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INTRODUCTION AND NOTES TO SIR HENRY MAINE'S "ANCIENT LAW"

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INTRODUCTION AND NOTES TO SIR HENRY MAINE'S "ANCIENT LAW"

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LONDON
JOHN MURRAY, ALBEMARLE STREET, W.
1914

The appearance of a new edition of Sohm's "Institutes of Roman Law," translated by Ledlie, which I have just received, is accountable for some fresh alteration in the references.

F. P.

13 OLD SQUARE,
Dec. 11, 1907.

INTRODUCTION

SIR HENRY MAINE'S "Ancient Law" is now a classical text. The object of this edition is to reproduce it, accompanied by such help to right understanding and profitable use as a younger generation may reasonably require. More than forty years have passed since the book was first published in 1861. During those years, and to a great extent under the influence of Maine's own work, research into the early history of laws and institutions has been more active, systematic, and fruitful than it ever was before. Many new facts have been disclosed; our knowledge of others has been freed from error and misconception; as many, perhaps more, which were formerly accessible, but neglected as being insignificant or of merely local interest, have found their due place and importance in a wider field of knowledge. The materials thus acquired enable us to confirm and supplement Maine's work in many points. If they also show us that it calls for amendment in some places, no one who is at all acquainted with the progressive character of legal and historical learning will find in this any cause for disappointment. The wonder is not that Maine's results, after more

than a generation, should stand in need of some correction, but that, in fact, they need so little as they do. Later speculation and research have, on the whole, confirmed Maine's leading ideas in the most striking manner, partly by actual verification of consequences indicated by him as probable, partly by new examples and applications in regions which he had not himself explored.

There is no better witness to the intrinsic weight of Maine's work than the nature of some criticism it has met with, from competent persons on the Continent rather than at home. So far as those learned persons complain of anything, they miss that symmetrical construction of a finished system to which their training has accustomed them. Now it is to be observed that no words of Maine's own ever gave his readers the promise of a systematic doctrine. Not one of his books professed on the face of it to account for the ultimate origin of human laws, or to settle the relations of jurisprudence to ethics, or to connect the science of law with any theory of politics or of social development. Yet it does not seem to have occurred to the critics in question to charge Maine with remissness in not having attempted these things. The disappointment expressed was that he did not fully accomplish them, or that, if he had a solution, he never sufficiently declared it. Regret that Maine's work was not more openly ambitious is legitimate, though I do not share it; expression of it might have signified much or little. It might have been thoroughly sincere, and due to imperfect understanding of the relations to time, circumstances,

and materials, which determined Maine's manner of working, and, as I believe, determined it for the best. It might also have been, in the critic's intention, the easy compliment of the professional and disciplined scholar to a brilliant amateur. Very different from this was the actual criticism. It assumed that the author had proved himself a master, and that, accordingly, the highest and most exacting standard was to be applied both to his method and to his results. When we turn from Dareste or Vanni to the original preface to "Ancient Law," we are astonished by the studiously modest terms in which Maine defined his own undertaking: "The chief object of the following pages is to indicate some of the earliest ideas of mankind as they are reflected in ancient law, and to point out the relation of those ideas to modern thought." In like manner, on the first publication of the lectures on Village Communities, he apologised for their fragmentary character, and in the height of his mature fame he described "Early Law and Custom" only as an endeavour "to connect a portion of existing institutions with a part of the primitive or very ancient usages of mankind, and of the ideas associated with those usages." It is worth while to observe Maine's caution in disclaiming authority to lay down what ancient usages, if any, are really primitive—a caution sometimes neglected by his followers, and often by the champions of other theories.

Maine's dignified and almost ironical reserve about his own work has certainly made it rather difficult for a student approaching it for the

first time to form any general notion of what it has really done for legal and historical science. Although Maine himself was the last person of whom the answer to such a question could be expected, we who are in no way bound to reticence must say that he did nothing less than create the natural history of law. He showed, on the one hand, that legal ideas and institutions have a real course of development as much as the genera and species of living creatures, and in every stage of that development have their normal characters; on the other hand, he made it clear that these processes deserve and require distinct study, and cannot be treated as mere incidents in the general history of the societies where they occur. There have been complaints, often too well justified, of the historical ignorance prevailing among lawyers. "Woe unto you also, ye lawyers!" Freeman said—whether in print in those terms, I know not; but I have heard him say it—when he was grieved at the fictions about mediæval institutions that still passed current for history twenty-five or thirty years ago. But Maine has taught us that the way to impart a historical habit of mind to lawyers is to show them that law has an important history of its own, not at all confined to its political and constitutional aspects, and offers a vast field for the regular application of historical and comparative method. When once a lawyer has grasped this, he is entitled to point out in turn that a historian who is not content to be a mere chronicler can hardly do without some understanding of legal ideas and systems. And the importance of the

legal element, so far from diminishing as we retrace the growth of our modern institutions into a semi-historic past, rather increases. Others have shown this besides Maine, but none before him. It is easy to underrate his originality now that his points have been taken up by many teachers and become current in the schools. Any student who harbours doubt as to the extent of Maine's contributions to the historical philosophy of law may do well to ask himself in what books, legal or historical, of earlier date than "Ancient Law," he could have found adequate perception, or any distinct perception, of such matters as these: The sentiment of reverence evoked by the mere existence of law in early communities; the essential formalism of archaic law; the predominance of rules of procedure over rules of substance in early legal systems; the fundamental difference between ancient and modern ideas as to legal proof; the relatively modern character of the individual citizen's disposing power, especially by will, and freedom of contract; and the still more modern appearance of true criminal law. Nowadays it may be said that "all have got the seed," but this is no justification for forgetting who first cleared and sowed the ground. We may till fields that the master left untouched, and one man will bring a better ox to yoke to the plough, and another a worse; but it is the master's plough still.

It will now be proper to consider in a general way what resources were available for Maine's purposes when he wrote "Ancient Law," or rather when he prepared and delivered the lectures

of which it was a revised publication ("Early Law and Custom," p. 194). We shall be pretty safe in taking legal and historical scholarship as they stood, for an English student who had not frequented Continental seats of learning, about the middle of the nineteenth century.

First, in Roman law Savigny, then still living, was the person of greatest authority; the historical school which he took a principal part in founding was dominant in Germany and beginning to prevail elsewhere. Savigny's work, as well as that of his contemporaries and immediate followers, dealt only with the Roman materials. Comparative investigation of archaic legal systems had scarcely been undertaken at all, certainly not on any considerable scale, and this may perhaps account for more than one conjecture of Savigny's which has not proved tenable. The work of Rudolf von Ihering, the character of whose genius, individual as it was, perhaps most nearly resembled Maine's in the same generation, was only beginning. His views on the evolution of modern from archaic law coincide remarkably with those of Maine in several points; for example, in the position that all jurisdiction, if we could trace it far back enough, would be found to be in its origin not compulsory, but voluntary. But there can be no question of borrowing either way. Maine had formed his own ideas before any part of Ihering's great work, "Der Geist des römischen Rechtes," was published; and Ihering was never in a position to make much use of Maine's work, even if he had the time; for, as I came to know from

himself, he could not read English with any facility.

The literature of Roman law to be found in our own language was, with few exceptions, antiquated or contemptible, and such incidental references to Roman law as occurred in English text-books were almost always crude, often inappropriate or quite erroneous. Blackstone has some very bad mistakes in this kind. For many years after the publication of "Ancient Law" this state of things remained unamended. At the present time it is very different. In our own language Muirhead, Poste, Dr. Moyle, Dr. Roby, and the late Dr. Greenidge have made excellent provision of various kinds both for beginners and for advanced students, and Sohm's Institutes are accessible in Mr. Ledlie's scholarly translation. Professor Girard's "Manuel élémentaire de droit romain" (3rd ed., 1901) is, notwithstanding its modest title, one of the most learned and comprehensive, as well as the most recent, works on the subject. The reader of "Ancient Law" will understand that, as Maine was careful to explain in his first preface, the portions dealing with Roman law were never intended to take the place of an academic treatise. In fact, they assume the elementary knowledge which may be obtained from a good edition of Justinian's Institutes. It would therefore be idle to attempt a detailed commentary on them from a technical point of view which would not be appropriate; and any reader who thinks he can use Maine's work as a substitute for first-hand acquaintance with the texts and the best commentators, instead of a

companion and aid, must do so wholly at his own peril. Still less can Maine be censured for having adopted, at the time, current views of the highest authorities in Roman legal history which have since been abandoned.

Germanic legal antiquities had been investigated to a considerable extent; but the Continental scholars who had done this were still hardly aware of the wealth or importance of the material awaiting scientific treatment in England. On the other hand, those who made their results known to English readers, John Mitchell Kemble the foremost, were not learned in the modern law of England, and had not the means of connecting its later or even its mediæval history with the earliest monuments of English institutions. Thus no one had made any serious attempt to sift the mass of information collected by English professional writers and antiquaries of the sixteenth and seventeenth centuries, whose industrious labour assuredly deserves all praise, and whose judgment has in some cases been restored to credit which it had not deserved to lose. We need hardly say that Maine, not being a technical antiquary, did not attempt any such thing himself. Indeed, the work he actually did was needful to disclose the right lines of antiquarian research, and rescue it from the state of mere dilettante curiosity.

English legal history was very imperfectly known, and what was known was concealed under huge masses of comparatively modern formalism. There was much to be learnt (as there still is) from Blackstone, whose work was admirable in

its day, notwithstanding conspicuous faults of method and arrangement mostly not his own; but Blackstone had ceased to be generally read with attention even by lawyers, and was not a safe guide for any period before the thirteenth century. Whatever was before the Great Charter (and I am taking the earliest possible date) lay under a cloud of thick darkness, pierced only in part by the brilliant lights of Kemble and Palgrave. These fell, moreover, chiefly on the political and constitutional aspects of the common law, leaving in shadow those technical archaisms which we now know for landmarks. Palgrave, again, was often exuberant and fanciful, Kemble not seldom rash; and their work (though its general merit can hardly be exaggerated) is by no means free from positive mistakes, which, considering its novelty at the time, is in no way surprising. In every branch of the law scientific or even well written and tolerably arranged text-books were rare; in some they were wholly wanting. Constitutional law (and that from a political more than a legal point of view) was the only department which could be said to have found an adequate historian. On the whole, historical knowledge of English law before the twelfth century was not to be found, and after the twelfth century was pretty much what Blackstone had left it. In consequence of the general indifference to historical study, besides the real difficulties then attending it, lawyers and judges, even really learned ones, were commonly prone to accept superficial explanations which a little more research, not of a recondite kind, would have

proved to be erroneous. In particular there was a strong tendency to exaggerate Roman influence in the formation of English institutions, by no means without plausible excuse. Perhaps it was knowledge of Kemble's work that saved Maine from this rife and dangerous error. Clearly the English materials were not in a fit state, when Maine was writing "Ancient Law," to be used with effect for any purpose of historical generalisation or comparison; and he had no choice but to leave them alone for the most part, and build on other and at that time safer ground.

Asiatic systems of law were more or less known to Orientalists, but only in so far as their texts were documents of Arabic or Sanskrit literature. On the other hand, it was the duty of a considerable number of British magistrates and officials in India to have some acquaintance with so much of Hindu and Mahometan law as was recognised and applied by the civil courts; but this was only for the necessities of judicial business. Few men, if any, followed the splendid example of Sir William Jones in combining literary with practical knowledge, as indeed very few can at any one time reasonably be supposed capable of it. As to the Mosaic law, it was still the received opinion that there was an impassable or at least a highly perilous gulf between sacred and profane history. Knowledge of the text of the Old Testament, far more complete and more generally diffused in English-speaking countries than anywhere else, had therefore produced little result for secular learning. Neither the philological nor the official handling of Asiatic law-books caused

any appreciable number of scholars to perceive the importance of Asiatic custom for the general study of legal ideas and history. Maine's pointed references to Hindu institutions, at a time before he had or expected to have anything to do with India, could have been made only by a man of quite extraordinary insight. It would be interesting to know from what quarter his attention was first directed that way.

It has been thought proper to reprint the text of "Ancient Law" as last revised by Maine not only without alteration, but without the interruption of editorial footnotes. Such comments as I have been able to add will be found collected in notes at the end of each chapter. As "Ancient Law" touches on a greater variety of matters than almost any modern book of serious learning which is not of an encyclopædic nature, I have perforce omitted some topics, not because they might not have been considered with profit by a person competent in them, but because I was not competent. For the same reason I can by no means vouch for the accuracy in detail, according to the present state of knowledge, of everything I have passed over without remark. But my experience of the points I am qualified to test has led me to presume that such errors as may be discovered by specialists will seldom be found to affect the general course of the argument. I have purposely not dwelt on matters of elementary information which any student capable of profiting by Maine's work is equally capable of verifying for himself with little trouble. Maine did not write, for example, for

readers who had never heard of Hobbes or Montesquieu. Such a name as Du Molin's, on the other hand, may well be strange, not only to an educated Englishman (as that of Bracton or Plowden might be to an educated Frenchman), but to an English lawyer who has not made a special study of the Reformation controversies or the revival of classical Roman law; and in this case it would be vexatious to put off such readers with a bare reference to the French biographical dictionaries.

I have to thank the owners and the editor of the *Edinburgh Review* for permission to make free use of an article entitled "Sir Henry Maine as a Jurist," contributed by me in 1893.

In the second issue of these Notes (1907) some additional references and explanations have been given, which it is hoped will make them more useful.

F. P.

For general information about Maine's life and works the following publications may be consulted: "Sir Henry Maine: a brief memoir of his life," by Sir M. E. Grant Duff, 1892; "Sir Henry Maine and his Work," in "Oxford Lectures and other discourses," 1890, by the present writer; and the articles in the Dictionary of National Biography (1893), and the Supplement to the ninth edition of the Encyclopædia Britannica (1902), by Leslie (afterwards Sir L.) Stephen and the present writer respectively.

NOTE.—Cross-references in the following pages, in all cases where the title of a book is not given, relate to the tenth edition of Maine's "Ancient Law" and to all subsequent impressions of that edition.

