious records. Even now there is perhaps a disposition to undervalue these accounts, or rather to decline generalising from them, as forming part of the traditions of a Semitic people. It is to be noted, however, that the legal testimony comes nearly exclusively from the institutions of societies belonging to the Indo-European stock, the Romans, Hindoos, and Sclavonians supplying the greater part of it; and indeed the difficulty, at the present stage of the inquiry, is to know where to stop, to say of what races of men it is *not* allowable to lay down that the society in which they are united was originally organised on the patriarchal model. The chief lineaments of such a society, as collected from the early chapters in Genesis, I need not attempt to depict with any minuteness, both because they are familiar to most of us from our earliest childhood, and because, from the interest once attaching to the controversy which takes its name from the debate between Locke and Filmer, they fill a whole chapter, though not a very profitable one, in English literature. The points which lie on the surface of the history are these:—The eldest male parent—the eldest ascendant—is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children and their houses as over his slaves; indeed the relations of sonship and serfdom appear to differ in little beyond the higher

capacity which the child in blood possesses o coming one day the head of a family himself. flocks and herds of the children are the flocks herds of the father, and the possessions of the p which he holds in a representative rather th a proprietary character, are equally divided a death among his descendants in the first degre eldest son sometimes receiving a double share the name of birthright, but more generally enc with no hereditary advantage beyond an hon precedence. A less obvious inference from the tural accounts is that they seem to plant us c traces of the breach which is first effected i empire of the parent. The families of Jaco Esau separate and form two nations; but the fa of Jacob's children hold together and become a p This looks like the immature germ of a state o monwealth, and of an order of rights superior claims of family relation.

If I were attempting, for the more special pu of the jurist, to express compendiously the c teristics of the situation in which mankind c themselves at the dawn of their history, I sho satisfied to quote a few verses from the *Odi* Homer:

> τοῖσιν δ' οὔτ' ἀγοραὶ βουληφόροι οὔτε θέμιστες,
> . . . θεμιστεύει δὲ ἕκαστος
> παίδων ἠδ' ἀλόχων, οὐδ' ἀλλήλων ἀλέγουσιν.

"They have neither assemblies for consultation nor *themistes*, but every one exercises jurisdiction over his wives and his children, and they pay no regard to one another." These lines are applied to the Cyclops, and it may not perhaps be an altogether fanciful idea when I suggest that the Cyclops is Homer's type of an alien and less advanced civilisation; for the almost physical loathing which a primitive community feels for men of widely different manners from its own usually expresses itself by describing them as monsters, such as giants, or even (which is almost always the case in Oriental mythology) as demons. However that may be, the verses condense in themselves the sum of the hints which are given us by legal antiquities. Men are first seen distributed in perfectly insulated groups, held together by obedience to the parent. Law is the parent's word, but it is not yet in the condition of those *themistes* which were analysed in the first chapter of this work. When we go forward to the state of society in which these early legal conceptions show themselves as formed, we find that they still partake of the mystery and spontaneity which must have seemed to characterise a despotic father's commands, but that at the same time, inasmuch as they proceed from a sovereign, they presuppose a union of family groups in some wider organisation. The next question is, what is the nature of this union and the degree of intimacy which

it involves? It is just here that archaic law renders us one of the greatest of its services and fills up a gap which otherwise could only have been bridged by conjecture. It is full, in all its provinces, of the clearest indications that society in primitive times was not what it is assumed to be at present, a collection of *individuals*. In fact, and in the view of the men who composed it, it was *an aggregation of families*. The contrast may be most forcibly expressed by saying that the *unit* of an ancient society was the Family, of a modern society the individual. We must be prepared to find in ancient law all the consequences of this difference. It is so framed as to be adjusted to a system of small independent corporations. It is therefore scanty, because it is supplemented by the despotic commands of the heads of households. It is ceremonious, because the transactions to which it pays regard resemble international concerns much more than the quick play of intercourse between individuals. Above all it has a peculiarity of which the full importance cannot be shown at present. It takes a view of *life* wholly unlike any which appears in developed jurisprudence Corporations *never die*, and accordingly primitive law considers the entities with which it deals, *i. e.* the patriarchal or family groups, as perpetual and inextinguishable. This view is closely allied to the peculiar aspect under which, in very ancient times, more

attributes present themselves. The moral elevation and moral debasement of the individual appear to be confounded with, or postponed to, the merits and offences of the group to which the individual belongs. If the community sins, its guilt is much more than the sum of the offences committed by its members; the crime is a corporate act, and extends in its consequences to many more persons than have shared in its actual perpetration. If, on the other hand, the individual is conspicuously guilty, it is his children, his kinsfolk, his tribesmen, or his fellow-citizens, who suffer with him, and sometimes for him. It thus happens that the ideas of moral responsibility and retribution often seem to be more clearly realised at very ancient than at more advanced periods, for, as the family group is immortal, and its liability to punishment indefinite, the primitive mind is not perplexed by the questions which become troublesome as soon as the individual is conceived as altogether separate from the group. One step in the transition from the ancient and simple view of the matter to the theological or metaphysical explanations of later days is marked by the early Greek notion of an inherited curse. The bequest received by his posterity from the original criminal was not a liability to punishment, but a liability to the commission of fresh offences which drew with them a condign retribution; and thus the responsibility of the family was reconciled

with the newer phase of thought which limited consequences of crime to the person of the ac delinquent.

It would be a very simple explanation of the or of society if we could base a general conclusion on hint furnished us by the Scriptural example alr adverted to, and could suppose that communities gan to exist wherever a family held together in of separating at the death of its patriarchal chie In most of the Greek states and in Rome long remained the vestiges of an ascending seri groups out of which the State was at first constit The Family, House, and Tribe of the Romans m taken as the type of them, and they are so desc to us that we can scarcely help conceiving them system of concentric circles which have grad expanded from the same point. The eleme group is the Family, connected by common subj to the highest male ascendant. The aggregati Families forms the Gens or House. The aggreg of Houses makes the Tribe. The aggregation of constitutes the commowealth. Are we at libe follow these indications, and to lay down th commonwealth is a collection of persons unit common descent from the progenitor of an or family? Of this we may at least be certain, t ancient societies regarded themselves as havin ceeded from one original stock, and even lat

under an incapacity for comprehending any reason except this for their holding together in political union. The history of political ideas begins, in fact, with the assumption that kinship in blood is the sole possible ground of community in political functions; nor is there any of those subversions of feeling, which we term emphatically revolutions, so startling and so complete as the change which is accomplished when some other principle—such as that, for instance, of *local contiguity*—establishes itself for the first time as the basis of common political action. It may be affirmed then of early commonwealths that their citizens considered all the groups in which they claimed membership to be founded on common lineage. What was obviously true of the Family was believed to be true first of the House, next of the Tribe, lastly of the State. And yet we find that along with this belief, or, if we may use the word, this theory, each community preserved records or traditions which distinctly showed that the fundamental assumption was false. Whether we look to the Greek states, or to Rome, or to the Teutonic aristocracies in Ditmarsh which furnished Niebuhr with so many valuable illustrations, or to the Celtic clan associations, or to that strange social organisation of the Sclavonic Russians and Poles which has only lately attracted notice, everywhere we discover traces of passages in their history when men of alien descent were

admitted to, and amalgamated with, the origina brotherhood. Adverting to Rome singly, we perceiv that the primary group, the Family, was being con stantly adulterated by the practice of adoption, whil stories seem to have been always current respectin the exotic extraction of one of the original Tribes an concerning a large addition to the Houses made b one of the early kings. The composition of the sta uniformly assumed to be natural, was neverthele known to be in great measure artificial. This co flict between belief or theory and notorious fact is first sight extremely perplexing; but what it real illustrates is the efficiency with which Legal Fictio do their work in the infancy of society. The earlie and most extensively employed of legal fictions w that which permitted family relations to be creat artificially, and there is none to which I conce mankind to be more deeply indebted. If it had ne existed, I do not see how any one of the primit groups, whatever were their nature, could have sorbed another, or on what terms any two of th could have combined, except those of absolute sup ority on one side and absolute subjection on the otl No doubt, when with our modern ideas we cont plate the union of independent communities, we suggest a hundred modes of carrying it out, simplest of all being that the individuals compr in the coalescing groups shall vote or act toge

according to local propinquity; but the idea that a number of persons should exercise political rights in common simply because they happened to live within the same topographical limits was utterly strange and monstrous to primitive antiquity. The expedient which in those times commanded favour was that the incoming population should *feign themselves* to be descended from the same stock as the people on whom they were engrafted; and it is precisely the good faith of this fiction, and the closeness with which it seemed to imitate reality, that we cannot now hope to understand. One circumstance, however, which it is important to recollect, is that the men who formed the various political groups were certainly in the habit of meeting together periodically, for the purpose of acknowledging and consecrating their association by common sacrifices. Strangers amalgamated with the brotherhood were doubtless admitted to these sacrifices; and when that was once done, we can believe that it seemed equally easy, or not more difficult, to conceive them as sharing in the common lineage. The conclusion then which is suggested by the evidence is, not that all early societies were formed by descent from the same ancestor, but that all of them which had any permanence and solidity either were so descended or assumed that they were. An indefinite number of causes may have shattered the primitive groups, but wherever their

ingredients recombined, it was on the model or principle of an association of kindred. Whatever were the fact, all thought, language, and law adjusted themselves to the assumption. But though all this seems to me to be established with reference to the communities with whose records we are acquainted, the remainder of their history sustains the position before laid down as to the essentially transient and terminable influence of the most powerful Legal Fictions. At some point of time—probably as soon as they felt themselves strong enough to resist extrinsic pressure—all these states ceased to recruit themselves by factitious extensions of consanguinity. They necessarily, therefore, became Aristocracies, in all cases where a fresh population from any cause collected around them which could put in no claim to community of origin. Their sternness in maintaining the central principle of a system under which political rights were attainable on no terms whatever except connexion in blood, real or artificial, taught their inferiors another principle, which proved to be endowed with a far higher measure of vitality. This was the principle of *local contiguity*, now recognised everywhere as the condition of community in political functions. A new set of political ideas came at once into existence, which, being those of ourselves our contemporaries, and in great measure of our ancestors, rather obscure our perception of the olde theory which they vanquished and dethroned.

The Family then is the type of an archaic society in all the modifications which it was capable of assuming; but the family here spoken of is not exactly the family as understood by a modern. In order to reach the ancient conception we must give to our modern ideas an important extension and an important limitation. We must look on the family as constantly enlarged by the absorption of strangers within its circle, and we must try to regard the fiction of adoption as so closely simulating the reality of kinship that neither law nor opinion makes the slightest difference between a real and an adoptive connexion. On the other hand, the persons theoretically amalgamated into a family by their common descent are practically held together by common obedience to their highest living ascendant, the father, grandfather, or great-grandfather. The patriarchal authority of a chieftain is as necessary an ingredient in the notion of the family group as the fact (or assumed fact) of its having sprung from his loins; and hence we must understand that if there be any persons who, however truly included in the brotherhood by virtue of their blood-relationship, have nevertheless *de facto* withdrawn themselves from the empire of its ruler, they are always, in the beginnings of law, considered as lost to the family. It is this patriarchal aggregate—the modern family thus cut down on one side and extended on the other—which

meets us on the threshold of primitive jurisprudence. Older probably than the State, the Tribe, and the House, it left traces of itself on private law long after the House and the Tribe had been forgotten, and long after consanguinity had ceased to be associated with the composition of States. It will be found to have stamped itself on all the great departments of jurisprudence, and may be detected, I think, as the true source of many of their most important and most durable characteristics. At the outset, the peculiarities of law in its most ancient state lead us irresistibly to the conclusion that it took precisely the same view of the family group which is taken of individual men by the systems of rights and duties now prevalent throughout Europe. There are societies open to our observation at this very moment whose laws and usages can scarcely be explained unless they are supposed never to have emerged from this primitive condition; but in communities more fortunately circumstanced the fabric of jurisprudence fell gradually to pieces, and if we carefully observe the disintegration we shall perceive that it took place principally in those portions of each system which were most deeply affected by the primitive conception of the family. In one all-important instance, that of the Roman law, the change was effected so slowly, that from epoch to epoch we can observe the line and direction which it followed, and can even give some

idea of the ultimate result to which it was tending. And, in pursuing this last inquiry, we need not suffer ourselves to be stopped by the imaginary barrier which separates the modern from the ancient world. For one effect of that mixture of refined Roman law with primitive barbaric usage, which is known to us by the deceptive name of feudalism, was to revive many features of archaic jurisprudence which had died out of the Roman world, so that the decomposition which had seemed to be over commenced again, and to some extent is still proceeding.