NOTES

NOTES TO CHAPTER I

NOTE A

ANTIQUITY OF ROMAN LAW

THE description of Roman law, in the preface to the first edition, as "bearing in its earlier portions the traces of the most remote antiquity," is literally correct unless, contrary to the usage of good authors, we press the superlative to its extreme construction, as if it had been meant to exclude the possibility that traces of still more remote antiquity may be found elsewhere. Maine obviously did not mean to deny that Germanic and Hindu law, for example, have at some points preserved more archaic features than those of the earliest Roman law known to us; much less to disparage the extremely modern character of classical Roman law, which gives it most of its value for modern jurisprudence: compare the passage cited from "Early Law and Custom" in Note F below. It may be still a natural temptation for a student unacquainted with other legal antiquities to suppose that the law of the Twelve Tables, or the law of the later Roman Republic as a whole, belongs to a more archaic type than it really does. Fifty years ago the temptation was almost inevitable; and we have to remember that Maine had been endeavouring, with indifferent success at the time, to revive the study of Roman law in a country where the educated public was in a state of absolute ignorance on the subject (as it probably still is), and the tradition of the civilians, confined, under the old division of jurisdictions and practice, to a small minority of the legal profession, was at least a century out of date. If Maine did use language tending to exaggerate the intrinsic merits and the practical importance of Roman jurisprudence, it was under those conditions a fault on the right side. But modern students must be warned not to assume that Roman law was in fact at any one time a perfect and symmetrical whole, or that its history can be deduced from any one formula. The Twelve Tables were no doubt regarded as an ultimate source of law for the field they covered, but they did not purport to include the whole of the recognised customary law. For the classical

period of the Empire the most important and fruitful written embodiment of law was the Prætor's Edict, as almost every title of the Digest bears witness. Moreover, the Twelve Tables themselves were no mere consolidation, but a reforming code. It is certain that they incorporated Greek materials, and it is of very little importance whether the story of a special commission being sent to Greece is literally acceptable or not. In any case the means of information were at hand in the Greek cities of southern Italy, a region where the Greek language is not yet extinct. Borrowing of this kind from neighbours who have reached a more advanced stage is by no means abnormal in archaic legislation. Indeed, it is rather common for the lawgiver of the heroic age to be represented as a stranger, or as having learnt the wisdom of older and greater kingdoms; and even if the personal element of such a tradition is dubious, it is not likely to be a gratuitous invention. Ingenious paradoxical doubts have quite lately been cast on the antiquity of the Twelve Tables; but the hypothesis that they are really a compilation or fabrication of the second century B.C. has not met with a favourable reception: see Dr. A. H. J. Greenidge, "The Authenticity of the Twelve Tables," English Historical Review, January, 1905, and Professor Goudy in the Juridical Review, June, 1905. It is perhaps unnecessary to warn English students against implicit acceptance of the conjectural restorations of the Decemvirs' work essayed by various learned persons. The most elaborate of these, that of Voigt, is described by the no less learned M. Girard as containing "une restitution tout à fait inacceptable et un commentaire fort aventureux" (Manuel élémentaire du droit romain, 3ᵉ éd., 1901, p. 23). Dr. Roby ("Roman Private Law in the Times of Cicero and of the Antonines," 1902, vol. i., p. x) calls it in even plainer terms a house of cards.

NOTE B

CUSTOMARY LAW IN HOMER

Maine's reference to the Homeric poems as some of our best evidence for the archaic forms of legal ideas in Indo-European communities is a brilliant example of his insight. As he points out, the poet or poets had no conscious theory of the matter at all, and this is our best warranty for the witness of the poems being true. They describe a society in which custom is understood if not always observed, positive duties are definable if not easily enforceable, and judgments are rendered with solemnity and regarded as binding, although we hear nothing of any standing authority such as could be called either legislative or executive in the modern sense. And Maine is clearly right in holding (p. 2) that the description is not wholly idealised—we might even say not much—and is of a state of society known to the writer. To

all appearance the usages described are real, and those of the singer's own time. The deliberate archaism of modern fiction has no place in Homer; only the wealth and prowess of the heroic age are exaggerated. The Chanson de Roland endows Charlemagne and his peers with the arms and manners of the twelfth century, as the Arthurian cycle attributes those of the fourteenth to the knights of the Round Table; and we cannot believe that Homer did otherwise.

Maine gives a hint (p. 7 *) that the analysis of positive law laid down by Bentham and Austin (following Hobbes, though Bentham seems not to have been aware of it) cannot be made to fit archaic society. For in communities like those of the Homeric age, or of Iceland as described in the Sagas, there is no sovereign (in Hobbes's sense) to be found, nor any legislative command, nor any definite sanction; and yet in Iceland there were regularly constituted courts with a regular and even technical procedure, as the Njáls Saga tells us at large. Maine afterwards worked out this position in the lectures on Sovereignty in "The Early History of Institutions," which are the foundation of sound modern criticism on the Hobbist doctrine. In those classical pages he dealt rather tenderly with Bentham and Austin, whom to some extent he regarded as his masters, in spite of the wholly unhistorical character of their work; and, apart from any particular feeling in this case, it was not his habit to exhibit the full consequences of his ideas. Those who come after him are free to push the conclusion home, as Mr. Bryce has done ("Studies in History and Jurisprudence," Essay X). As to the absence of executive sanction in archaic procedure, cp. "Early Law and Custom," p. 170.

With regard to the "Themistes" of the Homeric chiefs, the word appears to be not an anomalous plural of θέμις, but distinct, and to mean principles of law or justice; "Themis," the singular noun, being "right" in the abstract sense (E. C. Clark, "Practical Jurisprudence," pp. 42-9). Once it means "tribute," which does not offer much difficulty when compared with the constant use of *consuetudo* in medieval Latin. Some of the language used here by Maine seems to imply that the decisions called by this name were or might be arbitrary; but Maine himself added the desirable qualification in his chapter on "The King and Early Civil Justice." "The Homeric King is chiefly busy with fighting. But he is also a judge, and it is to be observed that he has no assessors. His sentences come directly into his mind by divine dictation from on high." That is, if the king is just; we read in the Iliad, though it occurs only in the course of a simile, of unjust kings who give crooked judgments, disregarding the voice of the gods:

* References, in all cases where the title of a book is not given, relate to the tenth edition of Maine's "Ancient Law," and to all subsequent impressions of that edition.

> Ὡς δ' ὑπὸ λαίλαπι πᾶσα κελαινὴ βέβριθε χθὼν
> ἤματ' ὀπωρινῷ, ὅτε λαβρότατον χέει ὕδωρ
> Ζεύς, ὅτε δή ῥ' ἄνδρεσσι κοτεσσάμενος χαλεπήνῃ,
> οἳ βίῃ εἰν ἀγορῇ σκολιὰς κρίνωσι θέμιστας,
> ἐκ δὲ δίκην ἐλάσωσι, θεῶν ὄπιν οὐκ ἀλέγοντες . . .
>
> Π. 384 sqq.

"These sentences, or θέμιστες—which is the same word with our "Teutonic word 'dooms'—*are doubtless drawn from pre-existing custom or usage*, but the notion is that they are conceived by the king spontaneously or through divine prompting. It is plainly a later development of the same view when the prompting comes from a learned lawyer, or from an authoritative law-book" ("Early Law and Custom," p. 163).

Custom, indeed, is so strong in Homer that the gods themselves are bound by it. Zeus is the greatest of chiefs, but he owes justice to his people, and justice implies the observance of rule. Power is not wanting, but a sense of duty moderates it. Thus in the Iliad Zeus is tempted to rescue Sarpedon from his fate, but dares not break his custom in the face of Hera's rebuke ("Do it if thou wilt: but the rest of the gods in no wise approve": Π. 443): and in the Odyssey the Sun-God threatens to go down and shine among the dead men if he is not to be avenged for the sacrilege of Odysseus' men who have killed and eaten his oxen :—

> Ζεῦ πάτερ ἠδ' ἄλλοι μάκαρες θεοὶ αἰὲν ἐόντες,
> τῖσαι δὴ ἑτάρους Λαερτιάδεω Ὀδυσῆος,
> οἵ μευ βοῦς ἔκτειναν ὑπέρβιον, ᾗσιν ἐγώ γε
> χαίρεσκον μὲν ἰὼν εἰς οὐρανὸν ἀστερόεντα,
> ἠδ' ὁπότ' ἂψ ἐπὶ γαῖαν ἀπ' οὐρανόθεν προτραποίμην.
> εἰ δέ μοι οὐ τίσουσι βοῶν ἐπιεικέ' ἀμοιβήν,
> δύσομαι εἰς Ἀίδαο καὶ ἐν νεκύεσσι φαείνω.
>
> μ. 377 sqq.

NOTE C

EARLY FORMS OF LAW: "WRITTEN" AND "UNWRITTEN" LAW: EARLY CODES

It should be noted that the growth of institutions is much too complicated, even if we confine our attention to one society, to be represented as a simple series in order of time. We constantly speak of one rule or custom as belonging to a more advanced stage of ideas than another; but this does not mean that in every society where it is found it must have been preceded in fact by a less advanced institution belonging to the next lower grade of culture. Imitation of neighbours or conquerors, or peculiar local conditions, may materially shorten a given stage in the normal development, or even cut it out altogether. What we do mean is that the order is not found reversed. Chalk is not everywhere in England, nor red sandstone; but where red sandstone is, we know that chalk is not below it. Iron was known in Africa so early that Africa may be said not to have had a bronze age; but this does

not make it more credible that any tribe should ever have abandoned iron for bronze. In like manner there may have been tribes that had lawgivers almost or quite as soon as they had judges. But no one has heard of a nation which, having acquired a body of legislation, reverted from it to pure customary law (cp. Kohler, "Zur Urgeschichte der Ehe," pp. 7–10).

A king's or chieftain's judicial dooms are very different from express laws promulgated for general observance; but it is noticeable that early traditions ascribe a divine origin to both. In the former case the judge enjoys, in some undefined way, the confidence of the gods; in the latter the human lawgiver is merely the scribe or reporter of a "Deity dictating an entire code or body of law," which, as Maine points out (p. 6), is a more artificial conception and belongs to a later stage. It appears, however, as early as anything that can be called legislation; and the tendency to refer the commandments of the law to a divine or semi-divine origin is quite regular. There is no reason, it may be added, why a lawgiver or recorder of divine law should not also be a speaker of dooms. A ruling ascribed to Moses, whom Sir Edward Coke claimed as the first law reporter, is at this day a practical decision, for it governs the civil law of succession in some Jewish communities (such as the Jews of Aden: Sir Courtenay Ilbert, "The Government of India," p. 397). Even if the Mosaic law has to admit the superior antiquity of King Hammurabi's code, we may safely say that the case of Zelophehad's daughters is the earliest recorded case which is still of authority.

When the king or chief ceases to bear all offices in his own person, and the political division of labour begins, those functions which had a sacred character naturally become attached to a priesthood or sacred tribe or family, and among them the custody and interpretation of the law. The distinction between religious and secular law is, one need hardly say, much later. Thus we find in both Germanic and Roman antiquity more than traces of priests, or nobles who claimed the priest's office as a birthright, being the first judges (Grimm, D.R.A. 272, i. 378 in 4th ed.). In Iceland the rather vague but not ineffectual authority which was ascribed to the Speaker of the Law seems to have had a religious character. At any rate we read in the Njáls Saga that to him, and him alone, was left the momentous decision of the question, which had all but led to civil war, whether Christianity should be adopted (Dasent, "Burut Njal," ch. ci.). There seems to be no reason against accepting this incident as mainly historical. It is worth observing that Thorgeir would not make his award until both the Christian and the heathen party had given pledges to abide by it: a striking illustration of the voluntary and arbitral character of early jurisdiction. Edward I. of England, more than two centuries later, used similar precaution when he adjudicated on the claims to the crown of Scotland.

Whether a monopoly of legal knowledge is established in the hands of a privileged caste or order, or a tradition of learning is handed down in something like a school, or, without any profession of secrecy, certain persons enjoy for the time being the reputation of superior knowledge, appears to depend on the particular circumstances of each community. Besides the Speaker of the Law, we find in the Iceland of the Sagas a few specially wise men, Njál himself, and after his death one or two others, whose advice is eagerly sought by their neighbours, and whose deliberate opinion is almost conclusive; yet there is no possible distinction of race or rank in that singularly homogeneous republic. A like position is ascribed to Nestor. This kind of reputation is obviously not less but more important in a society where jurisdiction and judicial power have not yet become compulsory; for the chances that any judgment or award will be observed will, in such a society, depend largely on the respect in which the acting judge or daysman is held.

Maine adds that law preserved as a kind of trade secret by a privileged class is the only real unwritten law. This may be literally true. But our current professional use of the term is really a matter of literary convention. We find it useful to confine the term "written law" to an enactment or declaration which is authoritative not only in matter but in form, so that its very words not only contain but constitute the law. An exposition whose very words are not binding is "unwritten law," however great its authority may be in substance. Consider the case of a judge in England, or any other jurisdiction under the system of the Common Law, making a careful statement of some point of law in a book written and published by him. This is only a private learned opinion, and has, properly speaking, no authority at all. But the same or another judge may adopt the statement in a reported judgment. It then acquires authority as a judicial exposition of the law, but still its actual terms are not binding, and it counts as "unwritten law." Finally, the proposition may be embodied in a statute. It then becomes "written law," and the Courts will have for the future to treat not only the substance but every word of it as authentic. The distinction is quite real, and no better way of expressing it has been found. French usage, moreover, presents a close analogy. Under the old monarchy the provinces of written law (*pays de droit écrit*) were those where the texts of Roman law were received as having binding authority, while in the *pays de droit coutumier* they were cited only for example and illustration, on the merits of the reason embodied in them, as they may be and sometimes are in England. Thus the same text might be "written" law in one province and "unwritten" (though there is no corresponding French term) in another. A learned modern writer says of the antithesis between *ius scriptum* and *ius non scriptum*, after careful examination of the various meanings with which they occur in the writings

of the classical Roman lawyers: "Its general practical use with them is as a distinction between customary law, on the one hand, and law drawn up and issued in any regular manner by any legislative authority, on the other. . . . The above is also the practical use of the distinction . . . by our English jurists, so far as they use it at all. . . . With modern Continental writers *written* and *unwritten* in general designate respectively *enacted* and *customary* law" (E. C. Clark, "Practical Jurisprudence," p. 272).

Maine's brief remarks on early codes (pp. 13-20) include a few sentences on Hindu law; these were written at a time when the existence of the books called by the names of Manu and Narada was hardly known outside Anglo-Indian official circles except to a few students of Sanskrit. In later years, after having been a member of the Government of India, he returned to the subject. The chapters in "Early Law and Custom" on "The Sacred Laws of the Hindus," "Religion in Law," and "Classifications of Legal Rules," should be read accordingly as a supplement; and the second and third lectures in "Village Communities" should also be consulted as to the general nature of archaic customary law, and the effect produced on it by contact with a modern system.

An entirely new light has been thrown on the early history of written law by the discovery of Hammurabi's Babylonian code; an extensive, practical, and mainly secular code which dates from considerably more than two thousand years before the Christian era, which seems to presuppose even earlier authentic dooms committed to writing, and which refers to conveyancing documents as in common use (English translation by C. H. W. Johns, Edinb. 1903). Less striking, but still of importance, are the Tables of Gortyn in Crete, discovered in 1884. They are later than the Roman Twelve Tables, but preserved in an authentic and not much mutilated inscription. See Dr. H. J. Roby thereon, with translation, L.Q.R. ii. 135.

Timely codification of customs, as Maine observes (pp. 16, 17), may prevent degradation; I must confess that the ascription of such an effect to the Twelve Tables, though ingenious and pleasing as a conjecture, appears to me to go beyond what is warranted by our knowledge of the state and tendencies of Roman society under the earlier Republic. It is certain that conversely the fixing of law in a codified form at a later stage may arrest a normal and scientific development. Such was the result of the Ordinance which stereotyped the French law of negotiable instruments in 1673 (Chalmers, "Bills of Exchange," Introduction, p. lvi). It would seem, indeed, that the Twelve Tables themselves went near to stereotype an archaic and formalist procedure, and that the Romans of later generations escaped from great inconvenience only by the devices of legal fictions and equity which Maine considers in the following chapter.

NOTE TO CHAPTER II

NOTE D

ENGLISH CASE-LAW AND FICTION

ABOUT the middle of the nineteenth century, and somewhat later, the language currently used by text-writers was such as to warrant Maine's selection of the authority of decided cases in England as an example of legal fiction. But the twentieth-century reader, if he has taken to heart Maine's brilliant generalisation in the earlier part of the chapter, will hardly expect the ideas and formulas even of English lawyers to have remained stationary in the midst of a progressive society; and in fact, though probably no society has ever made progress at a uniform rate all along the line, and there may quite conceivably be stagnation or even falling back in some departments while there is advance in others, criticism of legal ideas has advanced a good deal in the English-speaking world. No intelligent lawyer would at this day pretend that the decisions of the Courts do not add to and alter the law. The Courts themselves, in the course of the reasons given for those decisions, constantly and freely use language admitting that they do. Certainly they do not claim legislative power; nor, with all respect for Maine, do they exercise it. For a legislator is not bound to conform to the known existing rules or principles of law; statutes may not only amend but reverse the rule, or they may introduce absolutely novel principles and remedies, like the Workmen's Compensation Act. Still less, if possible, is he bound to respect previous legislation. But English judges are bound to give their decisions in conformity with the settled general principles of English law, with any express legislation applicable to the matter in hand, and with the authority of their predecessors and their own former decisions. At the same time they are bound to find a decision for every case, however novel it may be; and that decision will be authority for other like cases in future; therefore it is part of their duty to lay down new rules if required. Perhaps this is really the first and greatest rule of our customary law: that, failing a specific rule already ascertained and fitting the case in hand, the King's judges must find and apply the most reasonable rule they can, so that it be not inconsistent with any established principle.

They not only may but must develop the law in every direction except that of contradicting rules which authority has once fixed. Whoever denies this must deny that novel combinations of facts are brought before the Courts from time to time, which is a truth vouched by common experience and recognised in the forensic phrase describing such cases as "of the first impression"; or else he must refuse to accept the principle that the Court is bound to find a decision for every case, however novel. It is true that at many times the Courts have been over-anxious to avoid the appearance of novelty; and the shifts to which they resorted to avoid it have encumbered the Common Law with several of the fictions which Maine denounces as almost hopeless obstacles to an orderly distribution of its contents.

Observe that the process of making case-law cannot properly be called legislation even with any qualifying epithet intended to mark it as an exercise of limited or subordinate power. Many law-making authorities in the world are not sovereign, being merely delegated, or otherwise restrained, but are still sources of enactments which are verbally and literally binding within their competence. But the judicial authority of precedents is not of that kind. Under our system the Court is bound to give judgments consistent with former judgments of higher or equal rank, so far as their effect has not been abrogated by legislation or overruled by still higher authority; but it is not bound to follow their very words. Only the principle is binding, and it must be collected from the decision as a whole, and not assumed to be completely expressed by this or that sentence in a reported judgment, however carefully framed.

Perhaps Maine's exposition hardly brings out the prevailing motive for introducing fictions, the desire of obtaining a speedier or more complete remedy than the strictly appropriate form of procedure affords. Among the regular though not invariable marks of fictions in modern English law is the use of the word "constructive" or the word "implied," as any careful student may note for himself. It would be rash to suppose that the age of legal fictions is wholly past. When "Ancient Law" was written, one example was quite recent in our Courts, the rule that a man who professes to contract as an agent is deemed to warrant that he has authority from his alleged principal. This is a fiction, but beneficent and elegant, and it is now fully accepted.

NOTES TO CHAPTER III

NOTE E

THE LAW OF NATURE AND "IUS GENTIUM"

MAINE'S third and fourth chapters need more supplemental criticism than any other part of "Ancient Law." The medieval doctrine of the Law of Nature, and its continuity with the classical Roman doctrine, had been forgotten or misunderstood in England for quite two centuries at the time when these chapters were written; and even many years later there was no obvious way for an English scholar to get back to the right historical lines. I owe my own guidance mainly to a somewhat belated acquaintance with Dr. Gierke's exhaustive treatment of the controversies which occupied the publicists of the Middle Ages and "the Renaissance" ("Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien," Breslau, 1880; "Political Theories of the Middle Age," transl. with introduction by F. W. Maitland, Cambridge, 1900, from "Die Staats- und Korporationslehre," etc., Berlin, 1881; Pollock, "The History of the Law of Nature," Journ. Soc. Comp. Legisl., 1900, p. 418). Mr. Bryce's recent essay on the Law of Nature ("Studies in History and Jurisprudence," Oxford, 1901, ii. 112) should be read and considered by all students of legal history. The latest considerable publication touching the subject in this country is A. J. Carlyle's "History of Mediaeval Political Theory in the West," 1903 (only vol. 1 yet published): and see Dr. H. Rashdall thereon, L.Q.R. xx. 322.

Maine was not a medievalist or a canonist, and shared the general ignorance of English lawyers and scholars of his time. Accordingly his statement practically neglects the Middle Ages, and suggests, though it does not assert in terms, that the law of nature as understood by the publicists of the seventeenth and eighteenth centuries was derived exclusively from the classical Roman lawyers; that the influence of Greek philosophy was only indirect and through Roman law; and that the conception of a primeval and innocent "state of nature" was an integral part of the doctrine. Not one of these inferences would be correct. The theory of Grotius is continuous with that of the canonists and schoolmen; the medieval doctrine is founded on Aristotle and Cicero, no less than on the Corpus Iuris; and the "state of nature" of eighteenth-century writers is an exaggerated perversion of what, in the traditional system, is a quite subordinate point.

Political justice is divided, according to Aristotle ("Eth. Nic." V. vii.; this is one of the books not written by Aristotle himself,

but the substance is admitted to represent his teaching) into natural (τὸ μὲν φυσικόν, *naturale*) and conventional (τὸ δὲ νομικόν, *legale*). The Latin equivalents are from the current medieval translation directed by St. Thomas Aquinas. The rules of natural justice are those which all civilized men recognise. Those of conventional justice deal with matters indifferent in themselves or otherwise capable of being settled only by positive authority. Natural justice may tell me not to drive recklessly, but cannot tell me which is the right side of the road, a question which conventional justice answers one way in these kingdoms and the other in America and most, though not all, European Continental countries. Rules involving number and measure, again, cannot be fixed by natural justice alone. It is to be observed that Aristotle's conception of Nature implies rational design, and this was more fully worked out by the later Greek schools, and especially the Stoics. Maine, though he was an excellent classical scholar, omits all mention of Aristotle; but Aristotle is not prominent in the later literature of the subject which he almost exclusively made use of.

The Greek philosophical doctrine acquired an elegant Latin form in Cicero's hands at the very time when thoughtful Roman lawyers were in need of a theoretical foundation for the addition of the *ius gentium* to the old strict and archaic rules. Now *ius gentium*, in its original meaning, has nothing to do with distinct nations or tribes (which is not the meaning of *gentes*), but signifies the rules accepted as binding by all people (Nettleship, "Contributions to Latin Lexicography," *s. v.*; cp. E. C. Clark, "Practical Jurisprudence," p. 354). Towards the end of the republican period, it would seem not before Cicero's time, it became the special name of the rules administered by Roman magistrates in causes where Roman law proper was inapplicable, by reason of the parties not being both Roman citizens or allies, or otherwise. The personal and religious laws of one community are incapable, in archaic society, of being used by members of another; and such is still the universal custom of India, broken only, so far as it is broken, by the introduction of cosmopolitan ideas and habits from Europe. Many Roman legal formulas involved a religious element, and for that reason, we may be pretty sure, were available for Romans only: we know that in one case, that of the words *Dari spondes? spondeo*, such a restriction was still in force under the Empire. Similarly two strangers living under different laws of their own could not both be judged by either of those laws any more than by Roman law. There is no necessary question of one law being thought better in itself than another, or of "disdain for all foreign law"; still less of the Romans having refused requests for the application of Roman law which are most unlikely to have ever been made (p. 50). What we find, at any rate, in the

conflict of personal laws in the early Middle Ages is that every man wants to be judged by his own law. This being out of the question, the needs of business called for some practical solution in a jurisdiction into which the growing power of Rome brought merchants and traders from all parts of the Mediterranean. It is hard to believe that there was not already some kind of general custom among those merchants for matters of common occurrence, or that the Roman Praetor did not find it easier to adopt any such custom, if satisfied of its existence, than to frame a new rule by deliberate selection from the elements common to the domestic law of Rome and other Italian States. The recognition of the Law Merchant in England by the Common Law seems a nearer modern parallel than the development of the rules of Equity. Maine himself pointed out, in a later work, that the *ius gentium* was in part originally a market law, and grew out of commercial exigencies ("Village Communities," pp. 193-4). It is significant in this connexion that in the later Middle Ages and down to the seventeenth century English books regularly treat the Law Merchant of Western Christendom as equivalent to the law of nature, or a branch of it (Pollock, Journ. Soc. Comp. Legisl., 1900, p. 431; "The Expansion of the Common Law," p. 117).

However this may be, the actual *ius gentium* agreed well enough with the rules of natural justice or natural law in the sense of the Greek philosophers, so far as these could be observed in practice. Accordingly the Roman lawyers, probably working on Greek materials now lost, identified *ius gentium* for most practical purposes with *ius naturale*: they regarded it as the sum of rules which were evident to natural reason, and received by all men because they were reasonable; "quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur" (Gai. i. § 1). But this or any similar statement leaves it an open question whether *ius gentium* really coincides with *ius naturale*. There may possibly be rules that deserve to be recognised by all mankind, but in fact are not; and there may be universal or very widely prevailing usages which natural reason will not justify. Slavery was a recognised institution, part of the general customs of the Roman Empire if anything was; but the enlightened age of the Antonines could find no warrant for it in philosophy, and the incongruity pressed on at least one or two of the classical Roman jurists. Modern specialists in Roman law have not been able to agree what was exactly their doctrine as to the relation of the ideal to the actual usage of mankind, or whether there was any one accepted doctrine at all in the law schools of the empire. There is no apparent reason why there should have been any official or settled opinion on such a specula-

tive point. Perhaps we should not be far from the truth if we said, in the language familiar to our own system, that *ius gentium* was presumed to follow *ius naturale* if the contrary did not appear. At the outset of Justinian's Institutes (I. ii. § 2) we read that by the law of nature all men were born free, but capture and slavery, things contrary to the law of nature, were introduced by necessity as consequences of war, and are therefore part of the *ius gentium*. This imperial dictum, though it can hardly be said to solve the ethical or social problem, settled the terminology for the medieval publicists of whom we shall have to say a word later (Note G below). Similarly in tit. 5 pr. it is said that slavery was unknown in the law of nature, and whereas by nature there was only one name of man, the law of nations has distinguished free men, slaves, and freed men who have ceased to be slaves.

As for the celebrated passage of Ulpian which defines the law of nature as common to man and other animals, "quod natura omnia animalia docuit," and distinguishes it on this ground from *ius gentium*, the rule confined to men, "solis hominibus inter se commune," we are not bound to believe that it was current among Roman lawyers in Ulpian's own time, or anything but a conceit borrowed from some forgotten Greek rhetorician. It stands alone in the classical texts, but its conspicuous adoption at the beginning of both the Digest and the Institutes of Justinian was the cause of endless trouble to the medieval commentators, for whom every word in the Corpus Iuris was of equal authority. Maine assumes the invention to have been Ulpian's own, and ascribes it to "the propensity to distinguish characteristic of a lawyer"; I can only say that it does not look to me like a working lawyer's point.[1] A modern Italian scholar has proposed to understand "ius quod natura omnia animalia docuit" as meaning the instincts common to man and other animals which both morality and law postulate as existing in fact (Del Rosso, Ann. Ist. di storia di diritto Romano, Catania 1905-6). This appears as plausible an explanation as, failing the discovery of Ulpian's ultimate authority, we are likely to obtain.