On a few systems of law the family organisation of the earliest society has left a plain and broad mark in the life-long authority of the Father or other ancestor over the person and property of his descendants, an authority which we may conveniently call by its later Roman name of Patria Potestas. No feature of the rudimentary associations of mankind is deposed to by a greater amount of evidence than this, and yet none seems to have disappeared so generally and so rapidly from the usages of advancing communities. Gaius, writing under the Antonines, describes the institution as distinctively Roman. It is true that, had he glanced across the Rhine or the Danube to those tribes of barbarians which were exciting the curiosity of some among his contemporaries, he would have seen examples of patriarchal power in its crudest form; and in the far East a branch of the same ethnical

stock from which the Romans sprang was repeating their Patria Potestas in some of its most technical incidents. But among the races understood to be comprised within the Roman empire, Gaius could find none which exhibited an institution resembling the Roman "Power of the Father," except only the Asiatic Galatæ. There are reasons, indeed, as it seems to me, why the direct authority of the ancestor should, in the greater number of progressive societies, very shortly assume humbler proportions than belonged to it in their earliest state. The implicit obedience of rude men to their parent is doubtless a primary fact, which it would be absurd to explain away altogether by attributing to them any calculation of its advantages; but, at the same time, if it is natural in the sons to obey the father, it is equally natural that they should look to him for superior strength or superior wisdom. Hence, when societies are placed under circumstances which cause an especial value to be attached to bodily and mental vigour, there is an influence at work which tends to confine the Patria Potestas to the cases where its possessor is actually skilful and strong. When we obtain our first glimpse of organised Hellenic society, it seems as if supereminent wisdom would keep alive the father's power in persons whose bodily strength had decayed; but the relations of Ulysses and Laertes in the *Odyssey* appear to show that, where extraordinary valour and sagacity

were united in the son, the father in the decrepitude of age was deposed from the headship of the family. In the mature Greek jurisprudence, the rule advances a few steps on the practice hinted at in the Homeric literature; and though very many traces of stringent family obligation remain, the direct authority of the parent is limited, as in European codes, to the non-age or minority of the children, or, in other words, to the period during which their mental and physical inferiority may always be presumed. The Roman law, however, with its remarkable tendency to innovate on ancient usage only just so far as the exigency of the commonwealth may require, preserves both the primeval institution and the natural limitation to which I conceive it to have been subject. In every relation of life in which the collective community might have occasion to avail itself of his wisdom and strength, for all purposes of counsel or of war, the filius familias, or Son under Power, was as free as his father. It was a maxim of Roman jurisprudence that the Patria Potestas did not extend to the Jus Publicum. Father and son voted together in the city, and fought side by side in the field; indeed, the son, as general, might happen to command the father, or, as magistrate, decide on his contracts and punish his delinquencies. But in all the relations created by Private Law, the son lived under a domestic despotism which, considering the severity it retained to the

last, and the number of centuries through which it endured, constitutes one of the strangest problems in legal history.

The Patria Potestas of the Romans, which is necessarily our type of the primeval paternal authority, is equally difficult to understand as an institution of civilised life, whether we consider its incidence on the person or its effects on property. It is to be regretted that a chasm which exists in its history cannot be more completely filled. So far as regards the person, the parent, when our information commences, has over his children the *jus vitæ necisque*, the power of life and death, and *à fortiori* of uncontrolled corporal chastisement; he can modify their personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family by adoption; and he can sell them. Late in the Imperial period we find vestiges of all these powers, but they are reduced within very narrow limits. The unqualified right of domestic chastisement has become a right of bringing domestic offences under the cognisance of the civil magistrate; the privilege of dictating marriage has declined into a conditional veto; the liberty of selling has been virtually abolished, and adoption itself, destined to lose almost all its ancient importance in the reformed system of Justinian, can no longer be effected without the assent of

the child transferred to the adoptive parentage. In short, we are brought very close to the verge of the ideas which have at length prevailed in the modern world. But between these widely distant epochs there is an interval of obscurity, and we can only guess at the causes which permitted the Patria Potestas to last as long as it did by rendering it more tolerable than it appears. The active discharge of the most important among the duties which the son owed to the state must have tempered the authority of his parent if they did not annul it. We can readily persuade ourselves that the paternal despotism could not be brought into play without great scandal against a man of full age occupying a high civil office. During the earlier history, however, such cases of practical emancipation would be rare compared with those which must have been created by the constant wars of the Roman republic. The military tribune and the private soldier who were in the field three quarters of a year during the earlier contests, at a later period the proconsul in charge of a province, and the legionaries who occupied it, cannot have had practical reason to regard themselves as the slaves of a despotic master; and all these avenues of escape tended constantly to multiply themselves. Victories led to conquests, conquests to occupations; the mode of occupation by colonies was exchanged for the system of occupying provinces by standing armies. Each

step in advance was a call for the expatriation of more Roman citizens and a fresh draft on the blood of the failing Latin race. We may infer, I think, that a strong sentiment in favour of the relaxation of the Patria Potestas had become fixed by the time that the pacification of the world commenced on the establishment of the Empire. The first serious blows at the ancient institution are attributed to the earlier Cæsars, and some isolated interferences of Trajan and Hadrian seem to have prepared the ground for a series of express enactments which, though we cannot always determine their dates, we know to have limited the father's powers on the one hand, and on the other to have multiplied facilities for their voluntary surrender. The older mode of getting rid of the Potestas, by effecting a triple sale of the son's person, is evidence, I may remark, of a very early feeling against the unnecessary prolongation of the powers. The rule which declared that the son should be free after having been three times sold by his father seems to have been originally meant to entail penal consequences on a practice which revolted even the imperfect morality of the primitive Roman. But even before the publication of the Twelve Tables, it had been turned, by the ingenuity of the jurisconsults, into an expedient for destroying the parental authority wherever the father desired that it should cease.

Many of the causes which helped to mitigate the stringency of the father's power over the persons of his children are doubtless among those which do not lie upon the face of history. We cannot tell how far public opinion may have paralysed an authority which the law conferred, or how far natural affection may have rendered it endurable. But though the powers over the *person* may have been latterly nominal, the whole tenour of the extant Roman jurisprudence suggests that the father's rights over the son's *property* were always exercised without scruple to the full extent to which they were sanctioned by law. There is nothing to astonish us in the latitude of these rights when they first show themselves. The ancient law of Rome forbade the Children under Power to hold property apart from their parent, or (we should rather say) never contemplated the possibility of their claiming a separate ownership. The father was entitled to take the whole of the son's acquisitions, and to enjoy the benefit of his contracts without being entangled in any compensating liability. So much as this we should expect from the constitution of the earliest Roman society, for we can hardly form a notion of the primitive family group unless we suppose that its members brought their earnings of all kinds into the common stock while they were unable to bind it by improvident individual engagements. The true enigma of the

Patria Potestas does not reside here, but in the slowness with which these proprietary privileges of the parent were curtailed, and in the circumstances that, before they were seriously diminished, the whole civilised world was brought within their sphere. No innovation of any kind was attempted till the first years of the Empire, when the acquisitions of soldiers on service were withdrawn from the operation of the Patria Potestas, doubtless as part of the reward of the armies which had overthrown the free commonwealth. Three centuries afterwards the same immunity was extended to the earnings of persons who were in the civil employment of the state. Both changes were obviously limited in their application, and they were so contrived in technical form as to interfere as little as possible with the principle of Patria Potestas. A certain qualified and dependent ownership had always been recognised by the Roman law in the perquisites and savings which slaves and sons under power were not compelled to include in the household accounts, and the special name of this permissive property, Peculium, was applied to the acquisitions newly relieved from Patria Potestas, which were called in the case of soldiers Castrense Peculium, and Quasi castrense Peculium in the case of civil servants. Other modifications of the parental privileges followed, which showed a less studious outward respect for the ancient principle. Shortly after the

introduction of the Quasi-castrense Peculium, Constantine the Great took away the father's absolute control over property which his children had inherited from their mother, and reduced it to a *usufruct*, or life-interest. A few more changes of slight importance followed in the Western Empire, but the furthest point reached was in the East, under Justinian, who enacted that unless the acquisitions of the child were derived from the parent's own property, the parent's right over them should not extend beyond enjoying their produce for the period of his life. Even this, the utmost relaxation of the Roman Patria Potestas, left it far ampler and severer than any analogous institution of the modern world. The earliest modern writers on jurisprudence remark that it was only the fiercer and ruder of the conquerors of the empire, and notably the nations of Sclavonic origin, which exhibited a Patria Potestas at all resembling that which was described in the Pandects and the Code. All the Germanic immigrants seem to have recognised a corporate union of the family under the *mund*, or authority of a patriarchal chief; but his powers are obviously only the relics of a decayed Patria Potestas, and fell far short of those enjoyed by the Roman father. The Franks are particularly mentioned as not having the Roman Institution, and accordingly the old French lawyers, even when most busily engaged in filling the

interstices of barbarous customs with rules of Roman law, were obliged to protect themselves against the intrusion of the Potestas by the express maxim, *Puyssance de père en France n'a lieu.* The tenacity of the Romans in maintaining this relic of their most ancient condition is in itself remarkable, but it is less remarkable than the diffusion of the Potestas over the whole of a civilisation from which it had once disappeared. While the Castrense Peculium constituted as yet the sole exception to the father's power over property, and while his power over his children's persons was still extensive, the Roman citizenship, and with it the Patria Potestas, were spreading into every corner of the Empire. Every African or Spaniard, every Gaul, Briton, or Jew, who received this honour by gift, purchase, or inheritance, placed himself under the Roman Law of Persons, and, though our authorities intimate that children born before the acquisition of citizenship could not be brought under Power against their will, children born after it and all ulterior descendants were on the ordinary footing of a Roman *filius familias.* It does not fall within the province of this treatise to examine the mechanism of the later Roman society, but I may be permitted to remark that there is little foundation for the opinion which represents the constitution of Antoninus Caracalla conferring Roman citizenship on the whole of his subjects as a measure of small importance. How-

ever we may interpret it, it must have enormously enlarged the sphere of the Patria Potestas, and it seems to me that the tightening of family relations which it effected is an agency which ought to be kept in view more than it has been, in accounting for the great moral revolution which was transforming the world.