Maine's suggestions, beginning at p. 58, as to "the exact point of contact between the old *ius gentium* and the law of nature," being given by a conjectured special sense of *aequitas* are ingenious, but hardly seem required. The general coincidence between *ius gentium* and the φυσικὸν δίκαιον of Greek philosophy was obvious enough to jurists in search of a theory without being

[1] The suggestion that it is the nature of lawyers to distinguish where there is no difference may possibly have been inspired by Hobbes's censure of Coke in his Dialogue of the Common Laws of England:—"Sir Edw. Coke does seldom well distinguish when there are two divers Names for one and the same thing; though one contain the other, he makes them always different, as if it could not be that one and the same Man should be both an Enemy, and a Traytor."

emphasized by any one special point of contact. *Aequitas* appears, in classical Latin usage, to come very near "reasonableness"; and in fact the word *reason* and its derivatives are the proper terms in the Common Law for conveying the ideas, or some of them, which are at the bottom of the law of nature, as St. German pointed out nearly four centuries ago in "Doctor and Student." Maine appears to have assumed that the Roman doctrine included the historical acceptance of a golden age: "the belief gradually prevailed among the Roman lawyers that the old *jus gentium* was in fact the lost code of nature," p. 56. I am bound to say that I do not know of any evidence that such was the belief of either lawyers or philosophers. Certainly no Greek philosopher would have admitted that the law of nature was lost, nor would Cicero; and as to the supposition that *ius gentium* was the law of the golden age in the opinion of the philosophic lawyers, "so far were they from such a delusion," says Mr. Bryce, "that they ascribe to *ius gentium* war, captivity, slavery, and all the consequences of these facts, while in the golden age, the *Saturnia regna* of the poets, all men were free and war was unknown." *Ius gentium* is the common law or custom of mankind, actual not ideal custom. Just as little is there any traceable connection between the fables of a golden age and the fundamental conception of natural law, namely, that general rules of human conduct are at all times discoverable by human reason as being reasonable. The doctrine of the Roman jurists does not involve any historical assumption at all, neither, in itself, does that of the medieval doctors and commentators, although these, as good Catholics, accepted the Fall of Man and could give theological reasons for the law of nature not being sufficient in practice. Moreover, it is not probable that *ius gentium*, as a term of art, is much or at all older than *ius naturale* or *naturae*. The hypothesis of a "state of nature" antecedent to positive law, much more the suggestion that it was a golden age of ideal natural law, does not seem to occur before the sixteenth century. Where such a state is mentioned, down to the latter part of the fifteenth century, it is treated as barbarous; before they founded commonwealths, it is said, men lived like beasts (Aen. Silv. de ortu imp. Rom.).

NOTE F

EQUITY

A peculiar historical development has given this word a technical meaning among English-speaking lawyers. "Reasonableness," as mentioned in the last note, appears to be the primary and general idea. This conception, when embodied for practical use as an appeal to the common sense of right-minded men, is closely akin to that of natural justice, and further resembles it in being traceable to Aristotle. It is of the utmost importance in many branches of

our modern law; but we have specialised the name of Equity for one application of it, namely that administration of extraordinary justice by the king with the advice of his Chancellor and Council, and afterwards through the Chancellor alone, which produced the Court of Chancery. Maine, when he wrote "Ancient Law," seems to have doubted the historical truth of "the king's general right to superintend the administration of justice" (p. 71); but in "Early Law and Custom" (ch. vi., "The King and Early Civil Justice," p. 164), it is fully recognised. The king was held to retain a "pre-eminence of jurisdiction . . . as well for amendment as for supply of the Common Law," though he could not alter a regular jurisdiction once established; this "supplementary or residuary jurisdiction," as Maine aptly calls it, was exercised to form the Court of Chancery, and in due time it was held, as was inevitable, that this also had become an established Court, that the king's power to do equity as well as strict legal justice had been completely delegated, and that accordingly he could not create any new equitable jurisdiction. It was no less inevitable that after this Equity should become a technical system (cp. Pollock, "The Expansion of the Common Law," pp. 67-73).

Maine pointed out (E. L. and C., p. 166) that the early Roman law, "a stiff system of technical and ceremonious law," "underwent a transformation through this very residuary or supplementary royal authority," which under the Roman Republic was vested in the Praetor. "What has descended to so large a part of the modern world is not the coarse Roman law, but the Roman law distilled through the jurisdiction of the Praetor, and by him gradually bent into supposed accordance with the law of nature."

As to the relation of our Court of Chancery to the law of nature, I endeavoured to sum it up in a course of lectures given in America in 1903: "The early Chancellors did not disclose the sources of their inspiration; probably they had as good grounds of expediency for not talking about the law of nature as the common lawyers." The law of nature was intimately associated with the canon law, and for English lay people in the Middle Ages canon law signified obnoxious meddling of foreign ecclesiastics with English benefices and revenues, besides the vexatious and inquisitorial jurisdiction of bishops' and archdeacons' courts. "Certainly [the Chancellors] intended and endeavoured to follow the dictate of natural reason; and if their version of natural justice was somewhat artificial in its details, and bore a decided civilian or canonical stamp, this was only to be expected. Some centuries later, when British judicial officers in India were instructed to decide, in the absence of any native law applicable to both parties, according to "justice, equity, and good conscience," the results bore, even more manifestly, the stamp of the Common Law" ("The Expansion of the Common Law," p. 114).

NOTES TO CHAPTER IV

NOTE G

MEDIEVAL AND MODERN TREATMENT OF THE LAW OF NATURE: BRACTON: FRENCH PUBLICISTS

MUCH that has been written about the law of nature in modern times is, as Maine says, extremely confused. This may be due to several causes, but one cause which would alone be sufficient is the neglect of the scholastic tradition, amounting to practical oblivion, which followed on the Reformation controversies. Hooker was the latest English writer who possessed the tradition, and accordingly stated a consistent and intelligible doctrine. What the canonists and schoolmen added to the classical Roman theory was the identification of the law of nature with the law of God revealed in human reason: in this way they reconciled the temporal authority of the Corpus Iuris, and the moral authority of the philosophers (for Aristotle and Cicero, though heathens, had become almost sacred by orthodox commendations) with the spiritual authority of the Church. The natural revelation through reason and the supernatural revelation committed to the Church are equally divine, and cannot contradict one another; and the law of nature is no less paramount to any positive rule or custom of human origin than express revelation itself. The risk of this doctrine being turned against the Church or the Pope was, no doubt, serious, as later events proved; but it had to be taken. Hence the scholastic theory of the law of nature, though attempts were made to use it for the most opposite purposes, was on the whole rationalist and progressive. Indeed, it had several points of affinity with the utilitarian doctrine of our own times, although the founders of that school, who may be said to have neglected history on principle, were unaware of the fact. Natural justice had been identified by Epicurus with an agreement among men for their common advantage to abstain from harming one another (see Bryce, "Studies," ii. 127). In the fourteenth century we actually find *communis utilitas* a current term with William of Ockham and others, and it is used to denote a criterion for ascertaining what the law of nature prescribes; and this was only the development of a tendency already visible in St. Thomas

Aquinas. Maine perceived the analogy, and suggested that it might not be too fanciful to call natural law the ancient counterpart of Benthamism (p. 79).

Beyond the fundamental principles of natural justice, we may deduce by natural reason various rules which may or might be convenient in the absence of competent jurisdiction, but, as they are in matter of convenience and not of absolute right, may be modified by the law of the land. Rules of this kind were said to be secondary; and the so-called "state of nature" is, from the point of view of the schoolmen, merely human society conceived as governed by the "secondary law of nature" in default of positive ordinance, or any human society so far as it is actually found in that condition. Thus during a great part of the Middle Ages most of what we know as the law of contract was left to the law of nature, which was supposed to be the ultimate authority for the custom of merchants. Nothing can more strongly illustrate the confusion which resulted from neglecting this distinction than the modern belief that natural law as a whole depends on the "state of nature," or assumes it to be better than civilization. The scholastic habit of mind was alien from ours in many ways; but at any rate the schoolmen took some pains to know what they were talking about.

Hooker's statement of the first principles, as understood down to the sixteenth century, is quite accurate, and perhaps the most profitable for English readers The law of nature is a law of reason. Its rules "are investigable by Reason, without the help of Revelation supernatural and divine . . . the knowledge of them is general, the world hath always been acquainted with them. . . . It is not agreed upon by one, or two, or few, but by all. Which we may not so understand, as if every particular man in the whole world did know and confess whatsoever the law of reason doth contain; but this law is such that being proposed no man can reject it as unreasonable and unjust. Again, there is nothing in it but any man (having natural perfection of wit and ripeness of judgment) may by labour and travail find out." But the law of nature does not include all binding laws: "we restrain it to those only duties, which all men by force of natural wit either do or might understand to be such duties as concern all men" ("Eccl. Pol." I. viii. 10). A strange contrast to Hooker's clear apprehension and intelligent use of the medieval tradition is presented by the loose talk about the law of nature and the law of reason (apparently supposed to be different things) in Sir Henry Finch's "Discourse of Law," published in 1613. Before the middle of the eighteenth century the conception of "the aboriginal reign of nature" had gained a footing, and the confusion was complete. No less a man than Montesquieu thought natural law could be defined merely as the rules that would have been appropriate for men living before the

formation of civil society ("Esprit des Lois," I. ii.). The vitality of the old doctrine had in truth passed into the new science built on its foundations by Grotius and his successors; and such ornamental references to the law of nature as occur in Blackstone and other English writers of his time are echoes of contemporary or recent Continental publicists whose real subject-matter was the law of nations in its modern sense. In later Continental and especially German usage natural law is taken, by a considerable but legitimate extension, to denote all speculative construction in jurisprudence and politics as contrasted with the purely historical or comparative study of institutions; in the terms most familiar to English readers, it covers the whole ground of general jurisprudence and the theory of legislation. Herbert Spencer's volume on Justice and the essays of the Fabian Society would alike be classed as books of *Naturrecht*. Writers of the historical school who consider the law of nature obsolete include British utilitarian doctrine in their condemnation as a matter of course, as being a mere branch of it.

There are some incidental statements of Maine's in this connexion which need comment. What is said about the unquestioning respect paid in the Middle Ages to written texts is undoubtedly true, and is indeed rather understated. Reverence for any plausible show of authority was not confined to theology or law, and it was not necessary that the text quoted should purport to have any obligatory force, or that the sense in which it was quoted should be the natural one. Aristotle was nearly as good authority as the Bible, though not quite; Cicero was only second to Aristotle; and the Corpus Iuris was "written reason" even in jurisdictions where it was not binding. But in default of the Vulgate or the Philosopher, learned writers were glad enough to quote Virgil or Ovid or Lucan, though without any intention of putting them on a level with Scripture. Maine's particular illustration from "the plagiarisms of Bracton" is unfortunate. I do not know on what book or man having a pretended knowledge of Bracton he relied; certainly there were very few men living forty-five years ago who had studied Bracton to such purpose as to be qualified to inform him, and certainly he had not then made any critical examination of his own; but the solution of the historical enigma which Maine, with great reason, found in Bracton's alleged wholesale borrowing from Roman law is simply that the fact is not so. Not one-thirtieth of Bracton's matter, instead of a third as affirmed by Maine's unknown authority, is taken from the Corpus Iuris (Maitland, "Bracton and Azo," Selden Soc. 1895, p. xiv, which see on the whole matter). Bracton used Roman law, chiefly through Azo's famous gloss, partly as a systematic framework and partly as a store of written reason to fill up gaps in English learning. He had no thought of putting it off on his countrymen as "pure English law," any more than

a lawyer at Paris would have sought to put it off as pure Parisian custom; there is no concealment of its origin. When actual English custom was contrary to Roman law, Henry of Bratton (for such, it is now known, was his real name) did not hesitate to deny the Roman propositions.

Further, it is at least misleading to say that "the systematic study of the Roman law was formerly proscribed" in England. The only prohibition of which there is any evidence was confined to London; it is doubtful whether its purpose was to hold clerks in orders to their proper study of the canon as distinguished from the civil law, or to prevent London teachers from competing with the civilians of Oxford (Pollock and Maitland, "H.E.L.," i. 102). The earlier story of Stephen prohibiting Vacarius is ambiguous; it does not show whether he objected to the doctrines of Roman law or to the person of Vacarius, or whether his objection was founded on any permanent reason. All we know is that John of Salisbury thought Stephen's action, whatever it was, unreasonable; as indeed it is quite likely to have been. It may have been a mere caprice. Roman law was not only taught at Oxford and Cambridge without interruption, but sometimes, though not often, cited, at least in a general way, in the King's Courts (Selden ad Fletam, pp. 528-530).[1] There is no reason whatever to suppose that any one thought it needful or expedient to protect the Common Law against a Roman invasion. Blackstone ("Comm.," i. 20-22) contrived, by accumulating mistakes, to draw an imaginary picture of English aversion and contempt for the civil law. In the case cited by him, Y. B. 22 Ed. III. 14 (not 24), what really happened was this. Counsel said, by way of preliminary objection, that the Court had no judicial knowledge of what the civilian—or rather, in the case in hand, canonist—process of *inhibitio novi operis* was: to which Justice Shardelowe replied in effect: "That is only what they call restitution in their law, so we think nothing of your point; you must answer to the merits"; and the argument proceeded accordingly. Nothing here shows very gross ignorance, although the language might not satisfy a learned civilian; the Court, so far from treating Roman words of art as nonsense, professed to understand them quite enough for the purpose in hand; and the only contempt in question was that of an abbot who was charged with having cited a prior to the Pope's Court at Avignon and persisted in disregard of the king's prohibition. But in the nineteenth century an over-zealous Romanizing lawyer

[1] Selden speaks of two cases in a certain Inner Temple MS. of Year Books of Ed. II., where Roman texts are even cited with precise reference in the accustomed form of civilians. But this MS. is not now to be found, and, such references being otherwise unknown in other extant Year Books, it is safer to think that they were added by a specially learned scribe. See Maitland's Introduction to Y.B. 3 Ed. II., Seld. Soc. 1905, p. xx.

called Shardelowe an old savage on the strength of Blackstone's misunderstanding. What is really curious in the matter is that Blackstone appears to have been misled by Selden (ad Fletam, p. 533), who cites this to prove that Roman law had become unknown in the King's Courts in the reign of Edward III., though he does not use anything like Blackstone's rhetorical language about contempt and aversion. With all respect for Selden, I see no room for doubt that he did misunderstand the case; perhaps he was nodding a little, for he calls Shardelowe J. "Shardus." His general thesis that knowledge of Roman law in England, except among professed canonists, declined rapidly after the reign of Edward II., is doubtless correct. But there was no question of hostility. Not the fourteenth or thirteenth, but the sixteenth century was the time of recrimination between common lawyers and civilians, and perhaps of some real danger to the Common Law (Maitland, "English Law and the Renaissance"; Pollock, "The Expansion of the Common Law," p. 88).

Maine's remarks on the enthusiasm of French lawyers for natural law (p. 83 sqq.) seems rather to ignore its general reception by Continental publicists; though the centralization of the French monarchy no doubt made it easier for them to have something like uniform official doctrine. The enfranchising ordinance of Louis Hutin cited at p. 94, which asserts that all men ought to be free by natural law, repeats an earlier one issued by Philip the Fair in 1311 ("Journ. Soc. Comp. Legisl.," 1900, pp. 426-7). It is not very clear that the framers of this ordinance were thinking of the Roman maxim, "omnes homines natura aequales sunt" (or rather "quod ad ius naturale attinet omnes homines aequales sunt": Ulpian in D. *de div. reg.* 50, 17, 32); for the general tone is decidedly more religious than secular, and the Church had always favoured manumission as a pious work. If they had wanted to vouch the authority of the Digest or the Institutes that slavery was not recognised by the law of nature, they might easily have made the reference more pointed. That Ulpian did not mean to preach an ethical or political creed of equality is, as Maine says, plain enough; his assertion is that slavery (like other inequalities of condition) is justified only by positive law. At the same time no medieval publicist who desired to use the passage for his own purposes would have troubled himself about the author's original intention. In Justinian's authoritative declaration on the subject, already referred to in Note E, there is an ethical element which Maine seems to me to have underrated; and this is the passage of the Corpus Iuris, if any, which was present to the mind of King Philip's counsellors.

At p. 86 there is a statement about Dumoulin's opinions which I have not been able to verify. Charles Dumoulin (properly Du Molin latinized as Molinaeus, 1500-1566) was a profound jurist

and a famous champion of Gallican liberties against the Papal claims. He was for some time a Calvinist, and afterwards a Lutheran, but his biographer Julien Brodeau, whose book[1] seems to be the ultimate authority, was anxious to make it clear that he died a Catholic; which from the Gallican point of view was only natural. His life was wandering and troubled, and is a striking example of the general disturbance into which the world of letters as well as of action was thrown by the Reformation controversies; twice he fled from Paris, and twice his house was sacked under colour of zeal for Roman orthodoxy. The standard edition of his works was printed at Paris in 1681 in five volumes, folio, and is copiously indexed. I have not found in them anything about the law of nature except one depreciatory remark in a note on the Decretum of Gratian (Annotationes ad ius canonicum, in vol. 4): "politia externa regitur iure naturali et politico, sed utrumque subest divino quod altius est naturali." This directly contradicts the received theory, which put the law of nature (principles of right revealed in human reason) before the Law of God (interpretation of specific precepts communicated by external revelation). I suspect that Du Molin, writing at that time as a Protestant, took the Law of God to be the text of Scripture, and meant that the text was to be preferred to the reasonings of the schools: compare the so-called Protestant declaration formerly in use on the admission of Fellows at Trinity College, Cambridge, "verbum Dei iudiciis hominum praepositurum." Whatever the exact significance may be, Du Molin's observation is the reverse of a panegyric on the law of nature. One can only suppose that the rhetorical passages of which Maine appears to have had a pretty distinct recollection occur in some other French jurist of the time, and that the introduction of Du Molin's name was due to a slip of memory or to some accidental dislocation or misreading of manuscript notes.

It has already been pointed out that Maine greatly exaggerated the place of the "state of nature" in the doctrines of natural law. This comes out again in a startling manner in his remarks on Rousseau (p. 88).[2] Whatever Rousseau may have said elsewhere, we shall not find anything about the original perfection of mankind in the "Contrat Social," to which Maine apparently meant to refer. Rousseau believed, certainly, in natural law, and to some extent in the virtues of the "natural man" as an individual; but his "state of nature" is not much better than Hobbes's; it is

[1] La vie de Maistre Charles Du Molin, advocat au Parlement de Paris . . . et sa mort chrestienne et catholique. Par Me Julien Brodeau, advocat au mesme Parlement. Paris 1654, 4°.

[2] "Nothing that Rousseau had to say about the state of nature was seriously meant for scientific exposition, any more than the Sermon on the Mount was meant for political economy" (John Morley, "Rousseau," i. 183).

unstable and becomes intolerable, and the social contract is dictated by the need of self-preservation (liv. i. ch. vi.); justice, which did not exist in the state of nature, is due to the establishment of political society (ch. viii.). This is not the place to speak at large of Rousseau's influence on the founders of American independence and the leaders of the French Revolution; but the careful research of American scholars has lately shown that the Principles of 1789 owed more to the American Declaration of Independence and the earlier Bills of Rights of several States than we used to suppose, and less to Rousseau, and that the language of the American constitutional instruments proceeded from the school not of Rousseau but of Locke (Scherger, "The Evolution of Modern Liberty," New York, 1904).

NOTE H

THE ORIGINS OF THE MODERN LAW OF NATIONS

Maine's statement (p. 96) seems to ignore the continuity of Grotius and his immediate precursors with the scholastic doctrine. It is true that the spread of the New Learning, and still more the Reformation, did largely increase the weight of the classical and diminish that of the medieval elements; but it is also true that Grotius did not rely exclusively on Roman or on legal authorities. That Grotius and his contemporaries misunderstood the classical *ius gentium*, or supposed the modern rules of conduct between sovereign states to be contained in it, I am unable, with great respect for any suggestion of Maine's, to believe. The term had become less common than its practical synonym *ius naturale* in the Middle Ages, but came into fashion again with the Renaissance. Grotius, like Alberico Gentili, takes *ius gentium* as the rule of natural reason attested by general agreement, and makes it the starting-point of a new development. He may or may not have known that in its classical meaning it could, and sometimes did, include, among other rules of conduct sanctioned by general usage, whatever rules are reasonable and customary as between sovereign states. But as a scholar he must have known that *gentes* is not the plural of *civitas* or *populus*, which are the only apt words in classical Latin for a state or nation in its political capacity. At the same time Suarez had spoken of *iura gentium* with an approach to the modern "law of nations," and Hooker had used the English term in a fully international sense ("Eccl. Pol." I. x. § 12). There was no reason for Grotius to refuse the assistance of a verbal ambiguity, so far as it existed and could further his purposes (cp. L.Q.R. xviii. 425-8). The modern law of nations embodies certain distinctly legal conceptions. These are Roman and purely Roman. Inasmuch as, from the sixteenth century onwards, Roman law was generally received throughout Western Christendom, with the one

material exception of England, as a kind of universal law, there is nothing surprising in this fact, and indeed nothing else could have happened. Maine's following observations (p. 103 sqq.) as to the application of Roman ideas in the modern law of nations, and especially the treatment of every independent State, with regard to its territory, as if it were an owner or claimant of ownership under Roman law, and the relatively modern character of purely territorial dominion, show the author at his best. The theoretical equality of independent States naturally follows from their recognition as analogous to free persons, who must have full and equal rights in the absence of any definite reason for inequality. This indeed is all that the maxim of men's equality before the law of nature declares or involves according to its classical meaning (p. 20 of these notes).

It is interesting in connexion with Maine's thesis to observe how in our time the usual rules of international law cease to be applicable, or fail to give an adequate solution of difficulties, just in proportion as the fact of territorial sovereignty is not complete and definite. This is now of frequent occurrence in cases of "spheres of influence" in unsettled parts of the world, of protectorates, and of what are called semi-sovereign States dependent in various degrees on other and more powerful ones. In the last-named class we may notice a certain reversion to feudal conceptions. It would have been much easier to express the relations of Great Britain to the late South African Republic in medieval than in classical Latin. As to the Anglo-Saxon kingship, it should be remembered that the English kings never owed or rendered any temporal allegiance to the Empire or any other power, and that the assumption of the imperial title "Basileus" involved a pretty strong claim to temporal supremacy within approximately certain territorial limits. In this respect the situation of England was peculiar. Modern national sovereignty may be regarded, in a general way, as a reaction against both the feudal and the imperial conceptions. Rulers of the Middle Ages, as and when they felt strong enough, expressly or tacitly renounced both homage to any overlord and submission to the Emperor. A German electoral prince or grand duke in the decadence of the Holy Roman Empire, say the Elector of Brandenburg, is from the strictly feudal point of view an overgrown tenant of the Emperor who has added one "immunity" to another till he has strained the tie of fealty to the breaking point. From the strictly imperial point of view, if it had been maintained to any practical purpose, he would or might be a rebel. Feudal tenure, however, probably led to the notion of the territory ruled by a sovereign prince being really—not by mere analogy to ownership in private law—his property. For, so long as overlordship was a reality, every principality, short of the Empire and the few monarchies which did not acknowledge the

Emperor as superior, was in theory a "tenement"; and in the feudal system a tenement is indistinguishable from property; for absolute property is not recognised save in the supreme overlord, as is the strict theory of English and Scottish law to this day. This ultimate and now shadowy feudal superiority has nothing to do with the modern and purely political conception of Eminent Domain, though more than once they have been confused by able writers.

It must not be supposed, however, that medieval lawyers were incapable of distinguishing between territorial sovereignty and feudal overlordship. The distinction was clearly made in 1284 by the framers of Edward I.'s Statute of Wales. In its preamble the king is made to acknowledge the bounty of Providence whereby the land of Wales, formerly subject to him as a fief, has been wholly reduced into his lordship in possession and annexed to his crown as part of the body of the kingdom.

"Divina Providentia . . . inter alia dispensacionis sue munera quibus nos et regnum nostrum Anglie decorare dignata est terram Wallie cum incolis suis prius nobis iure feodali subiectam iam sui [*sic*] gratia in proprietatis nostre dominium . . . totaliter et cum integritate convertit et corone Regni predicti tanquam partem corporis eiusdem annexuit et univit" ("Statutes of the Realm," i. 55).

NOTES TO CHAPTER V

NOTE I

MONTESQUIEU, BENTHAM, AND HISTORICAL METHOD

MAINE'S judgment of Montesquieu is, in effect, that, notwithstanding inevitable defects of method and some individual faults, he came nearer than any other man to founding the historical and comparative study of institutions. It is true, as Sir Courtenay Ilbert has said in a fuller criticism ("The Romanes Lecture: 'Montesquieu,'" Oxford, 1904), that "his appreciation of the historical method was imperfect, and his application of it defective": at the same time his work "prepared for and gave an enormous stimulus to those methods of study which are now recognized as indispensable to any scientific treatment either of Law or of Politics" (*op. cit.* pp. 35-6).

In 1903, on quitting the chair which I had the honour of holding in succession to Maine at Oxford, I thus endeavoured to sum up Montesquieu's relation to these studies:—

"If we hesitate to call him the founder, it is only because neither his materials nor his methods of execution were adequate to do justice to his ideas. He aimed (if I may repeat my own words, first written many years ago) at constructing a comparative theory of legislation and institutions adapted to the political needs of different forms of government, and a comparative theory of politics and law based on wide observation of the actual systems of different lands and ages. Hobbes was before him in realising that history is not a series of accidents, but Montesquieu was the first of the moderns to proclaim that a nation's institutions are part of its history, and must be considered as such if we are to understand them rightly. Much of his history is sound, and many of his judgments are admirable. Yet he failed to construct a durable system, and 'L'Esprit des Lois' cannot even be called a systematic book. The materials were still too scattered and uncertain to be safely handled on Montesquieu's grand scale. Perhaps he would have done better to confine himself to Western Europe. The main defects of his method may be reduced, I think, to two. First, he overrated the influence of climate and other external conditions, and underrated, if he did not wholly neglect, the effects of race and tradition. Next, he had not even an inkling of what is now a fundamental rule of this kind of enquiry: namely, that there is a normal course of development for communities as well as for

individuals, and that institutions which belong to different stages are not commensurable terms in any scientific comparison. This is as much as to say that even Montesquieu could not wholly escape from the unhistorical dogmatism of his time. It is perhaps a minor drawback that he constantly seeks for reasons of deliberate policy to account for seemingly eccentric features of outlandish customs, rightly or wrongly reported by missionaries or others, instead of endeavouring to connect them with their historic and racial surroundings. But the result is that many chapters of his great work amount, taken by themselves, to little more than collections of anecdotes and conjectures in which the most incongruous elements, such as the customs of China and the laws of Spain, are brought together at random. Also Montesquieu is not free from the very common error, especially prevalent in the eighteenth century, of attributing a constant and infallible efficacy to forms of government. In short, Montesquieu saw the promised land afar off, but was not equipped for entering it. I do not wish to be understood as affecting to find any fault with him. The greatness of Montesquieu's conception was his own, and the shortcomings in execution were at the time necessary, or at least natural" ("The History of Comparative Jurisprudence, a farewell Public Lecture": Journ. Soc. Comp. Legisl., 1903, at pp. 83-4).

The "historical theory" ascribed to Bentham (p. 117) seems to be not quite so unfruitful as Maine's criticism supposes. If it is said that societies modify their laws according to modifications of their views of general expediency, this must mean views formed by actual observation and experience, as opposed to the application of dogmatic or traditional rules; and it must be implied that such views have a greater part in the changes of legal institutions than is avowed, or perhaps realised, by the actors and promoters. Doubtless Bentham underrated the power of tradition and custom. Probably he underrated it very much in the case of archaic societies. But his proposition, understood as above explained, is a substantial one and capable of discussion. It is not reducible to the truism that people make changes because they think change expedient, or in other words because they desire change; it signifies that the reasons professed or admitted for making particular changes are often not the real or the most operative reasons. Apparently the passages to which Maine alludes are scattered about various works of Bentham's and not expressed in clear or positive terms; it therefore does not seem practicable, in the absence of any specific reference, to identify them. But it was obviously natural for Bentham, with his thoroughgoing conviction that all ethical problems can be solved by the utilitarian calculus, to maintain that in fact the greater part of mankind are utilitarians without knowing it.