Before this branch of our subject is dismissed, it should be observed that the Paterfamilias was answerable for the delicts (or *torts*) of his Sons under Power. He was similarly liable for the torts of his slaves; but in both cases he originally possessed the singular privilege of tendering the delinquent's person in full satisfaction of the damage. The responsibility thus incurred on behalf of sons, coupled with the mutual incapacity of Parent and Child under Power to sue one another, has seemed to some jurists to be best explained by the assumption of a "unity of person" between the Paterfamilias and the Filius-familias. In the Chapter on Successions I shall attempt to show in what sense, and to what extent, this "unity" can be accepted as a reality. I can only say at present that these responsibilities of the Paterfamilias, and other legal phenomena which will be discussed hereafter, appear to me to point at certain *duties* of the primitive Patriarchal chieftain which balanced his *rights*. I conceive that, if he disposed absolutely of the persons and fortune of his clansmen, this repre-

sentative ownership was coextensive with a liability to provide for all members of the brotherhood out of the common fund. The difficulty is to throw ourselves out of our habitual associations sufficiently for conceiving the nature of his obligation. It was not a legal duty, for law had not yet penetrated into the precinct of the Family. To call it *moral* is perhaps to anticipate the ideas belonging to a later stage of mental development; but the expression "moral obligation" is significant enough for our purpose, if we understand by it a duty semi-consciously followed and enforced rather by instinct and habit than by definite sanctions.

The Patria Potestas, in its normal shape, has not been, and, as it seems to me, could not have been, a generally durable institution. The proof of its former universality is therefore incomplete so long as we consider it by itself; but the demonstration may be carried much further by examining other departments of ancient law which depend on it ultimately, but not by a thread of connexion visible in all its parts or to all eyes. Let us turn for example to Kinship, or in other words, to the scale on which the proximity of relatives to each other is calculated in archaic jurisprudence. Here again it will be convenient to employ the Roman terms, Agnatic and Cognatic relationship. *Cognatic* relationship is simply the conception of kinship familiar to modern ideas: it is the relation-

ship arising through common descent from the same pair of married persons, whether the descent be traced through males or females. *Agnatic* relationship is something very different: it excludes a number of persons whom we in our day should certainly consider of kin to ourselves, and it includes many more whom we should never reckon among our kindred. It is in truth the connexion existing between the members of the Family, conceived as it was in the most ancient times. The limits of this connexion are far from conterminous with those of modern relationship.

Cognates then are all those persons who can trace their blood to a single ancestor and ancestress; or, if we take the strict technical meaning of the word in Roman law, they are all who trace their blood to the legitimate marriage of a common pair. "Cognation" is therefore a relative term, and the degree of connexion in blood which it indicates depends on the particular marriage which is selected as the commencement of the calculation. If we begin with the marriage of father and mother, Cognation will only express the relationship of brothers and sisters; if we take that of the grandfather and grandmother, then uncles, aunts, and their descendants will also be included in the notion of Cognation, and following the same process a larger number of Cognates may be continually obtained by choosing the starting point

higher and higher up in the line of ascent. All this is easily understood by a modern; but who are the Agnates? In the first place, they are all the Cognates who trace their connexion exclusively through males. A table of Cognates is, of course, formed by taking each lineal ancestor in turn and including all his descendants of both sexes in the tabular view; if then, in tracing the various branches of such a genealogical table or tree, we stop whenever we come to the name of a female and pursue that particular branch or ramification no further, all who remain after the descendants of women have been excluded are Agnates, and their connexion together is Agnatic Relationship. I dwell a little on the process which is practically followed in separating them from the Cognates, because it explains a memorable legal maxim, "Mulier est finis familiæ"—a woman is the terminus of the family. A female name closes the branch or twig of the genealogy in which it occurs. None of the descendants of a female are included in the primitive notion of family relationship.

If the system of archaic law at which we are looking be one which admits Adoption, we must add to the Agnates thus obtained all persons, male or female, who have been brought into the family by the artificial extension of its boundaries. But the descendants of such persons will only be Agnates, if they satisfy the conditions which have just been described.

What then is the reason of this arbitrary inclusion and exclusion? Why should a conception of Kinship, so elastic as to include strangers brought into the family by adoption, be nevertheless so narrow as to shut out the descendants of a female member? To solve these questions we must recur to the Patria Potestas. The foundation of Agnation is not the marriage of Father and Mother, but the authority of the Father. All persons are Agnatically connected together who are under the same Paternal Power, or who have been under it, or who might have been under it if their lineal ancestor had lived long enough to exercise his empire. In truth, in the primitive view, Relationship is exactly limited by Patria Potestas. Where the Potestas begins, Kinship begins; and therefore adoptive relatives are among the kindred. Where the Potestas ends, Kinship ends; so that a son emancipated by his father loses all rights of Agnation. And here we have the reason why the descendants of females are outside the limits of archaic kinship. If a woman died unmarried, she could have no legitimate descendants. If she married, her children fell under the Patria Potestas, not of her Father, but of her Husband, and thus were lost to her own family. It is obvious that the organization of primitive societies would have been confounded, if men had called themselves relatives of their mother's relatives. The inference would have been that a person

might be subject to two distinct Patriæ Potestates; but distinct Patriæ Potestates implied distinct jurisdictions, so that anybody amenable to two of them at the same time would have lived under two different dispensations. As long as the Family was an imperium in imperio, a community within the commonwealth, governed by its own institutions of which the parent was the source, the limitation of relationship to the Agnates was a necessary security against a conflict of laws in the domestic forum.

The Paternal Powers proper are extinguished by the death of the Parent, but Agnation is as it were a mould which retains their imprint after they have ceased to exist. Hence comes the interest of Agnation for the inquirer into the history of jurisprudence. The powers themselves are discernible in comparatively few monuments of ancient law, but Agnatic Relationship, which implies their former existence, is discoverable almost everywhere. There are few indigenous bodies of law belonging to communities of the Indo-European stock, which do not exhibit peculiarities in the most ancient part of their structure which are clearly referable to Agnation. In Hindoo law, for example, which is saturated with the primitive notions of family dependency, kinship is entirely Agnatic, and I am informed that in Hindoo genealogies the names of women are generally omitted altogether. The same view of relationship pervades

so much of the laws of the races who overran the Roman Empire as appears to have really formed part of their primitive usage, and we may suspect that it would have perpetuated itself even more than it has in modern European jurisprudence, if it had not been for the vast influence of the later Roman law on modern thought. The Prætors early laid hold on Cognation as the *natural* form of kinship, and spared no pains in purifying their system from the older conception. Their ideas have descended to us, but still traces of Agnation are to be seen in many of the modern rules of succession after death. The exclusion of females and their children from governmental functions, commonly attributed to the usage of the Salian Franks, has certainly an agnatic origin, being descended from the ancient German rule of succession to allodial property. In Agnation too is to be sought the explanation of that extraordinary rule of English Law, only recently repealed, which prohibited brothers of the half-blood from succeeding to one another's lands. In the Customs of Normandy, the rule applies to *uterine* brothers only, that is, to brothers by the same mother but not by the same father; and, limited in this way, it is a strict deduction from the system of Agnation, under which uterine brothers are no relations at all to one another. When it was transplanted to England, the English judges, who had no clue to its principle, interpreted it as

a general prohibition against the succession of the half-blood, and extended it to *consanguineous* brothers, that is to sons of the same father by different wives. In all the literature which enshrines the pretended philosophy of law, there is nothing more curious than the pages of elaborate sophistry in which Blackstone attempts to explain and justify the exclusion of the half-blood.

It may be shown, I think, that the Family, as held together by the Patria Potestas, is the nidus out of which the entire Law of Persons has germinated. Of all the chapters of that Law the most important is that which is concerned with the status of Females. It has just been stated that Primitive Jurisprudence, though it does not allow a Woman to communicate any rights of Agnation to her descendants, includes herself nevertheless in the Agnatic bond. Indeed, the relation of a female to the family in which she was born is much stricter, closer, and more durable than that which unites her male kinsmen. We have several times laid down that early law takes notice of Families only; this is the same thing as saying that it only takes notice of persons exercising Patria Potestas, and accordingly the only principle on which it enfranchises a son or grandson at the death of his Parent, is a consideration of the capacity inherent in such son or grandson to become himself the head of a new family and the root of a new set of Parental

Powers. But a woman, of course, has no capacity of the kind, and no title accordingly to the liberation which it confers. There is therefore a peculiar contrivance of archaic jurisprudence for retaining her in the bondage of the Family for life. This is the institution known to the oldest Roman law as the Perpetual Tutelage of Women, under which a Female, though relieved from her Parent's authority by his decease, continues subject through life to her nearest male relations, or to her Father's nominees, as her Guardians. Perpetual Guardianship is obviously neither more nor less than an artificial prolongation of the Patria Potestas, when for other purposes it has been dissolved. In India, the system survives in absolute completeness, and its operation is so strict that a Hindoo Mother frequently becomes the ward of her own sons. Even in Europe, the laws of the Scandinavian nations respecting women preserved it until quite recently. The invaders of the Western Empire had it universally among their indigenous usages, and indeed their ideas on the subject of Guardianship, in all its forms, were among the most retrogressive of those which they introduced into the Western world. But from the mature Roman jurisprudence it had entirely disappeared. We should know almost nothing about it, if we had only the compilations of Justinian to consult; but the discovery of the manuscript of Gaius discloses it to us at a most

interesting epoch, just when it had fallen into complete discredit and was verging on extinction. The great jurisconsult himself scouts the popular apology offered for it in the mental inferiority of the female sex, and a considerable part of his volume is taken up with descriptions of the numerous expedients, some of them displaying extraordinary ingenuity, which the Roman lawyers had devised for enabling Women to defeat the ancient rules. Led by their theory of Natural Law, the jurisconsults had evidently at this time assumed the equality of the sexes as a principle of their code of equity. The restrictions which they attacked were, it is to be observed, restrictions on the disposition of property, for which the assent of the woman's guardians was still formally required. Control of her person was apparently quite obsolete.

Ancient law subordinates the woman to her blood relations, while a prime phenomenon of modern jurisprudence has been her subordination to her husband The history of the change is remarkable. It begin far back in the annals of Rome. Anciently, ther were three modes in which marriage might be cor tracted according to Roman usage, one involving religious solemnity, the other two the observance certain secular formalities. By the religious marria or *Confarreation*; by the higher form of civil marria which was called *Coemption*; and by the lower for which was termed *Usus*, the Husband acquired

number of rights over the person and property of his wife, which were on the whole in excess of such as are conferred on him in any system of modern jurisprudence. But in what capacity did he acquire them? Not as *Husband*, but as *Father*. By the Confarreation, Coemption, and Usus, the woman passed *in manum viri*, that is, in law she became the *Daughter* of her husband. She was included in his Patria Potestas. She incurred all the liabilities springing out of it while it subsisted, and surviving it when it had expired. All her property became absolutely his, and she was retained in tutelage after his death to the guardian whom he had appointed by will. These three ancient forms of marriage fell, however, gradually into disuse, so that, at the most splendid period of Roman greatness, they had almost entirely given place to a fashion of wedlock—old apparently, but not hitherto considered reputable—which was founded on a modification of the lower form of civil marriage. Without explaining the technical mechanism of the institution now generally popular, I may describe it as amounting in law to a little more than a temporary deposit of the woman by her family. The rights of the family remained unimpaired, and the lady continued in the tutelage of guardians whom her parents had appointed and whose privileges of control overrode, in many material respects, the inferior authority of her husband. The consequence was