Maine's claim of scientific validity for the historical treatment of jurisprudence (p. 119) is now disputed by no one; indeed, if we now find any difficulty, it is in remembering that in 1861 it was still novel, and that its champion at that time had need of much

insight and some boldness. His precepts as to the need of observing the caution approved by experience in other kinds of scientific enquiry, beginning with the best evidence and working gradually from what is known to what is obscure or unknown, are still in full force, and might easily be illustrated by the failure of ambitious reconstructions of later date whose authors have neglected them.

NOTE K

THE PATRIARCHAL THEORY

In the preface to the tenth edition, reprinted in all subsequent issues, Maine himself referred to the chapter on Theories of Primitive Society in "Early Law and Custom." The note on the Gens in the same volume (p. 286 sqq.) should also be consulted. In 1886 Maine replied in the Quarterly Review to the criticisms of the McLennan brothers (Q.R., vol. 162, p. 181); no secret was made of the authorship, though the practice of the Review, as it then stood, did not allow signature or public acknowledgment. It should be noted that the supposed ancient Slavonic poem cited at p. 196 of this article is a modern forgery: see Kovalevsky, "Modern Customs and Ancient Laws of Russia," p. 5. The last-named learned author made fuller contributions to the subject in his lectures delivered and published in French at Stockholm ("Tableau des origines et de l'évolution de la famille et de la propriété," 1890: some account of this book, which may not be easily accessible in England, was given in the Saturday Review of October 18 and 25, 1890). Still later Dr. Kohler of Berlin has dealt systematically with the whole topic of archaic marriage and kinship, following and applying Morgan's doctrine with less reserve than Lord Avebury and Dr. Tylor, who do not accept Morgan's inferences ("Zur Urgeschichte der Ehe: Totemismus, Gruppenehe, Mutterrecht," reprinted from "Ztschr. für vergleichende Rechtswissenschaft," Stuttgart, 1897: and see a more summary statement by the same learned author in the "Encyklopädie der Rechtswissenschaft," re-edited by him in 1904, vol. i. pp. 27 sqq.). Most English readers, however, will find in the latest edition (1902) of Lord Avebury's "Origin of Civilisation," and in Dr. E. B. Tylor's article on the Matriarchal Family System, Nineteenth Century, xi. 81 (1896), and in Mr. Andrew Lang's "The Secret of the Totem" (1905), the easiest and certainly not the least profitable guides, among writings published since Maine's death, to what is now known or conjectured in this extremely difficult inquiry.

Much trouble and confusion might have been saved if Maine had in the first place expressly confined his thesis, as for all practical purposes it was confined, to the Indo-European family of nations. Herbert Spencer, whose courteous treatment of "Ancient Law" set a good example not always followed, gave a hint of this long

ago. When Maine wrote "Ancient Law" there were no trustworthy materials for dealing with the social history of other races on a large scale. It is certain that from the earliest times at which we have any distinct knowledge of Indo-European society we find families—or communities which may be considered as expanded families—tracing descent through males, and living under the authority, more or less tempered by custom, of the eldest male ascendant. The worship of ancestors in the male line is of extreme antiquity in every branch of the stock; it is in full force at this day among the Hindus, and there are quite recent traces of it elsewhere. This is enough for the historian of Indo-European institutions; for the remaining evidences of a different earlier system are mere survivals at best, and of no importance for any subsequent development, however interesting they may be for prehistoric anthropology. My own judgment, so far as I have been able to form one, is that many of them are no better than ambiguous. Further, it is to be observed that local survivals of "matriarchal" institutions, where their existence is made out, may quite possibly not be Indo-European at all, but belong to the customs of the non-Aryan tribes who were subdued by Aryan invaders in India, or in Eastern Europe, or in the Mediterranean countries. We have been asked to regard the Erinyes prosecuting Orestes for matricide as the champions of a more ancient "mother-right" against the paternal system: as if the natural tendency of that system were to treat matricide as venial. Surely the question whether the son is bound to take up the father's blood-feud even against his own mother is hard enough to make a dramatic problem under any system which admits private vengeance at all. But in any case the Erinyes were autochthonous deities, looking on the gods of Olympus as intruders (τοιαῦτα δρῶσιν οἱ νεώτεροι θεοί). If their failure in the suit against Orestes is a symbol of anything, it may well symbolise the triumph of Hellenic over aboriginal customs. The existence of non-Aryan elements in the Mycenaean and even the later historical civilization of Greece is accepted for independent reasons by some of our best archaeologists (P. Gardner in Eng. Hist. Rev. xvi. 744). Again (to take a Semitic example) we are told that Gideon avenged the sons of his mother upon the kings of Midian (Judges viii. 19). But there was no one else to do it, and the men of Israel who, as we read only a few verses below, said unto Gideon: "Rule thou over us, both thou and thy son, and thy son's son also," were certainly familiar with succession through males. The German, Scandinavian, and Celtic tribal customs as disclosed in the earliest known history of those branches appear to be thoroughly paternal, though not without traces of preference for relatives on the mother's side.[1] Summing up

[1] It is now admitted that marriage by capture was part of the earliest Germanic law, but it is very doubtful whether it survived the introduction of Christianity in

the results, Dr. Tylor says (Nineteenth Century, xl. 94): "There is no proof that at any period the maternal system held exclusive possession of the human race, but the strength with which it kept its ground may be measured by its having encompassed the globe in space, and lasted on from remote antiquity in time." For different views as to the significance of some archaic Indo-European customs, see J. D. Mayne in L.Q.R. i. 485, 494, and Kovalevsky, "Droit coutumier Ossétien," Paris, 1893, p. 181. It is no doubt possible, as suggested by Mr. Kovalevsky, that survivals from an earlier system may be maintained under a later one for reasons different from the original ones. But if patriarchal reasons are enough to account for the custom as we find it, we can hardly assume that in a given case it was formerly matriarchal, merely because for all we know it might have been. This would be to assume the very thing to be proved, namely that the society in question was in fact maternal at some earlier time.

On the whole the safest opinion appears at present to be that the Indo-European race may have gone through a stage of "matriarchy" at some remote time, but at any rate before the great migration which dispersed the several branches. This was Ihering's conclusion in his brilliant posthumous work, "Vorgeschichte der Indo-Europäer" (p. 40 of Eng. tr., 62 of original). It would seem, again, that the transformation, if such a transformation there was, must not only have taken place very early, but must have been singularly rapid and complete. Thus we are brought face to face with Maine's original problem: How and why did the Indo-Europeans become progressive? In this connexion I cannot forbear from citing some profitable words of my lamented friend Professor F. W. Maitland, though their immediate subject-matter is the history not of the family but of property.

"Even had our anthropologists at their command material that would justify them in prescribing a normal programme for the human race and in decreeing that every independent portion of mankind must, if it is to move at all, move through one fated series of stages which may be designated as Stage *A*, Stage *B*, Stage *C*, and so forth, we still should have to face the fact that the rapidly progressive groups have been just those which have not been independent, which have not worked out their own salvation, but have appropriated alien ideas and have thus been enabled, for anything that we can tell, to leap from Stage *A* to Stage *X* without passing through any intermediate stages. Our Anglo-Saxon ancestors did not arrive at the alphabet, or at the Nicene Creed, by traversing a long series of 'stages'; they leapt to the one and to the other" ("Domesday Book and Beyond," p. 345).

England. The Anglo-Saxon bride-price appears to have been paid not for the wife's person but for the rights of wardship (Hazeltine, "Zur Geschichte der Eheschliessung nach angelsächsischem Recht," Berlin, 1905).

The accident of borrowing one alphabet rather than another, or in one stage rather than another, may determine the affinities of a literature and a civilization for many generations. All the tendency of modern research is to show that deliberate imitation was earlier, easier, and commoner than scholars formerly supposed; and that people will imitate pretty odd things is amply shown by modern experience.

Maine was not the first to discover that the ancient Indo-European tribe or city, as the case may be, is an expanded family with the tie of actual kindred supplemented, so far as needful to keep the community together, by adoption or even by bolder fictions; indeed, the conception is in its essential points as old as Aristotle. But he was, I think, the first to call attention in an adequate manner to the general existence and importance of this feature in archaic society. His view has been strikingly confirmed by the researches in the history of Slavonic institutions which are mentioned in "Early Law and Custom" under the head of East European House Communities. The family element in the Indo-European community has now and then been unduly suffered to drop out of sight. Thus the exclusiveness of the archaic village or township is simply and adequately explained as the exclusiveness of a community which had been or pretended to be a clan, and no deeper mystery need be sought in the much discussed Salic rule *De Migrantibus*.

Maine's original thesis was further developed by himself in the lecture on Kinship as the Basis of Society in "The Early History of Institutions," pp. 64 sqq.

It is impossible here, and I hardly think it would be relevant if possible, to enter at large on discussion of the "matriarchal" or, as Dr. Tylor prefers to call it, maternal family system. But it may be pointed out that, whatever else it is or has been, primitive it is not. It goes along with an elaborate and complex nomenclature of kindred and affinity, of which the interpretation is much disputed,[1] and often though not always with other usages of the most artificial kind, of which the explanation is no less conjectural, and as obscure to the modern historian as the facts to be explained are repugnant to modern civilized manners. Dr. Tylor has observed that its real characteristic point is the continuance of

[1] J. F. McLennan's opinion, which he intended to develop farther and prove in detail, was that this classification had nothing to do with consanguinity, but was a system of modes of salutation; and this is also maintained by Dr. Westermarck. Morgan, on the other hand, would allow no merit to McLennan's work and thought the term "exogamy," now generally adopted, useless. Professor Kohler, and less decidedly Mr. Kovalevsky, are, I believe, the only recent authors prepared to accept as a whole the consequences drawn by Morgan himself from the "classificatory" system. Subject to what McLennan might have added if he had lived, his particular line of objection just mentioned does not seem sufficient. Mr. Andrew Lang's conclusions are about equally remote from both schools.

the wife in her own family, who do not lose her property or the value of her work, and gain the husband's alliance. If these or such-like politic motives were the true determining causes of "matriarchy"—and Dr. Tylor makes out a case which is none the less strong for being simple and using the general known materials of human nature instead of hypothetical superstitions—we are a long way off from primitive man, and the problem of what came before all this remains open. Here Maine's appeal to the Homeric description of the savage (not merely barbarous) Cyclopes is probably nearer to the truth than the state of promiscuity—surely the least likely state of nature ever heard of—which some anthropologists have postulated. At any rate it has, in substance, Dr. Tylor's support. "The claim of the patriarchal system to have belonged to primitive human life has not merely long acceptance in its favour, but I venture to think that those who uphold it have the weight of evidence on their side, provided that they do not insist on its fully developed form having at first appeared, but are content to argue that already in the earliest ages the man took his wife to himself, and that the family was under his power and protection, the law of male descent and all that belongs to it gradually growing up afterwards on this basis. . . . Among the great ancient and modern nations within the range of history, the paternal system becomes so dominant as to be taken for granted, and the existence of any other rule seems extraordinary" (Nineteenth Century, xl. 84, 85). So far as the evidence has gone, the maternal system appears to be unstable when people who live under it come into contact with paternal families: in such cases the husband's predominance pretty soon begins to assert or re-assert itself. It is also remarkable that a received custom so lax as not to seem to civilized administrators fit to rank as any kind of marriage law has been found compatible with fairly strict monogamy in practice (on both these points see H. H. Shephard, "Marriage Law in Malabar," L.Q.R. viii. 314). It seems fairly certain that both the frequency and the importance of polyandry have been exaggerated, and that, where it occurs, it can be explained, by those who regard "group-marriage" as proved, as a limiting case of group-marriage determined by special conditions. Thus we are rather led to regard the maternal system as a product of social necessities, not yet very well understood, which, although they have prevailed at some time in many or most inhabited parts of the world, may be fairly called abnormal with respect to the most original and persistent instincts of mankind as a species. When the maternal is supplanted by the paternal society, those instincts come to their own again in surroundings that no longer demand the highly artificial discipline of matriarchy. Much more evidence is needed both as to the origins of the maternal family, and as to the causes and manner

of its transformation into the paternal type, before anything like a comprehensive statement can be made. We should remember that, as Professor Maitland says, continuing the passage already quoted, "we are learning that the attempt to construct a normal programme for all portions of mankind is idle and unscientific." Probably no one would now maintain that either marriage by capture or matriarchy is primitive. Any such position is formally disclaimed, for example, by a recent learned and ingenious author, Dr. Richard Hildebrand, "Recht und Sitte auf den verschiedenen Kulturstufen," 1ter Teil, Jena, 1896. It is perhaps needless at this day to refute the formerly current opinion that the customs of savages are the result of degradation from a more ancient state of innocence or civilization. Partial backsliding into barbarism over a considerable range of both time and space is of course possible, as shown in the decline of the Roman and the Mogul empires. But trying to account for the systems of kinship (if it is kinship) investigated by Morgan as fallings off from monogamy or patriarchal polygamy is, if I may repeat an illustration I have already used in an earlier note, like expecting to find chalk under granite.

Finally Mr. Lang, in "The Secret of the Totem," agreeing in the main with Darwin on this point, wholly rejects the hypothesis of a promiscuous horde having been the earliest state of human life, and holds that "men, whatever their brutal ancestors may have done, when they became men indeed, lived originally in small anonymous local groups, and had, for a reason to be given"—the jealous despotism of the eldest male, as is explained in a later chapter—"the habit of selecting female mates from groups *not* their own." McLennan's explanation of exogamy is dismissed as wholly inadequate, and the facts supposed by Morgan and his school to establish a general epoch of "group-marriage" are treated as exceptional and belonging to a relatively advanced stage. I do not presume to appreciate Mr. Lang's theory, or make any critical comparison of it with those of other anthropologists who differ widely from Mr. Lang and from one another. But it is legitimate to observe that Mr. Lang, as well as Dr. Tylor, appears to justify Maine's opinion as to the primitive character of the Cyclopean family, and that it is less plausible now than it was twenty years ago to regard Maine as an old-fashioned literary scholar standing out against the lights of modern research. No doubt Maine, when he wrote "Ancient Law," conceived the transition from the savagery of the Cyclops to the archaic civilisation of a Roman paterfamilias under the Kings or the early Republic as having been a far more direct and simple process than we can at this day think probable. This is so common an incident of historical speculation, in the absence of full and trustworthy material, that there is nothing in it to derogate from Maine's credit.