that the situation of the Roman female, whether married or unmarried, became one of great personal and proprietary independence, for the tendency of the later law, as I have already hinted, was to reduce the power of the guardian to a nullity, while the form of marriage in fashion conferred on the husband no compensating superiority. But Christianity tended somewhat from the very first to narrow this remarkable liberty. Led at first by justifiable disrelish for the loose practices of the decaying heathen world, but afterwards hurried on by a passion of asceticism, the professors of the new faith looked with disfavour on a marital tie which was in fact the laxest the Western world has seen. The latest Roman law, so far as it is touched by the Constitutions of the Christian Emperors, bears some marks of a reaction against the liberal doctrines of the great Antonine jurisconsults. And the prevalent state of religious sentiment may explain why it is that modern jurisprudence, forged in the furnace of barbarian conquest, and formed by the fusion of Roman jurisprudence with patriarchal usage, has absorbed, among its rudiments, much more than usual of those rules concerning the position of women which belong peculiarly to an imperfect civilisation. During the troubled era which begins modern history and while the laws of the Germanic and Sclavonic immigrants remained superposed like a separate layer above the Roman jurisprudence of their provinces

subjects, the women of the dominant races are seen everywhere under various forms of archaic guardianship, and the husband who takes a wife from any family except his own pays a money-price to her relations for the tutelage which they surrender to him. When we move onwards, and the code of the middle ages has been formed by the amalgamation of the two systems, the law relating to women carries the stamp of its double origin. The principle of the Roman jurisprudence is so far triumphant that unmarried females are generally (though there are local exceptions to the rule) relieved from the bondage of the family; but the archaic principle of the barbarians has fixed the position of married women, and the husband has drawn to himself in his marital character the powers which had once belonged to his wife's male kindred, the only difference being that he no longer purchases his privileges. At this point therefore the modern law of Southern and Western Europe begins to be distinguished by one of its chief characteristics, the comparative freedom it allows to unmarried women and widows, the heavy disabilities it imposes on wives. It was very long before the subordination entailed on the other sex by marriage was sensibly diminished. The principal and most powerful solvent of the revived barbarism of Europe was always the codified jurisprudence of Justinian, wherever it was studied with that passionate

enthusiasm which it seldom failed to awaken. It covertly but most efficaciously undermined the customs which it pretended merely to interpret. But the Chapter of law relating to married women was for the most part read by the light, not of Roman, but of Canon Law, which in no one particular departs so widely from the spirit of the secular jurisprudence as in the view it takes of the relations created by marriage. This was in part inevitable, since no society which preserves any tincture of Christian institution is likely to restore to married women the personal liberty conferred on them by the middle Roman law, but the proprietary disabilities of married females stand on quite a different basis from their personal incapacities, and it is by the tendency of their doctrines to keep alive and consolidate the former, that the expositors of the Canon Law have deeply injured civilisation. There are many vestiges of a struggle between the secular and ecclesiastical principles, but the Canon Law nearly everywhere prevailed. In some of the French provinces, married women, of a rank below nobility, obtained all the powers of dealing with property which Roman jurisprudence had allowed, and this local law has been largely followed by the Code Napoleon; but the state of the Scottish law shows that scrupulous deference to the doctrines of the Roman jurisconsults did not always extend to mitigating the disabilities of wives.

The systems however which are least indulgent to married women are invariably those which have followed the Canon Law exclusively, or those which, from the lateness of their contact with European civilisation, have never had their archaisms weeded out. The Danish and Swedish laws, harsh for many centuries to all females, are still much less favourable to wives than the generality of Continental codes. And yet more stringent in the proprietary incapacities it imposes is the English Common Law, which borrows far the greatest number of its fundamental principles from the jurisprudence of the Canonists. Indeed, the part of the Common Law which prescribes the legal situation of married women may serve to give an Englishman clear notions of the great institution which has been the principal subject of this chapter. I do not know how the operation and nature of the ancient Patria Potestas can be brought so vividly before the mind as by reflecting on the prerogatives attached to the husband by the pure English Common Law, and by recalling the rigorous consistency with which the view of a complete legal subjection on the part of the wife is carried by it, where it is untouched by equity or statutes, through every department of rights, duties and remedies. The distance between the eldest and latest Roman law on the subject of Children under Power may be considered as equivalent to the difference between

the Common Law and the jurisprudence of the Court of Chancery in the rules which they respectively apply to wives.

If we were to lose sight of the true origin of Guardianship in both its forms, and were to employ the common language on these topics, we should find ourselves remarking that, while the Tutelage of Women is an instance in which systems of archaic law push to an extravagant length the fiction of suspended rights, the rules which they lay down for the Guardianship of Male Orphans are an example of a fault in precisely the opposite direction. Such systems terminate the Tutelage of Males at an extraordinary early period. Under the ancient Roman law, which may be taken as their type, the son who was delivered from Patria Potestas by the death of his Father or Grandfather remained under guardianship till an epoch which for general purposes may be described as arriving with his fifteenth year; but the arrival of that epoch placed him at once in the full enjoyment of personal and proprietary independence. The period of minority appears therefore to have been as unreasonably short as the duration of the disabilities of women was preposterously long. But, in point of fact, there was no element either of excess or of shortcoming in the circumstances which gave their original form to the two kinds of guardianship. Neither the one nor the other of them was based on the slightest consideration of public or

private convenience. The guardianship of male orphans was no more designed originally to shield them till the arrival of years of discretion than the tutelage of women was intended to protect the other sex against its own feebleness. The reason why the death of the father delivered the son from the bondage of the family was the son's capacity for becoming himself the head of a new family and the founder of a new Patria Potestas: no such capacity was possessed by the woman, and therefore she was *never* enfranchised. Accordingly the Guardianship of Male Orphans was a contrivance for keeping alive the semblance of subordination to the family of the Parent, up to the time when the child was supposed capable of becoming a parent himself. It was a prolongation of the Patria Potestas up to the period of bare physical manhood. It ended with puberty, for the rigour of the theory demanded that it should do so. Inasmuch, however, as it did not profess to conduct the orphan ward to the age of intellectual maturity or fitness for affairs, it was quite unequal to the purposes of general convenience; and this the Romans seem to have discovered at a very early stage of their social progress. One of the very oldest monuments of Roman legislation is the *Lex Lætoria* or *Plætoria*, which placed all free males who were of full years and rights under the temporary control of a new class of guardians, called *Curatores*, whose sanction was required to

validate their acts or contracts. The twenty-sixth year of the young man's age was the limit of this statutory supervision ; and it is exclusively with reference to the age of twenty-five that the terms "majority" and "minority" are employed in Roman law. *Pupilage* or *wardship* in modern jurisprudence has adjusted itself with tolerable regularity to the simple principle of protection to the immaturity of youth both bodily and mental. It has its natural termination with years of discretion. But for protection against physical weakness and for protection against intellectual incapacity, the Romans looked to two different institutions, distinct both in theory and design. The ideas attendant on both are combined in the modern idea of guardianship.

The Law of Persons contains but one other chapter which can be usefully cited for our present purpose. The legal rules by which systems of mature jurisprudence regulate the connexion of *Master* and *Slave*, present no very distinct traces of the original condition common to ancient societies. But there are reasons for this exception. There seems to be something in the institution of Slavery which has at all times either shocked or perplexed mankind however little habituated to reflection, and however slightly advanced in the cultivation of its moral instincts. The compunction which ancient communities almost unconsciously experienced appears to have always resulted in the adoption of some ima

nary principle upon which a defence, or at least a rationale, of slavery could be plausibly founded. Very early in their history the Greeks explained the institution as grounded on the intellectual inferiority of certain races and their consequent natural aptitude for the servile condition. The Romans, in a spirit equally characteristic, derived it from a supposed agreement between the victor and the vanquished, in which the first stipulated for the perpetual services of his foe; and the other gained in consideration the life which he had legitimately forfeited. Such theories were not only unsound but plainly unequal to the case for which they affected to account. Still they exercised powerful influence in many ways. They satisfied the conscience of the Master. They perpetuated and probably increased the debasement of the Slave. And they naturally tended to put out of sight the relation in which servitude had originally stood to the rest of the domestic system. This relation, though not clearly exhibited, is casually indicated in many parts of primitive law, and more particularly in the typical system—that of ancient Rome.

Much industry and some learning have been bestowed in the United States of America on the question whether the Slave was in the early stages of society a recognised member of the Family. There is a sense in which an affirmative answer must certainly

be given. It is clear, from the testimony both of ancient law and of many primeval histories, that the Slave might under certain conditions be made the Heir, or Universal Successor, of the Master, and this significant faculty, as I shall explain in the Chapter on Succession, implies that the government and representation of the Family might, in a particular state of circumstances, devolve on the bondman. It seems, however, to be assumed in the American arguments on the subject that, if we allow Slavery to have been a primitive Family institution, the acknowledgement is pregnant with an admission of the moral defensibility of Negro-servitude at the present moment. What then is meant by saying that the Slave was originally included in the Family? Not that his situation may not have been the fruit of the coarsest motives which can actuate man. The simple wish to use the bodily powers of another person as a means of ministering to one's own ease or pleasure is doubtless the foundation of Slavery, and as old as human nature. When we speak of the Slave as anciently included in the Family, we intend to assert nothing as to the motives of those who brought him into it or kept him there; we merely imply that the tie which bound him to his master was regarded as one of the same general character with that which united every other member of the group to its chieftain. This consequence is, in fact, carried in the general assertion already made that the primitive ideas of mankin

were unequal to comprehending any basis of the connexion *inter se* of individuals, apart from the relations of family. The Family consisted primarily of those who belonged to it by consanguinity, and next of those who had been engrafted on it by adoption; but there was still a third class of persons who were only joined to it by common subjection to its head, and these were the Slaves. The born and the adopted subjects of the chief were raised above the Slave by the certainty that in the ordinary course of events they would be relieved from bondage and entitled to exercise powers of their own; but that the inferiority of the Slave was not such as to place him outside the pale of the Family, or such as to degrade him to the footing of inanimate property, is clearly proved, I think, by the many traces which remain of his ancient capacity for inheritance in the last resort. It would, of course, be unsafe in the highest degree to hazard conjectures how far the lot of the Slave was mitigated, in the beginnings of society, by having a definite place reserved to him in the empire of the Father. It is, perhaps, more probable that the son was practically assimilated to the Slave, than that the Slave shared any of the tenderness which in later times was shown to the son. But it may be asserted with some confidence of advanced and matured codes that, wherever servitude is sanctioned, the Slave has uniformly greater advantages under systems which preserve some memento of his earlier condition than

under those which have adopted some other theory of his civil degradation. The point of view from which jurisprudence regards the Slave is always of great importance to him. The Roman law was arrested in its growing tendency to look upon him more and more as an article of property by the theory of the Law of Nature; and hence it is that, wherever servitude is sanctioned by institutions which have been deeply affected by Roman jurisprudence, the servile condition is never intolerably wretched. There is a great deal of evidence that in those American States which have taken the highly Romanised code of Louisiana as the basis of their jurisprudence, the lot and prospects of the Negro-population were better in many material respects, until the letter of the fundamental law was overlaid by recent statutory enactments passed under the influence of panic, than under institutions founded on the English Common Law, which, as recently interpreted, has no true place for the Slave, and can only therefore regard him as a chattel.