With regard to the extreme form of paternal power which, as Maine says (p. 135), we may conveniently call by its later Roman name of Patria Potestas, it is not clear that it is a mere incident of family headship. Some competent persons, such as Mr. Kovalevsky, hold it to be derived from the notion that the wife is the husband's property, and therefore her offspring must be in his power too. If this be so, the right, being proprietary and not merely social, would belong exclusively to Private Law, and the "maxim of Roman jurisprudence that the Patria Potestas did not extend to the Jus Publicum" would be strictly logical as well as politic. But some, again, think that the paternal family itself was developed through marriage by capture or purchase, causing the wife so acquired to be regarded as the husband's chattel (Kohler, "Encykl. der Rechtswissenschaft," i. 30, 33; "Das Vaterrecht entwickelt sich . . . zunächst als Herrschaftsrecht: der Ehemann ist Herr der Frau und damit Herr ihrer Frucht"). Not that lordship in a rudimentary society can safely be identified with our modern legal ownership. *Dominus* is an ambiguous word except in strict Roman law. At all events we cannot disregard the testimony of Gaius that the Patria Potestas of the Roman family law was, in the time of Hadrian, singular among the Mediterranean nations; and, so far as we know anything of the provincial customs of the empire, they seem to have been not less but more archaic than the law of Rome. The responsibilities of the Roman paterfamilias, on the other hand, are not distinguishable in character or extent from those of the patriarch in other Indo-European family systems.

Another reason against regarding the Roman Patria Potestas as of the highest antiquity is that at an earlier time the paterfamilias was regarded not as owner, but as an administrator of the family property which in some sense already belonged to the heirs as well as himself. Indeed, this idea survived as late as the classical ages of Roman law in the untranslatable term of art *sui heredes*, of which "necessary heirs" is perhaps the most tolerable rendering, and the comments of the jurists upon it (Paulus in D. 28, 2, *de liberis et postumis*, 11, cited by Holmes, "The Common Law," p. 342). We are fully confirmed in this by the history of the Hindu Joint Family. In Bengal the change from the position of an administrator with large powers to that of an owner is known to have taken place in relatively modern times.

Finally, I venture to record, for what it may be worth, my impression that recent inquirers, with the notable exception of Mr. J. G. Frazer, have somewhat neglected the part of superstitions and magical or pseudo-scientific beliefs in the formation of social customs. There is no presumption whatever that the true explanation of any savage practice is that which to us appears most reasonable or natural. The fundamental difference between religion and magic has been explained by Lord Avebury and Sir

Alfred Lyall. Religious offerings and ceremonies, apart from the higher ethical and philosophical developments of advanced theology, seek to propitiate supernatural powers, magical ritual to control both natural and supernatural agencies. The priest is, in the current phrase, a minister, that is to say a servant of whatever gods he worships; he begs their peace and alliance with tribute in his hand. The magician or wizard acts as a master; he aims at using the secrets of nature, or commanding for his own use or that of his clients, and at his own will, the "armies of angels that soar, legions of demons that lurk." Solomon's seal is magical, his dedication of the temple is religious. The facts that magic and religion are often intermixed, and that the priest is very apt to revert to the position of a mere thaumaturgist, do not appear to alter the importance of the distinction. But this has little, if anything, to do with the present subject.

NOTE L

STATUS AND CONTRACT

Maine's now celebrated dictum as to the movement from Status to Contract in progressive societies is perhaps to be understood as limited to the law of Property, taking that term in its widest sense as inclusive of whatever has a value measurable in exchange. With that limitation the statement is certainly just, and has not ceased to be significant. The movement is not yet complete, for example, in England, where the emancipation of married women's property has been proceeding in a piecemeal fashion for more than a generation, and is at present in a transitional state capable not only of raising hard questions but of producing, within a few years, decisions not easy to reconcile. As regards the actual definition of different personal conditions, and the more personal relations incidental to them, it does not seem that a movement from Status to Contract can be asserted with any generality For example, the tendency of modern legislation has been to make the dissolution of marriage less difficult, and in some jurisdictions this has gone very far. But it has nowhere been enacted, and I do not think any legislator has yet seriously proposed, that the parties shall be free to settle for themselves, by the terms of the marriage contract, whether the marriage shall be dissoluble or not, and if so, on what grounds. Assimilation of marriage, as a personal relation, to partnership is not within the scope of practical jurisprudence. Again, a minor who has attained years of discretion cannot advance or postpone the date of his full age by contract with his parent or guardian, and we do not hear of any one proposing to confer such a power. The test which Maine suggests as alone justifying the preservation of disabilities—that the persons concerned do not possess the faculty of forming a judgment on their

own interests—will hardly be received as adequate for either of the cases just put. In fact, the interests which these rules of law regard are not those of the parties alone. Paramount considerations of the stability of society, or the general convenience of third persons, override the freedom usually left to parties in their own affairs. The law of persons may be and has been cut short; but, so long as we recognise any differences at all among persons, we cannot allow their existence and nature to be treated merely as matter of bargain. Status may yield ground to Contract, but cannot itself be reduced to Contract. On the other hand Contract has made attacks on Property which have been repulsed. There was a time in the thirteenth century during which it seemed as if there was no rule of tenure that could not be modified by the agreement of parties. Our settled rules that only certain defined forms of interest in property can be created by private acts, our rule against perpetuities, are the answer of the Common Law to attempts to bring everything under private bargain and control. The importance of Contract in the feudal scheme of society is pointed out by Maine himself in this book, ch. ix *ad fin.* (cp. Pollock and Maitland, H.E.L. ii. 230).

One department of the law of Persons is increasing, not diminishing, in importance, namely the law of corporations or "moral persons." We are beginning to find that the law cannot afford to ignore collective personality—that of a trade union, for example—where fact and usage have conferred a substantially corporate character on a more or less permanent social group. Modern company law is largely, no doubt, a law of contract; but of contract whose action is regulated and modified at every turn by the fact that one of the chief parts is born by a corporate and not an individual person.

Maine guarded his position, however, to a considerable extent in the final words of this chapter, for he seems not to include Marriage—at all events marriage among Western nations, which is preceded by and results from agreement of the parties—under the head of Status. And, if the term is thus restricted, the gravest apparent exception to Maine's dictum is removed. This, of course, involves a sensible narrowing of the term Status, a much discussed term which, according to the best modern expositions, includes the sum total of a man's personal rights and duties (Salmond, "Jurisprudence," 1902, pp. 253-7), or, to be verbally accurate, of his capacity for rights and duties (Holland, "Jurisprudence," 9th ed. p. 88). It is curious that the word "estate," which is nothing but the French form of "status," should have come to stand over against it in an almost opposite category. A man's *estate* is his measurable property; what we call his *status* is his position as a lawful man, a voter, and so forth. The liability of every citizen to pay rates and taxes is a matter of status; what a given citizen has to pay

depends on his estate, or portions of it assigned as the measures of particular imposts. We have, too, an "estate" in land, which so far preserves the original associations of "status" that, as we have just noted, contract may not alter its incidents or nature. Again, as Professor Maitland has pointed out (Introduction to Gierke's "Political Theories of the Middle Age," Camb. 1900, p. xxv), the Roman Status has also become the State of modern public law, and in that form has refused to be reduced to a species of contract by the ingenious efforts of individualist philosophers, notwithstanding the widespread acceptance of the Social Contract for a century or more.

It is not clear how far Maine regarded the movement of which he spoke as a phase of the larger political individualism which prevailed in the eighteenth century and great part of the nineteenth, or what he would have thought of the reaction against this doctrine which we are now witnessing. At all events the questions at issue between publicists of various schools as to the proper limits of State interference with trade, or of State and municipal enterprise, do not seem to have much to do with simplifying the tenure and transfer of property, nor with removing obsolete personal disabilities.

Professor Dicey says indeed ("Law and Public Opinion in England," p. 283) that "the rights of workmen in regard to compensation for accidents have become a matter not of contract, but of status." But many other kinds of contracts have long had incidents attached to them by law, and those incidents are not always subject to be varied at the will of the parties. A mortgagor cannot enter into an agreement with the mortgagee which has the effect of making the mortgage irredeemable, or even tends that way by "clogging the equity of redemption." It would be a strong thing to say that this peculiar doctrine of English courts of equity has created a status of mortgagors.

The Trade Disputes Act, 1906, passed since this note was first published, may certainly be said to have conferred a new and unexampled status on combinations of both employers and workmen by exempting them in several respects from the operation of the general law; but the obligation of contracts is not directly affected, and it remains to be seen whether the Act represents any general movement of legislative ideas, or anything else than the pressure of very powerful interests astutely applied at a critical moment. On one or two points it only confirms what was already the better supported opinion.

NOTE TO CHAPTER VI

NOTE M

TESTAMENTARY SUCCESSION

THE burden of this chapter is that the Will or Testament of modern law, with its specific characters of being secret, revocable, and posthumous in operation, is unknown to archaic law, and is of comparatively recent introduction wherever we find it. Maine's position is amply confirmed by later historical research, and one or two seeming exceptions which he felt bound to notice have been removed.

Jurists of the seventeenth century, we read in Maine's text, resorted to the law of nature to explain and justify testamentary power. This is almost enough of itself to show that no such power was commonly found in customary law. For the doctrine of natural law was, as we have already seen, a progressive and rationalist doctrine. Its use was to override the commonplace objections founded on lack of authority or even on the existence of contrary custom; and at the time of the Renaissance and even earlier it served speculative publicists in much the same way as the principle of utility (with which it has considerable affinities) has served modern reformers. In fact, the whole conception of individual succession to property, even without a will, is relatively modern. The archaic Indo-European family was, Maine tells us, a corporation of which the patriarch for the time being was the representative or public officer—or at most, we may add, managing director. Evidently we are not meant to take this statement as if a definite legal doctrine of persons, much less artificial persons, was to be ascribed to the patriarchal stage of society. For in that stage, as Maine also says, a man was not yet regarded as an individual, but only as a member of his family and class; and this is still true to a great extent in Hindu law. Now the modern doctrine of corporations assumes that the "natural person" or individual, considered as a subject of rights and duties, or "lawful man," as our English books say, is the normal unit of legal institutions, and that the collective personality of a group of men acting in a common interest or duty and behaving like an individual is something which needs to be explained. But for archaic society the collective body and not the individual is the natural person.

We find the same conditions existing in full force among the German tribes in a much later period of time than that which Maine is directly considering in this chapter. A recent learned writer in France, dealing with precisely the same subject as it occurs in the medieval history of French law, has forcibly contrasted the Roman conception, as it was established in the classical law of the empire, with the German.

"Le droit romain consacre le triomphe de l'individualisme; la volonté personnelle du chef de famille, voilà le facteur juridique essentiel, l'agent de toutes les transactions; la force créatrice de tous les droits. Cette volonté est si respectée et si puissante, qu'elle continue d'agir après la disparition de celui qui l'a exprimée. Le père règle le sort de sa fortune et de sa famille pour le temps où il ne sera plus, et cela par un acte souverainement libre, qu'il est toujours à même de modifier. . . . L'individu *sui juris* est, dans le monde romain, l'unité juridique et social.

"Chez les Germains, c'est bien plutôt la famille. Il serait sans doute excessif, surtout pour le temps des Leges [the custumals collectively known as 'Leges Barbarorum'], de déclarer en termes absolus que la famille est tout et que l'individu n'est rien; la vérité sous cette forme serait exagérée et dénaturée. Mais il est certain cependant que l'exaltation de l'individu est beaucoup moins complète qu'à Rome, et que d'autre part la famille forme une association, une sorte d'être collectif armé de droits inconnus des jurisconsultes de l'Empire. L'énergie individuelle est limitée dans le temps, et les Germains ne peuvent pas concevoir qu'elle s'exerce au delà de la tombe; sitôt l'homme mort, toutes ses volontés s'évanouissent. Au même moment ses prérogatives juridiques sont recouvertes et absorbées par celles de ses parents, car de son vivant même sa famille jouissait de droits autonomes qu'il ne dépendait pas de lui de supprimer: sa mort les développe, mais elle ne les crée pas" (Auffroy, "Evolution du testament en France," Paris, 1899, pp.173-4. Cf. Brunner, "Grundzüge der deutschen Rechtsgeschichte," § 56; "Das germanische Erbrecht war ein Familienrecht." For examples of analogous customs among various uncivilized tribes, see Lord Avebury, "Origin of Civilisation," 6th ed. pp. 489-91).

The suggestion in Maine's text of regarding the Roman ancestor in his representative character as a kind of corporation sole may be helpful to English students, but we can hardly trust it to throw light on the actual formation of Roman legal ideas. For our English category of corporations sole is not only, as Maine calls it, a fiction, but modern, anomalous, and of no practical use. When a parson or other solely corporate office-holder dies, there is no one to act for the corporation until a successor is appointed, and, when appointed, that successor can do nothing which he could not do without being called a corporation sole. In the case of

the parson even the continuity of the freehold is not saved, and it is said to be in abeyance in the interval. As for the king, or "the Crown," being a corporation sole, the language of our books appears to be nothing but a clumsy and, after all, ineffective device to avoid openly personifying the State. The problems of federal politics in Canada and Australia threaten to make the fiction complex. Is "the Crown" a trustee for Dominion and Province, for Commonwealth and State, with possibly conflicting interests? or is there one indivisible Crown being or having several persons for different purposes? (F. W. Maitland, L.Q.R. xvi. 335, xvii. 131; W. Harrison Moore, L.Q.R. xx. 351; Markby, "Elements of Law," §145). The whole thing seems to have arisen from the technical difficulty of making grants to a parson and his successors after the practice of making them to God and the patron saint had been discontinued, as tending to bring the saints into the unseemly position of litigants before secular courts. All this we may now think makes for historical curiosity rather than philosophical edification.