We have now examined all parts of the ancient Law of Persons which fall within the scope of this treatise, and the result of the inquiry is, I trust, to give additional definiteness and precision to our view of the infancy of jurisprudence. The Civil laws of States first make their appearance as the Themiste of a patriarchal sovereign, and we can now see that these Themistes are probably only a developed form

of the irresponsible commands which, in a still earlier condition of the race, the head of each isolated household may have addressed to his wives, his children, and his slaves. But, even after the State has been organised, the laws have still an extremely limited application. Whether they retain their primitive character as Themistes, or whether they advance to the condition of Customs or Codified Texts, they are binding not on individuals, but on Families. Ancient jurisprudence, if a perhaps deceptive comparison may be employed, may be likened to International Law, filling nothing, as it were, excepting the interstices between the great groups which are the atoms of society. In a community so situated, the legislation of assemblies and the jurisdiction of Courts reach only to the heads of families, and to every other individual the rule of conduct is the law of his home, of which his Parent is the legislator. But the sphere of civil law, small at first, tends steadily to enlarge itself. The agents of legal change, Fictions, Equity, and Legislation, are brought in turn to bear, on the primeval institutions, and at every point of the progress, a greater number of personal rights and a larger amount of property are removed from the domestic forum to the cognizance of the public tribunals. The ordinances of the government obtain gradually the same efficacy in private concerns as in matters of state, and are no longer liable to be overridden by the behests of a despot enthroned by

each hearthstone. We have in the annals of Roman law a nearly complete history of the crumbling away of an archaic system, and of the formation of new institutions from the re-combined materials, institutions some of which descended unimpaired to the modern world, while others, destroyed or corrupted by contact with barbarism in the dark ages, had again to be recovered by mankind. When we leave this jurisprudence at the epoch of its final reconstruction by Justinian, few traces of archaism can be discovered in any part of it except in the single article of the extensive powers still reserved to the living Parent. Everywhere else principles of convenience, or of symmetry, or of simplification—new principles at any rate—have usurped the authority of the jejune considerations which satisfied the conscience of ancient times. Everywhere a new morality has displaced the canons of conduct and the reasons of acquiescence which were in unison with the ancient usages, because in fact they were born of them.

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the co

lapse of the ancient organisation can only be perceived by careful study of the phenomena they present. But, whatever its pace, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared—it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. So too the status of the Son under Power has no true place in the law of modern European societies. If any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives its legal validity. The apparent

exceptions are exceptions of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their capacities and incapacities regulated by the Law of Persons. But why? The reason is differently expressed in the conventional language of different systems, but in substance it is stated to the same effect by all. The great majority of Jurists are constant to the principle that the classes of persons just mentioned are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract.

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract.*

CHAPTER VI.

THE EARLY HISTORY OF TESTAMENTARY SUCCESSION.

If an attempt were made to demonstrate in England the superiority of the historical method of investigation to the modes of inquiry concerning Jurisprudence which are in fashion among us, no department of Law would better serve as an example than Testaments or Wills. Its capabilities it owes to its great length and great continuity. At the beginning of its history we find ourselves in the very infancy of the social state, surrounded by conceptions which it requires some effort of mind to realise in their ancient form; while here, at the other extremity of its line of progress, we are in the midst of legal notions which are nothing more than those same conceptions disguised by the phraseology and by the habits of thought which belong to modern times, and exhibiting therefore a difficulty of another kind, the difficulty of believing that ideas which form part of our every-day mental stock can really stand in need of analysis and examination. The growth of the Law of

before these controversies rose into overwhelming importance, all the intellectual activity of the Western Romans had been expended on jurisprudence exclusively. They had been occupied in applying a peculiar set of principles to all the combinations in which the circumstances of life are capable of being arranged. No foreign pursuit or taste called off their attention from this engrossing occupation, and for carrying it on they possessed a vocabulary as accurate as it was copious, a strict method of reasoning, a stock of general propositions on conduct more or less verified by experience, and a rigid moral philosophy. It was impossible that they should not select from the questions indicated by the Christian records those which had some affinity with the order of speculations to which they were accustomed, and that their manner of dealing with them should not borrow something from their forensic habits. Almost everybody who has knowledge enough of Roman law to appreciate the Roman penal system, the Roman theory of the obligations established by Contract or Delict, the Roman view of Debts and of the modes of incurring, extinguishing, and transmitting them, the Roman notion of the continuance of individual existence by Universal Succession, may be trusted to say whence arose the frame of mind to which the problems of Western theology proved so congenial, whence came the phraseology in which these problems were stated, and

whence the description of reasoning employed in their solution. It must only be recollected that the Roman law which had worked itself into Western thought was neither the archaic system of the ancient city, nor the pruned and curtailed jurisprudence of the Byzantine Emperors; still less, of course, was it the mass of rules, nearly buried in a parasitical overgrowth of modern speculative doctrine, which passes by the name of Modern Civil Law. I speak only of that philosophy of jurisprudence, wrought out by the great juridical thinkers of the Antonine age, which may still be partially reproduced from the Pandects of Justinian, a system to which few faults can be attributed except perhaps that it aimed at a higher degree of elegance, certainty, and precision than human affairs will permit to the limits within which human laws seek to confine them.

It is a singular result of that ignorance of Roman law which Englishmen readily confess, and of which they are sometimes not ashamed to boast, that many English writers of note and credit have been led by it to put forward the most untenable of paradoxes concerning the condition of human intellect during the Roman empire. It has been constantly asserted, as unhesitatingly as if there were no temerity in advancing the proposition, that from the close of the Augustan era to the general awakening of interest on the points of the Christian faith, the mental energies

of the civilised world were smitten with a paralysis. Now there are two subjects of thought—the only two perhaps with the exception of physical science—which are able to give employment to all the powers and capacities which the mind possesses. One of them is Metaphysical inquiry, which knows no limits so long as the mind is satisfied to work on itself; the other is Law, which is as extensive as the concerns of mankind. It happens that, during the very period indicated, the Greek-speaking provinces were devoted to one, the Latin-speaking provinces to the other, of these studies. I say nothing of the fruits of speculation in Alexandria and the East, but I confidently affirm that Rome and the West had an occupation in hand fully capable of compensating them for the absence of every other mental exercise, and I add that the results achieved, so far as we know them, were not unworthy of the continuous and exclusive labour bestowed on producing them. Nobody except a professional lawyer is perhaps in a position completely to understand how much of the intellectual strength of individuals Law is capable of absorbing; but a layman has no difficulty in comprehending why it was that an unusual share of the collective intellect of Rome was engrossed by jurisprudence. "The proficiency * of a given community in jurisprudence depends in the long run on the same conditions as its

* *Cambridge Essays*, 1856.

progress in any other line of inquiry; and the chief of these are the proportion of the national intellect devoted to it, and the length of time during which it is so devoted." Now, a combination of all the causes, direct and indirect, which contribute to the advancing and perfecting of a science continued to operate on the jurisprudence of Rome through the entire space between the Twelve Tables and the severance of the two Empires,—and that not irregularly or at intervals, but in steadily increasing force and constantly augmenting number. We should reflect that the earliest intellectual exercise to which a young nation devotes itself is the study of its laws. As soon as the mind makes its first conscious efforts towards generalisation, the concerns of every-day life are the first to press for inclusion within general rules and comprehensive formulas. The popularity of the pursuit on which all the energies of the young commonwealth are bent is at the outset unbounded; but it ceases in time. The monopoly of mind by law is broken down. The crowd at the morning audience of the great Roman jurisconsult lessens. The students are counted by hundreds instead of thousands in the English Inns of Court. Art, Literature, Science, and Politics, claim their share of the national intellect; and the practice of jurisprudence is confined within the circle of a profession, never indeed limited or insignificant, but attracted

as much by the rewards as by the intrinsic recommendations of their science. This succession of changes exhibited itself even more strikingly at Rome than in England. To the close of the Republic the law was the sole field for all ability except the special talent of a capacity for generalship. But a new stage of intellectual progress began with the Augustan age, as it did with our own Elizabethan era. We all know what were its achievements in poetry and prose; but there are some indications, it should be remarked, that, besides its efflorescence in ornamental literature, it was on the eve of throwing out new aptitudes for conquest in physical science. Here, however, is the point at which the history of mind in the Roman States ceases to be parallel to the routes which mental progress has since then pursued. The brief span of Roman literature, strictly so called, was suddenly closed under a variety of influences, which though they may partially be traced it would be improper in this place to analyse. Ancient intellect was forcibly thrust back into its old courses, and law again became no less exclusively the proper sphere for talent than it had been in the days when the Romans despised philosophy and poetry as the toys of a childish race. Of what nature were the external inducements which, during the Imperial period, tended to draw a man of inherent capacity to the pursuits of the jurisconsult may best be understood

by considering the option which was practically before him in his choice of a profession. He might become a teacher of rhetoric, a commander of frontier-posts, or a professional writer of panegyrics. The only other walk of active life which was open to him was the practice of the law. Through *that* lay the approach to wealth, to fame, to office, to the council-chamber of the monarch—it may be to the very throne itself.

The premium on the study of jurisprudence was so enormous that there were schools of law in every part of the Empire, even in the very domain of Metaphysics. But, though the transfer of the seat of empire to Byzantium gave a perceptible impetus to its cultivation in the East, jurisprudence never dethroned the pursuits which there competed with it. Its language was Latin, an exotic dialect in the Eastern half of the Empire. It is only of the West that we can lay down that law was not only the mental food of the ambitious and aspiring, but the sole aliment of all intellectual activity. Greek philosophy had never been more than a transient fashionable taste with the educated class of Rome itself, and when the new Eastern capital had been created, and the Empire subsequently divided into two, the divorce of the Western provinces from Greek speculation, and their exclusive devotion to jurisprudence, became more decided than ever. As soon then as they ceased to sit

at the feet of the Greeks and began to ponder out a theology of their own, the theology proved to be permeated with forensic ideas and couched in a forensic phraseology. It is certain that this substratum of law in Western theology lies exceedingly deep. A new set of Greek theories, the Aristotelian philosophy, made their way afterwards into the West, and almost entirely buried its indigenous doctrines. But when at the Reformation it partially shook itself free from their influence, it instantly supplied their place with Law. It is difficult to say whether the religious system of Calvin or the religious system of the Arminians has the more markedly legal character.

The vast influence of this specific jurisprudence of Contract produced by the Romans upon the corresponding department of modern Law belongs rather to the history of mature jurisprudence than to a treatise like the present. It did not make itself felt till the school of Bologna founded the legal science of modern Europe. But the fact that the Romans, before their Empire fell, had so fully developed the conception of Contract becomes of importance at a much earlier period than this. Feudalism, I have repeatedly asserted, was a compound of archaic barbarian usage with Roman law; no other explanation of it is tenable, or even intelligible. The earliest social forms of the feudal period differ in little from the ordinary associations in which the men of primi-

tive civilisations are everywhere seen united. A Fief was an organically complete brotherhood of associates whose proprietary and personal rights were inextricably blended together. It had much in common with an Indian Village Community and much in common with a Highland clan. But still it presents some phenomena which we never find in the associations which are spontaneously formed by beginners in civilisation. True archaic communities are held together not by express rules, but by sentiment, or, we should perhaps say, by instinct; and new comers into the brotherhood are brought within the range of this instinct by falsely pretending to share in the blood-relationship from which it naturally springs. But the earliest feudal communities were neither bound together by mere sentiment nor recruited by a fiction. The tie which united them was Contract. and they obtained new associates by contracting with them. The relation of the lord to the vassals had originally been settled by express engagement, and a person wishing to engraft himself on the brotherhood by *commendation* or *infeudation* came to a distinct understanding as to the conditions on which he was to be admitted. It is therefore the sphere occupied in them by Contract which principally distinguishes the feudal institutions from the unadulterated usages of primitive races. The lord had many of the characteristics of a patriarchal chieftain, but his pre-

rogative was limited by a variety of settled customs traceable to the express conditions which had been agreed upon when the infeudation took place. Hence flow the chief differences which forbid us to class the feudal societies with true archaic communities. They were much more durable and much more various; more durable, because express rules are less destructible than instinctive habits, and more various, because the contracts on which they were founded were adjusted to the minutest circumstances and wishes of the persons who surrendered or granted away their lands. This last consideration may serve to indicate how greatly the vulgar opinions current among us as to the origin of modern society stand in need of revision. It is often said that the irregular and various contour of modern civilisation is due to the exuberant and erratic genius of the Germanic races, and it is often contrasted with the dull routine of the Roman Empire. The truth is that the Empire bequeathed to modern society the legal conception to which all this irregularity is attributable; if the customs and institutions of barbarians have one characteristic more striking than another, it is their extreme uniformity.

CHAPTER X.

THE EARLY HISTORY OF DELICT AND CRIME.

THE Teutonic Codes, including those of our Anglo-Saxon ancestors, are the only bodies of archaic secular law which have come down to us in such a state that we can form an exact notion of their original dimensions. Although the extant fragments of Roman and Hellenic codes suffice to prove to us their general character, there does not remain enough of them for us to be quite sure of their precise magnitude or of the proportion of their parts to each other. But still on the whole all the known collections of ancient law are characterised by a feature which broadly distinguishes them from systems of mature jurisprudence. The proportion of criminal to civil law is exceedingly different. In the German codes, the civil part of the law has trifling dimensions as compared with the criminal. The traditions which speak of the sanguinary penalties inflicted by the code of Draco seem to indicate that it had the same characteristic. In the Twelve Tables alone, produced by a society of greater legal genius and at first of gentler manners, the civil law has something like its modern precedence; but the relative amount of space given

to the modes of redressing wrong, though not enormous, appears to have been large. It may be laid down, I think, that the more archaic the code, the fuller and the minuter is its penal legislation. The phenomenon has often been observed, and has been explained, no doubt to a great extent correctly, by the violence habitual to the communities which for the first time reduced their laws to writing. The legislator, it is said, proportioned the divisions of his work to the frequency of a certain class of incidents in barbarian life. I imagine, however, that this account is not quite complete. It should be recollected that the comparative barrenness of civil law in archaic collections is consistent with those other characteristics of ancient jurisprudence which have been discussed in this treatise. Nine-tenths of the civil part of the law practised by civilised societies are made up of the Law of Persons, of the Law of Property and of Inheritance, and of the Law of Contract. But it is plain that all these provinces of jurisprudence must shrink within narrower boundaries, the nearer we make our approaches to the infancy of social brotherhood. The Law of Persons, which is nothing else than the Law of Status, will be restricted to the scantiest limits as long as all forms of status are merged in common subjection to Paternal Power, as long as the Wife has no rights against her Husband, the Son none against his

Father, and the infant Ward none against the Agnates who are his Guardians. Similarly, the rules relating to Property and Succession can never be plentiful, so long as land and goods devolve within the family, and, if distributed at all, are distributed inside its circle. But the greatest gap in ancient civil law will always be caused by the absence of Contract, which some archaic codes do not mention at all, while others significantly attest the immaturity of the moral notions on which Contract depends by supplying its place with an elaborate jurisprudence of Oaths. There are no corresponding reasons for the poverty of penal law, and accordingly, even if it be hazardous to pronounce that the childhood of nations is always a period of ungoverned violence, we shall still be able to understand why the modern relation of criminal law to civil should be inverted in ancient codes.

I have spoken of primitive jurisprudence as giving to *criminal* law a priority unknown in a later age. The expression has been used for convenience sake, but in fact the inspection of ancient codes shows that the law which they exhibit in unusual quantities is not true criminal law. All civilised systems agree in drawing a distinction between offences against the State or Community and offences against the Individual, and the two classes of injuries, thus kept apart, I may here, without pretending that the terms

have always been employed consistently in jurisprudence, call Crimes and Wrongs, *crimina* and *delicta*. Now the penal Law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds. If the Commentaries of Gaius be opened at the place where the writer treats of the penal jurisprudence founded on the Twelve Tables, it will be seen that at the head of the civil wrongs recognised by the Roman law stood *Furtum* or *Theft*. Offences which we are accustomed to regard exclusively as *crimes* are exclusively treated as *torts*, and not theft only, but assault and violent robbery, are associated by the jurisconsult with trespass, libel and slander. All alike gave rise to an Obligation or *vinculum juris*, and were all requited by a payment of money. This peculiarity, however, is most strongly brought out in the consolidated Laws of the Germanic tribes. Without an exception, they describe an immense system of money compensations for homicide, and with few exceptions, as large a scheme of compensation for minor injuries. "Under Anglo-Saxon law," writes Mr. Kemble (*Anglo-Saxons*, i. 177), "a sum was placed on the life of every free man, according to his rank, and a corresponding sum on every wound

that could be inflicted on his person, for nearly every injury that could be done to his civil rights, honour, or peace; the sum being aggravated according to adventitious circumstances." These compositions are evidently regarded as a valuable source of income; highly complex rules regulate the title to them and the responsibility for them; and, as I have already had occasion to state, they often follow a very peculiar line of devolution, if they have not been acquitted at the decease of the person to whom they belong. If therefore the criterion of a *delict*, *wrong*, or *tort* be that the person who suffers it, and not the State, is conceived to be wronged, it may be asserted that in the infancy of jurisprudence the citizen depends for protection against violence or fraud not on the Law of Crime but on the Law of Tort.

Torts then are copiously enlarged upon in primitive jurisprudence. It must be added that Sins are known to it also. Of the Teutonic codes it is almost unnecessary to make this assertion, because those codes, in the form in which we have received them, were compiled or recast by Christian legislators. But it is also true that non-Christian bodies of archaic law entail penal consequences on certain classes of acts and on certain classes of omissions, as being violations of divine prescriptions and commands. The law administered at Athens by the senate of

Areopagus was probably a special religious code, and at Rome, apparently from a very early period, the Pontifical jurisprudence punished adultery, sacrilege and perhaps murder. There were therefore in the Athenian and in the Roman States laws punishing *sins*. There were also laws punishing *torts*. The conception of offence against God produced the first class of ordinances; the conception of offence against one's neighbour produced the second; but the idea of offence against the State or aggregate community did not at first produce a true criminal jurisprudence.

Yet it is not to be supposed that a conception so simple and elementary as that of wrong done to the State was wanting in any primitive society. It seems rather that the very distinctness with which this conception is realised is the true cause which at first prevents the growth of a criminal law. At all events, when the Roman community conceived itself to be injured, the analogy of a personal wrong received was carried out to its consequences with absolute literalness, and the State avenged itself by a single act on the individual wrong-doer. The result was that, in the infancy of the commonwealth, every offence vitally touching its security or its interests was punished by a separate enactment of the legislature. And this is the earliest conception of a *crimen* or Crime—an act involving such high issues that the State, instead of leaving its cognisance

to the civil tribunal or the religious court, directed a special law or *privilegium* against the perpetrator. Every indictment therefore took the form of a bill of pains and penalties, and the trial of a *criminal* was a proceeding wholly extraordinary, wholly irregular, wholly independent of settled rules and fixed conditions. Consequently, both for the reason that the tribunal dispensing justice was the sovereign State itself and also for the reason that no classification of the acts prescribed or forbidden was possible, there was not at this epoch any *Law* of Crimes, any criminal jurisprudence. The procedure was identical with the forms of passing an ordinary statute; it was set in motion by the same persons and conducted with precisely the same solemnities. And it is to be observed that, when a regular criminal law with an apparatus of Courts and officers for its administration had afterwards come into being, the old procedure, as might be supposed from its conformity with theory, still in strictness remained practicable; and, much as resort to such an expedient was discredited, the people of Rome always retained the power of punishing by a special law offences against its majesty. The classical scholar does not require to be reminded that in exactly the same manner the Athenian Bill of Pains and Penalties, or εἰσαγγελία, survived the establishment of regular tribunals. It is known too

that when the freemen of the Teutonic races assembled for legislation, they also claimed authority to punish offences of peculiar blackness or perpetrated by criminals of exalted station. Of this nature was the criminal jurisdiction of the Anglo-Saxon Witenagemot.

It may be thought that the difference which I have asserted to exist between the ancient and modern view of penal law has only a verbal existence. The community, it may be said, besides interposing to punish crimes legislatively, has from the earliest times interfered by its tribunals to compel the wrong-doer to compound for his wrong, and if it does this, it must always have supposed that in some way it was injured through his offence. But, however rigorous this inference may seem to us now-a-days, it is very doubtful whether it was actually drawn by the men of primitive antiquity. How little the notion of injury to the community had to do with the earliest interferences of the State *through its tribunals*, is shown by the curious circumstances that in the original administration of justice, the proceedings were a close imitation of the series of acts which were likely to be gone through in private life by persons who were disputing, but who afterwards suffered their quarrel to be appeased. The magistrate carefully stimulated the demeanour of a private arbitrator casually called in.

In order to show that this statement is not a mere fanciful conceit, I will produce the evidence on which it rests. Very far the most ancient judicial proceeding known to us is the Legis Actio Sacramenti of the Romans, out of which all the later Roman Law of Actions may be proved to have grown. Gaius carefully describes its ceremonial. Unmeaning and grotesque as it appears at first sight, a little attention enables us to decipher and interpret it.

The subject of litigation is supposed to be in Court. If it is moveable, it is actually there. If it be immoveable, a fragment or sample of it is brought in its place; land, for instance, is represented by a clod, a house by a single brick. In the example selected by Gaius, the suit is for a slave. The proceeding begins by the plaintiff's advancing with a rod, which, as Gaius expressly tells, symbolised a spear. He lays hold of the slave and asserts a right to him with the words, "*Hunc ego hominem ex Jure Quiritium meum esse dico secundum suam causam sicut dixi*;" and then saying, "*Ecce tibi Vindictam imposui*," he touches him with the spear. The defendant goes through the same series of acts and gestures. On this the Prætor intervenes, and bids the litigants relax their hold, "*Mittite ambo hominem.*" They obey, and the plaintiff demands from the defendant the reason of his interference, "*Postulo*

anne dicas quâ ex causâ vindicaveris," a question which is replied to by a fresh assertion of right, "*Jus peregi sicut vindictam imposui.*" On this, the first claimant offers to stake a sum of money, called a Sacramentum, on the justice of his own case, "*Quando tu injuriâ provocasti, D æris Sacramento te provoco*, and the defendant, in the phrase "*Similiter ego te*," accepts the wager. The subsequent proceedings were no longer of a formal kind, but it is to be observed that the Prætor took security for the Sacramentum, which always went into the coffers of the State.

Such was the necessary preface of every ancient Roman suit. It is impossible, I think, to refuse assent to the suggestion of those who see in it a dramatization of the origin of Justice. Two armed men are wrangling about some disputed property. The Prætor, *vir pietate gravis*, happens to be going by and interposes to stop the contest. The disputants state their case to him, and agree that he shall arbitrate between them, it being arranged that the loser, besides resigning the subject of the quarrel, shall pay a sum of money to the umpire as remuneration for his trouble and loss of time. This interpretation would be less plausible than it is, were it not that, by a surprising coincidence, the ceremony described by Gaius as the imperative course of proceeding in a Legis Actio is substantially

the same with one of the two subjects which the God Hephæstus is described by Homer as moulding into the First Compartment of the Shield of Achilles. In the Homeric trial-scene, the dispute, as if expressly intended to bring out the characteristics of primitive society, is not about property, but about the composition for a homicide. One person asserts that he has paid it, the other that he has never received it. The point of detail, however, which stamps the picture as the counterpart of the archaic Roman practice is the reward designed for the judges. Two talents of gold lie in the middle, to be given to him who shall explain the grounds of the decision most to the satisfaction of the audience. The magnitude of this sum as compared with the trifling amount of the Sacramentum seems to me indicative of the difference between fluctuating usage and usage consolidated into law. The scene introduced by the poet as a striking and characteristic, but still only occasional, feature of city life in the heroic age has stiffened, at the opening of the history of civil process, into the regular, ordinary formalities of a lawsuit. It is natural therefore that in the Legis Actio the remuneration of the Judge should be reduced to a reasonable sum, and that, instead of being adjudged to one of a number of arbitrators by popular acclamation, it should be paid as a matter of course to the State which the Prætor

represents. But that the incidents described so vividly by Homer, and by Gaius with even more than the usual crudity of technical language, have substantially the same meaning, I cannot doubt; and in confirmation of this view it may be added that many observers of the earliest judicial usages of modern Europe have remarked that the fines inflicted by Courts on offenders were originally *sacramenta*. The State did not take from the defendant a composition for any wrong supposed to be done to itself, but claimed a share in the compensation awarded to the plaintiff simply as the fair price of its time and trouble. Mr. Kemble expressly assigns this character to the Anglo-Saxon *bannum* or *fredum*.

Ancient law furnishes other proofs that the earliest administrators of justice simulated the probable acts of persons engaged in a private quarrel. In settling the damages to be awarded, they took as their guide the measure of vengeance likely to be exacted by an aggrieved person under the circumstances of the case. This is the true explanation of the very different penalties imposed by ancient law on offenders caught in the act or soon after it and on offenders detected after considerable delay. Some strange exemplifications of this peculiarity are supplied by the old Roman law of Theft. The laws of the Twelve Tables seem to have divided Thefts into Manifest and

Non-Manifest, and to have allotted extraordinarily different penalties to the offence according as it fell under one head or the other. The Manifest Thief was he who was caught within the house in which he had been pilfering, or who was taken while making off to a place of safety with the stolen goods; the Twelve Tables condemned him to be put to death if he were already a slave, and if he were a freeman, they made him the bondsman of the owner of the property. The Non-Manifest Thief was he who was detected under any other circumstances than those described; and the old code simply directed that an offender of this sort should refund double the value of what he had stolen. In Gaius's day the excessive severity of the Twelve Tables to the Manifest Thief had naturally been much mitigated, but the law still maintained the old principle by mulcting him in fourfold the value of the stolen goods, while the Non-Manifest Thief still continued to pay merely the double. The ancient lawgiver doubtless considered that the injured proprietor, if left to himself, would inflict a very different punishment when his blood was hot from that with which he would be satisfied when the Thief was detected after a considerable interval; and to this calculation the legal scale of penalties was adjusted. The principle is precisely the same as that followed in the Anglo-Saxon and other Germanic codes, when they suffer a thief chased

down and caught with the booty to be hanged or decapitated on the spot, while they exact the full penalties of homicide from anybody who kills him after the pursuit has been intermitted. These archaic distinctions bring home to us very forcibly the distance of a refined from a rude jurisprudence. The modern administrator of justice has confessedly one of his hardest tasks before him when he undertakes to discriminate between the degrees of criminality which belong to offences falling within the same technical description. It is always easy to say that a man is guilty of manslaughter, larceny, or bigamy, but it is often most difficult to pronounce what extent of moral guilt he has incurred, and consequently what measure of punishment he has deserved. There is hardly any perplexity in casuistry, or in the analysis of motive, which we may not be called upon to confront, if we attempt to settle such a point with precision; and accordingly the law of our day shows an increasing tendency to abstain as much as possible from laying down positive rules on the subject. In France, the jury is left to decide whether the offence which it finds committed has been attended by extenuating circumstances; in England, a nearly unbounded latitude in the selection of punishments is now allowed to the judge; while all States have in reserve an ultimate remedy for the miscarriages of law in the Prerogative of Pardon, universally lodged with

the Chief Magistrate. It is curious to observe how little the men of primitive times were troubled with these scruples, how completely they were persuaded that the impulses of the injured person were the proper measure of the vengeance he was entitled to exact, and how literally they imitated the probable rise and fall of his passions in fixing their scale of punishment. I wish it could be said that their method of legislation is quite extinct. There are, however, several modern systems of law which, in cases of graver wrong, admit the fact of the wrong-doer having been taken in the act to be pleaded in justification of inordinate punishment inflicted on him by the sufferer—an indulgence which, though superficially regarded it may seem intelligible, is based, as it seems to me, on a very low morality.

Nothing, I have said, can be simpler than the considerations which ultimately led ancient societies to the formation of a true criminal jurisprudence. The State conceived itself to be wronged, and the Popular Assembly struck straight at the offender with the same movement which accompanied its legislative action. It is further true of the ancient world—though not precisely of the modern, as I shall have occasion to point out—that the earliest criminal tribunals were merely subdivisions, or committees, of the legislature. This, at all events, is the conclusion pointed at by the legal history of the two great

states of antiquity with tolerable clearness in one case; and with absolute distinctness in the other. The primitive penal law of Athens intrusted the castigation of offences partly to the Archons, who seem to have punished them as *torts*, and partly to the Senate of Areopagus, which punished them as *sins*. Both jurisdictions were substantially transferred in the end to the Heliæa, the High Court of Popular Justice, and the functions of the Archons and of the Areopagus became either merely ministerial or quite insignificant. But "Heliæa" is only an old word for assembly; the Heliæa of classical times was simply the Popular Assembly convened for judicial purposes, and the famous Dikasteries of Athens were only its subdivisions or panels. The corresponding changes which occurred at Rome are still more easily interpreted, because the Romans confined their experiments to the penal law, and did not, like the Athenians, construct popular courts with a civil as well as a criminal jurisdiction. The history of Roman criminal jurisprudence begins with the Old Judicia Populi, at which the Kings are said to have presided. These were simply solemn trials of great offenders under legislative forms. It seems, however, that from an early period the Comitia had occasionally delegated its criminal jurisdiction to a Quæstio or Commission, which bore much the same relation to the Assembly which a Committee of the

House of Commons bears to the House itself, except that the Roman Commissioners or Quæstores did not merely *report* to the Comitia, but exercised all powers which that body was itself in the habit of exercising, even to the passing sentence on the Accused. A Quæstio of this sort was only appointed to try a particular offender, but there was nothing to prevent two or three Quæstiones sitting at the same time; and it is probable that several of them were appointed simultaneously, when several grave cases of wrong to the community had occurred together. There are also indications that now and then these Quæstiones approached the character of our *Standing* Committees, in that they were appointed periodically, and without waiting for occasion to arise in the commission of some serious crime. The old Quæstores Parricidii, who are mentioned in connection with transactions of very ancient date, as being deputed to try (or, as some take it, to search out and try) all cases of parricide and murder, seem to have been appointed regularly every year; and the Duumviri Perduellionis, or Commission of Two for trial of violent injury to the Commonwealth, are also believed by most writers to have been named periodically. The delegations of power to these latter functionaries bring us some way forwards. Instead of being appointed *when and as* state-offences were committed, they had a general, though a temporary

jurisdiction over such as *might* be perpetrated. Our proximity to a regular criminal jurisprudence is also indicated by the general terms "Parricidium" and "Perduellio," which mark the approach to something like a classification of crimes.

The true criminal law did not however come into existence till the year B.C. 149, when L. Calpurnius Piso carried the statute known as the Lex Calpurnia de Repetundis. The law applied to cases Repetundarum Pecuniarum, that is, claims by Provincials to recover monies improperly received by a Governor-General, but the great and permanent importance of this statute arose from its establishing the first Quæstio Perpetua. A Quæstio Perpetua was a *Permanent* Commission as opposed to those which were occasional and to those which were temporary. It was a regular criminal tribunal, whose existence dated from the passing of the statute creating it and continued till another statute should pass abolishing it. Its members were not specially nominated, as were the members of the older Quæstiones, but provision was made in the law constituting it for selecting from particular classes the judges who were to officiate, and for renewing them in conformity with definite rules. The offences of which it took cognisance were also expressly named and defined in this statute, and the new Quæstio had authority to [illegible] all persons in future whose acts

should fall under the definitions of crime supplied by the law. It was therefore a regular criminal judicature, administering a true criminal jurisprudence.

The primitive history of criminal law divides itself therefore into four stages. Understanding that the conception of *Crime*, as distinguished from that of *Wrong* or *Tort*, and from that of *Sin*, involves the idea of injury to the State or collective community, we first find that the commonwealth, in literal conformity with the conception, itself interposed directly, and by isolated acts, to avenge itself on the author of the evil which it had suffered. This is the point from which we start; each indictment is now a bill of pains and penalties, a special law naming the criminal and prescribing his punishment. A *second* step is accomplished when the multiplicity of crimes compels the legislature to delegate its powers to particular Quæstiones or Commissions, each of which is deputed to investigate a particular accusation, and if it be proved, to punish the particular offender. Yet *another* movement is made when the legislature, instead of waiting for the alleged commission of a crime as the occasion of appointing a Quæstio, periodically nominates Commissioners like the Quæstores Parricidii and the Duumviri Perduellionis, on the chance of certain classes of crimes being committed, and in the expectation that they *will* be perpetrated. The *last* stage is reached when the Quæstiones

from being periodical or occasional become permanent Benches or Chambers—when the judges, instead of being named in the particular law nominating the Commission, are directed to be chosen through all future time in a particular way and from a particular class—and when certain acts are described in general language and declared to be crimes, to be visited, in the event of their perpetration, with specified penalties appropriated to each description.

If the Quæstiones Perpetuæ had had a longer history, they would doubtless have come to be regarded as a distinct institution, and their relation to the Comitia would have seemed no closer than the connection of our own Courts of Law with the Sovereign, who is theoretically the fountain of justice. But the Imperial despotism destroyed them before their origin had been completely forgotten, and so long as they lasted, these Permanent Commissions were looked upon by the Romans as the mere depositaries of a delegated power. The cognisance of crimes was considered a natural attribute of the legislature, and the mind of the citizen never ceased to be carried back from the Quæstiones to the Comitia which had deputed them to put into exercise some of its own inalienable functions. The view which regarded the Quæstiones, even when they became permanent, as mere Committees of the Popular Assembly—as [illegible] to a higher authority

—had some important legal consequences which left their mark on the criminal law to the very latest period. One immediate result was that the Comitia continued to exercise criminal jurisdiction by way of bills of pains and penalties, long after the Quæstiones had been established. Though the legislature had consented to delegate its powers for the sake of convenience to bodies external to itself, it did not follow that it surrendered them. The Comitia and the Quæstiones went on trying and punishing offenders side by side; and any unusual outburst of popular indignation was sure, until the extinction of the Republic, to call down upon its object an indictment before the Assembly of the Tribes.

One of the most remarkable peculiarities of the institutions of the Republic is also traceable to this dependence of the Quæstiones on the Comitia. The disappearance of the punishment of Death from the penal system of Republican Rome used to be a very favourite topic with the writers of the last century, who were perpetually using it to point some theory of the Roman character or of modern social economy. The reason which can be confidently assigned for it stamps it as purely fortuitous. Of the three forms which the Roman legislature successively assumed, one, it is well known—the Comitia Centuriata —was exclusively taken to represent the State as embodied for military operations. The Assembly of the

Centuries, therefore, had all powers which may be supposed to be properly lodged with a General commanding an army, and, among them, it had authority to subject all offenders to the same correction to which a soldier rendered himself liable by breaches of discipline. The Comitia Centuriata could therefore inflict capital punishment. Not so, however, the Comitia Curiata or Comitia Tributa. They were fettered on this point by the sacredness with which the person of a Roman citizen, inside the walls of the city, was invested by religion and law; and, with respect to the last of them, the Comitia Tributa, we know for certain that it became a fixed principle that the Assembly of the Tribes could at most impose a fine. So long as criminal jurisdiction was confined to the legislature, and so long as the assemblies of the Centuries and of the Tribes continued to exercise co-ordinate powers, it was easy to prefer indictments for graver crimes before the legislative body which dispensed the heavier penalties; but then it happened that the more democratic assembly, that of the Tribes, almost entirely superseded the others, and became the ordinary legislature of the later Republic. Now the decline of the Republic was exactly the period during which the Quæstiones Perpetuæ were established, so that the statutes creating them were all passed by a legislative assembly which itself could not, at its ordinary sittings, punish a criminal with

death. It followed that the Permanent Judicial Commissions, holding a delegated authority, were circumscribed in their attributes and capacities by the limits of the powers residing with the body which deputed them. They could do nothing which the Assembly of the Tribes could not have done; and, as the Assembly could not sentence to death, the Quæstiones were equally incompetent to award capital punishment. The anomaly thus resulting was not viewed in ancient times with anything like the favour which it has attracted among the moderns, and indeed, while it is questionable whether the Roman character was at all the better for it, it is certain that the Roman Constitution was a great deal the worse. Like every other institution which has accompanied the human race down the current of its history, the punishment of death is a necessity of society in certain stages of the civilising process. There is a time when the attempt to dispense with it baulks both of the two great instincts which lie at the root of all penal law. Without it, the community neither feels that it is sufficiently revenged on the criminal, nor thinks that the example of his punishment is adequate to deter others from imitating him. The incompetence of the Roman Tribunals to pass sentence of death led distinctly and directly to those frightful Revolutionary intervals, known as the Proscriptions, during which all law was

formally suspended simply because party violence could find no other avenue to the vengeance for which it was thirsting. No cause contributed so powerfully to the decay of political capacity in the Roman people as this periodical abeyance of the laws; and, when it had once been resorted to, we need not hesitate to assert that the ruin of Roman liberty became merely a question of time. If the practice of the Tribunals had afforded an adequate vent for popular passion, the forms of judicial procedure would no doubt have been as flagrantly perverted as with us in the reigns of the later Stuarts, but national character would not have suffered as deeply as it did, nor would the stability of Roman institutions have been as seriously enfeebled.

I will mention two more singularities of the Roman Criminal System which were produced by the same theory of judicial authority. They are, the extreme multiplicity of the Roman criminal tribunals, and the capricious and anomalous classification of crimes which characterised Roman penal jurisprudence throughout its entire history. Every *Quæstio*, it has been said, whether Perpetual or otherwise, had its origin in a distinct statute. From the law which created it, it derived its authority; it rigorously observed the limits which its charter prescribed to it, and touched no form of criminality which that charter did not expressly define. As

then the statutes which constituted the various Quæstiones were all called forth by particular emergencies, each of them being in fact passed to punish a class of acts which the circumstances of the time rendered particularly odious or particularly dangerous, these enactments made not the slightest reference to each other, and were connected by no common principle. Twenty or thirty different criminal laws were in existence together, with exactly the same number of Quæstiones to administer them; nor was any attempt made during the Republic to fuse these distinct judicial bodies into one, or to give symmetry to the provisions of the statutes which appointed them and defined their duties. The state of the Roman criminal jurisdiction at this period, exhibited some resemblances to the administration of civil remedies in England at the time when the English Courts of Common Law had not as yet introduced those fictitious averments into their writs which enabled them to trespass on each other's peculiar province. Like the Quæstiones, the Courts of Queen's Bench, Common Pleas, and Exchequer, were all theoretical emanations from a higher authority, and each entertained a special class of cases supposed to be committed to it by the fountain of its jurisdiction; but then the Roman Quæstiones were many more than three in number, and it was infinitely less easy to discriminate the acts which fell under

the cognisance of each Quæstio, than to distinguish between the provinces of the three Courts in Westminster Hall. The difficulty of drawing exact lines between the spheres of the different Quæstiones made the multiplicity of Roman tribunals something more than a mere inconvenience; for we read with astonishment that when it was not immediately clear under what general description a man's alleged offences ranged themselves, he might be indicted at once or successively before several different Commissions, on the chance of some one of them declaring itself competent to convict him; and, although conviction by one Quæstio ousted the jurisdiction of the rest, acquittal by one of them could not be pleaded to an accusation before another. This was directly contrary to the rule of the Roman civil law; and we may be sure that a people so sensitive as the Romans to anomalies (or, as their significant phrase was, to *inelegancies*) in jurisprudence, would not long have tolerated it, had not the melancholy history of the Quæstiones caused them to be regarded much more as temporary weapons in the hands of factions than as permanent institutions for the correction of crime. The Emperors soon abolished this multiplicity and conflict of jurisdiction; but it is remarkable that they did not remove another singularity of the criminal law which stands in close connection with the number of the Courts. The classifications of crimes which

are contained even in the Corpus Juris of Justinian are remarkably capricious. Each Quæstio had, in fact, confined itself to the crimes committed to its cognisance by its charter. These crimes, however, were only classed together in the original statute because they happened to call simultaneously for castigation at the moment of passing it. They had not therefore anything necessarily in common; but the fact of their constituting the particular subject-matter of trials before a particular Quæstio impressed itself naturally on the public attention, and so inveterate did the association become between the offences mentioned in the same statute that, even when formal attempts were made by Sylla and by the Emperor Augustus to consolidate the Roman criminal law, the legislator preserved the old grouping. The Statutes of Sylla and Augustus were the foundation of the penal jurisprudence of the Empire, and nothing can be more extraordinary than some of the classifications which they bequeathed to it. I need only give a single example in the fact that *perjury* was always classed with *cutting and wounding* and with *poisoning*, no doubt because a law of Sylla, the Lex Cornelia de Sicariis et Veneficis, had given jurisdiction over all these three forms of crime to the same Permanent Commission. It seems too that this capricious grouping of crimes affected the vernacular speech of the Romans. People naturally

fell into the habit of designating all the offences enumerated in one law by the first name on the list, which doubtless gave its style to the Law Court deputed to try them all. All the offences tried by the Quæstio De Adulteriis would thus be called Adultery.

I have dwelt on the history and characteristics of the Roman Quæstiones because the formation of a criminal jurisprudence is nowhere else so instructively exemplified. The last Quæstiones were added by the Emperor Augustus, and from that time the Romans may be said to have had a tolerably complete criminal law. Concurrently with its growth, the analogous process had gone on, which I have called the conversion of Wrongs into Crimes, for, though the Roman legislature did not extinguish the civil remedy for the more heinous offences, it offered the sufferer a redress which he was sure to prefer. Still, even after Augustus had completed his legislation, several offences continued to be regarded as Wrongs, which modern societies look upon exclusively as crimes; nor did they become criminally punishable till some late but uncertain date, at which the law began to take notice of a new description of offences called in the Digest *crimina extraordinaria*. These were doubtless a class of acts which the theory of Roman jurisprudence treated merely as wrongs: but the growing sense of the

majesty of society revolted from their entailing nothing worse on their perpetrator than the payment of money damages, and accordingly the injured person seems to have been permitted, if he pleased, to pursue them as crimes *extra ordinem*, that is, by a mode of redress departing in some respect or other from the ordinary procedure. From the period at which these *crimina extraordinaria* were first recognised, the list of crimes in the Roman State must have been as long as in any community of the modern world.

It is unnecessary to describe with any minuteness the mode of administering criminal justice under the Roman Empire, but it is to be noted that both its theory and practice have had powerful effect on modern society. The Emperors did not immediately abolish the Quæstiones, and at first they committed an extensive criminal jurisdiction to the Senate, in which, however servile it might show itself in fact, the Emperor was no more nominally than a Senator like the rest. But some sort of collateral criminal jurisdiction had been claimed by the Prince from the first; and this, as recollections of the free commonwealth decayed, tended steadily to gain at the expense of the old tribunals. Gradually the punishment of crimes was transferred to magistrates directly nominated by the Emperor, and the privileges of the Senate passed to the Imperial Privy

Council, which also became a Court of ultimate criminal appeal. Under these influences the doctrine, familiar to the moderns, insensibly shaped itself that the Sovereign is the fountain of all Justice and the depositary of all Grace. It was not so much the fruit of increasing adulation and servility as of the centralisation of the empire which had by this time perfected itself. The theory of criminal justice had, in fact, worked round almost to the point from which it started. It had begun in the belief that it was the business of the collective community to avenge its own wrongs by its own hand; and it ended in the doctrine that the chastisement of crimes belonged in an especial manner to the Sovereign as representative and mandatory of his people. The new view differed from the old one chiefly in the air of awfulness and majesty which the guardianship of justice appeared to throw around the person of the Sovereign.

This later Roman view of the Sovereign's relation to justice certainly assisted in saving modern societies from the necessity of travelling through the series of changes which I have illustrated by the history of the Quæstiones. In the Primitive law of almost all the races which have peopled Western Europe there are vestiges of the archaic notion that the punishment of crimes belongs to the general assembly of [illegible] States—Scotland is

said to be one of them—in which the parentage of the existing judicature can be traced up to a Committee of the legislative body. But the development of the criminal law was universally hastened by two causes, the memory of the Roman Empire and the influence of the Church. On the one hand, traditions of the majesty of the Cæsars, perpetuated by the temporary ascendency of the House of Charlemagne, were surrounding Sovereigns with a prestige which a mere barbarous chieftain could never otherwise have acquired, and were communicating to the pettiest feudal potentate the character of guardian of society and representative of the State. On the other hand, the Church, in its anxiety to put a curb on sanguinary ferocity, sought about for authority to punish the graver misdeeds, and found it in those passages of Scripture which speak with approval of the powers of punishment committed to the civil magistrate. The New Testament was appealed to as proving that secular rulers exist for the terror of evil-doers; the Old Testament, as laying down that "whoso sheddeth man's blood, by man shall his blood be shed." There can be no doubt, I imagine, that modern ideas on the subject of crime are based upon two assumptions contended for by the Church in the Dark Ages—first, that each feudal ruler, in his degree, might be assimilated to the Roman Magistrates spoken of by Saint Paul; and next, that the offences

which he was to chastise were those selected for prohibition in the Mosaic Commandments, or rather such of them as the Church did not reserve to her own cognisance. Heresy, supposed to be included in the First and Second Commandments, Adultery and Perjury were ecclesiastical offences, and the Church only admitted the co-operation of the secular arm for the purpose of inflicting severer punishment in cases of extraordinary aggravation. At the same time, she taught that murder and robbery, with their various modifications, were under the jurisdiction of civil rulers, not as an accident of their position, but by the express ordinance of God.

There is a passage in the writings of King Alfred (Kemble, ii. 209) which brings out into remarkable clearness the struggle of the various ideas that prevailed in his day as to the origin of criminal jurisdiction. It will be seen that Alfred attributes it partly to the authority of the Church and partly to that of the Witan, while he expressly claims for treason against the lord the same immunity from ordinary rules which the Roman Law of Majestas had assigned to treason against the Cæsar. "After this it happened," he writes, "that many nations received the faith of Christ, and there were many synods assembled thoughout the earth, and among the English race also after they had received the faith of Christ, both of holy bishops and of their exalted

Witan. They then ordained that, out of that mercy which Christ had taught, secular lords, with their leave, might without sin take for every misdeed the *bot* in money which they ordained; except in cases of treason against a lord, to which they dared not assign any mercy because Almighty God adjudged none to them that despised Him, nor did Christ adjudge any to them which sold Him to death; and He commanded that a lord should be loved like Himself."

INDEX.

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