But in any case the chief part of Maine's argument, his insistence on "the theory of a man's posthumous existence in the person of his heir," and the intimate connection of that theory with the ancestor's representative character as head of the family, goes to the root of the matter. Mr. Justice Holmes, now of the Supreme Court of the United States, writing twenty years after Maine, summed this up with concise elegance ("The Common Law," p. 343):

"If the family was the owner of the property administered by a *paterfamilias*, its rights remained unaffected by the death of its temporary head. The family continued, although the head died. And when, probably by a gradual change, the *paterfamilias* came to be regarded as owner, instead of a simple manager of the family rights, the nature and continuity of those rights did not change with the title to them. The *familia* continued to the heirs as it was left by the ancestor. . . .

"The aggregate of the ancestor's rights and duties, or, to use the technical phrase, the total *persona* sustained by him, was early separated from his natural personality. For this *persona* was but the aggregate of what had formerly been family rights and duties, and was originally sustained by any individual only as the family head. Hence it was said to be continued by the inheritance; and when the heir assumed it, he had his action in respect of injuries previously committed."

Maine proceeds to trace the development of the Roman testament from a distribution of property, taking effect at once, made in contemplation of impending death or great peril, and requiring, in its earliest form, something like legislative sanction (cp. Girard, "Manuel," pp. 792-5), through the intermediate stage of a conveyance reserving a life interest, which may be seen in the

provincial customs of the Roman Empire, and much later in medieval and even modern systems. Muirhead ("Historical Introduction to the Private Law of Rome," pp. 66, 168) pointed out a remedy for the difficulty suggested at p. 206, that a will by mancipation must have left the testator penniless. Usufruct might very well be reserved on a mancipation, Gai. ii. 33, "and a reservation of a life interest in one's own *familia* would possibly be construed even more liberally than an ordinary usufruct." Still, usufruct is not among the earliest institutions, and it would be rash to say that the difficulty may not have been real at one time. But men have been driven all over the world, by an imperfect state of property law or by special reasons for avoiding publicity, to put very large trust in the honour of chosen friends and assistants; and there is nothing about the Roman *familiae emtor* in his most archaic stage to surprise an English student who has made acquaintance with our medieval feoffee to uses. Indian practice will furnish a parallel in the *benâmi* (literally, "anonymous") conveyances to a nominal purchaser, to hold on a secret trust for the real one, which appear to have survived the original reasons for them. Sohm, however, holds ("Institutes," § 112, pp. 543, 544, in Ledlie's translation, 3rd ed.) that the testament *per aes et libram* was coupled with a mandate to the *familiae emtor*, which was binding under the well-known provision of the Twelve Tables, "uti lingua nuncupassit ita ius esto." This would of course simplify the matter. The same learned author's suggestion that the institution of an heir was a modified form of adoption—that is, an adoption deferred to the testator's death—does not seem to be generally accepted (Girard, "Manuel," p. 793).

What is said in this chapter about Hindu law would no doubt have been fuller if a convenient and trustworthy text-book like Mr. Mayne's had existed at the time when it was written. I am not aware, however, that any modification is needed except on one point, namely that the strict determination of the order of succession among an ancestor's next of kin according to the spiritual efficacy of their sacrifices is found only in the school of Bengal. This has been thought to be a deliberate Brahmanical innovation; but lately two learned Indian scholars, Mr. Justice Mitra of the High Court of Calcutta and Mr. S. S. Setlur, have rejected that view; the former of them asserts, but the latter denies, that the peculiar doctrines in question are of Buddhistic origin (see L.Q.R. xxi. 380, xxii. 50, xxiii. 202). As Maine himself said in 1883, "we now can discern something of the real relation which the sacerdotal Hindu law bears to the true ancient law of the race" ("Early Law and Custom," p. 194; see also the chapter on Ancestor Worship and Inheritance). The general importance of keeping up the family ritual both in Hindu and in other archaic law remains undoubted. Some addition has to be made as regards the Hindu

will. Quite unknown to early Hindu law, will-making came into use in modern times, though not in imitation of European practice according to the best authorities, and was not recognised in any of the Presidency Courts before 1832, when it was allowed in Bengal. When "Ancient Law" was published the law was not yet quite settled in Madras and Bombay; but the courts of those Presidencies followed the same course within a few years. Apparently the first form of the Bengal will was a gift *mortis causa* to religious uses. The reader will perceive the resemblance to the development of the testament of chattels, under ecclesiastical influence, in medieval English law. The English history, however, is for the most part too complex and peculiar to throw much light on the normal type of evolution. As for the Anglo-Saxon will, even if it can be assimilated to modern wills, which is doubtful, it was a special and anomalous kind of document, and disappeared after the Norman Conquest. Probably language is still to be found in popular books asserting or implying that before the Conquest there was general freedom of alienation; but this is due to pure misunderstanding, the privileged class of transactions which are recorded in the Anglo-Saxon charters having been taken as typical and indigenous. Early English "post obit gifts" (Pollock and Maitland, H.E.L. ii. 317. sqq., and see Note Q below) do present some analogy to the Roman will by mancipation; and this appears in a strengthened form in the conveyance to feoffees to uses to be declared by the feoffee's will which was common in the later Middle Ages. In the thirteenth century divers learned clerks made an ingenious and, it seems, almost a successful attempt to create posthumous disposing power by grants *inter vivos*, containing in what we now call the "habendum" such words as "cuicunque dare vel etiam legare voluerit." A clause so framed is quite common in deeds of the third and even fourth quarters of that century, and inconsistent utterances in Bracton show that learned opinion fluctuated (18*b*, 412*b*, *pro*, 49*a*, fuller and seemingly more deliberate, *contra*, cp. Pollock and Maitland, ii. 27). We may believe[1] that for some time and to some extent the power such clauses purported to confer was exercised without objection. But this was a transitory experiment, and has nothing to do with any real testamentary distribution or succession. Local customs to devise land or, at any rate, purchased land existed, but their origin and early history are still obscure.

In Scotland we find the most remarkable illustration of the præ-testamentary stage, as we may call it, of property law. Properly there is no such term as Will in Scots law, and there

[1] Extant wills of the period which purport to devise parcels of land (Madox, Form. Anglic. DCCLXVIII., DCCLXIX., DCCLXXI.) are not conclusive as to the practice in the absence of a known previous grant with which they can be connected, as other explanations are possible.

was no true will of lands before 1868. "Heritage could only be transmitted by a deed containing words of *de praesenti* disposition, and the use of the word 'dispone' was essential" (Green's "Encycl. of the Law of Scotland," s.v. *Will.*). The accustomed form was (and apparently still is, notwithstanding that it is no longer necessary) a "trust disposition and settlement," a present conveyance reserving a life interest to the grantor. Scotland, in fact, is the last home of the old Germanic *Vergabung von Todes wegen* (Goffin, "The Testamentary Executor," 1901, pp. 19, 99). It may survive many generations yet, for aught we know, as in the customs of Egypt and other parts of the Roman Empire essentially similar forms continued in use long after true wills had become familiar in the law of Rome. Original examples of the second century A.D. found at Naucratis might be seen in London some years ago. Notwithstanding the marks of Roman influence which the modern English will bears, its practical scope and effect remain as different as possible from those of the Roman testament. As a rule the wills of Englishmen having any considerable property to dispose of aim not at investing any one person with the whole of the testator's control over his estate, subject to payment of debts and legacies, but rather at postponing absolute control and preserving the estate under the sanction of a trust which will not be finally determined while any child of the testator is a minor or his widow living. The capital is to be intact as long as possible, while the income is enjoyed or applied according to the testator's directions. If any one is at all like a Roman heir, it is the executor, who does not necessarily take any beneficial interest, and whose origin is quite different (Goffin, *op. cit.* p. 33; O. W. Holmes, L.Q.R. i. 165-6; Gierke, "Grundzüge des deutschen Privatrechts," § 126, in "Encykl. d. Rechtswiss." i. 555). The Roman horror of intestacy mentioned in the early part of the following chapter was equalled or surpassed among medieval Englishmen (Pollock and Maitland, ii. 356); but the reason was not one that would have occurred to any Roman from the time of Labeo to that of Justinian, being the danger to the intestate's soul if he died without having assigned a fitting part of his estate to pious uses (Du Cange *s.v. intestatio*).

NOTE TO CHAPTER VII

NOTE N

PRIMOGENITURE

MUCH has been written in recent years about the origins of medieval jurisdiction and land tenure, and the peculiar complication of tenure with personal lordship and jurisdiction which we call feudalism ; we mention, almost at random, the names of Brunner, Waitz, Fustel de Coulanges, Flach, Luchaire ; but there is nothing to throw doubt on the general soundness of the luminous sketch given in this chapter. Maine returns to the subject in the latter part of ch. viii. At the end of that chapter an opinion is adopted, it seems from Kemble, that "some shade of servile debasement" attached to a Germanic king's or chieftain's personal companions. I have never been able to discover Kemble's authority for this supposition, or to meet with any other acceptance of it. See, *contra*, Konrad Maurer in "Kritische Überschau," ii. 391.

Further observations on Primogeniture by Maine himself will be found in "The Early History of Institutions," pp. 124, 198-205. We may add to the brief mention of "parage" at p. 205 that the "paragium" of the Norman custumals has an important part in the Anglo-Norman nomenclature of Domesday Book. Groups of co-heirs holding "in paragio," and represented, for the purposes of the service due to their lord, by one of them who is sometimes called the senior, are common in several counties (Maitland, "Domesday Book and Beyond," p. 145; Pollock and Maitland, H.E.L. ii. 263-4, 276; Pollock in Eng. Hist. Rev. 1896, xi. 228, note 65). This arrangement is a strong illustration of the practical convenience of primogeniture for the lord when feudal service was really military service. Maine's view that primogeniture originally had an official character seems to be thoroughly accepted; it would probably be found, if we had all the facts, that the occasional examples of primogeniture in servile or inferior tenures are to be explained by the tenement having been attached to some manorial or communal office. It would seem that, whether for reasons of convenience or because men liked to imitate the fashion of their lords, the general introduction of primogeniture in England was to some extent a popular movement. In 1255 the burgesses of

Leicester alleged that they were being ruined by partible tenures, and procured a charter from their lord, Simon de Montfort, which Henry III. shortly afterwards confirmed, to change the course of descent to primogeniture (" Records of the Borough of Leicester," ed. Bateson, Nos. xxiii. xxiv., the latter indorsed "carta quod hereditas sit ad communem legem"). On the whole subject Mr. Evelyn Cecil's book "Primogeniture: A Short History of its Development in Various Countries, and its Practical Effects," Lond. 1895, may be studied with advantage.

NOTES TO CHAPTER VIII

NOTE O

CAPTURE, OCCUPATION, POSSESSION

THE statements made in the early part of this chapter about the Roman doctrine of capture in war, its relation to the ordinary rules of *occupatio*, and the relation of both to the modern law of nations, are not easy to follow. Maine's general results do not depend on the accuracy of these statements, but it is necessary to indicate the points on which a reader unacquainted with Roman and international law might find the text misleading. First, there is really no authority for attributing to the Roman jurists the unqualified opinion that all spoil of war belonged to the individual captor, nor for deducing the rule of war from the law of *occupatio* in time of peace. Next, it is by no means clear that the Roman law of *occupatio* was more than one of many elements which went to form the modern rules as to belligerent rights. It is necessary to examine the authorities in some detail.

Maine seems to have relied on a passage of Gaius in the title of the Digest "de adquirendo rerum dominio" (41, 1, ll. 5, §7, 7. *pr.*; l. 6 is clumsily interpolated by the compilers from another writer, and is not to our purpose). Gaius has spoken of the "occupation" of *res nullius*, such as wild animals, and goes on to other classes of cases in which occupation or something like it confers ownership (and not merely possession) *iure gentium*. This last term would seem, in relation to hostile capture, to point to the actual usage of war rather than to the ideal law of nature, which at all events would not justify treating captives of free condition as slaves. "Item quae ex hostibus capiuntur iure gentium statim capientium finat . . . adeo quidem ut et liberi homines in servitutem deducantur." Then Paulus says, at the head of the next title, "de adquirenda vel amittenda possessione": "Item bello capta et insula in mari enata et gemmae lapilli margaritae in litoribus inventae eius fiunt, qui primus eorum possessionem nanctus est." Obviously no proof or authority was needed to show that a public enemy in arms could have no civil rights. The point is not that spoil of war ceases to belong to the enemy,

but that capture, when it occurs, makes the captor an owner and not merely a possessor as between himself and his fellow-citizens. This does not tell us what is lawful spoil of war according to any specially Roman usage, nor does it exclude the restrictions of military discipline. Under the Empire, in fact, the commanding officer might distribute booty if he pleased, but plunder for the individual soldier's benefit or any kind of subsequent private appropriation was distinctly forbidden. "Is, qui praedam ab hostibus captam subripuit, lege peculatus tenetur et in quadruplum damnatur": Modestinus in D. 48, 13, *ad legem Iuliam peculatus*, 15 (ed. Mommsen, *vulg.* 13). Indeed, it may well be that the dicta of Gaius and Paulus contemplate only the case of enemy property found on Roman ground at the outbreak of a war: "quae res hostiles *apud nos* sunt non publicae sed occupantium fiunt": Celsus, D. 41, 1, 51. Grotius comments on this dictum of Celsus, understanding it in this sense, and holds the right of private capture to be confined to acts not in the course of service, "extra ministerium publicum": De Iure Belli ac Pacis, III. vi. xii. § 1; and so Girard, "Manuel," p. 314. There is no doubt that land seized in war was acquired and distributed by the State: Pomponius in D. 49, 15, *de captivis*, 20, §1. In considering these passages it is just as well to remember that problems arising out of a state of war between Rome and a civilized or wealthy enemy must have seemed a mere archaic curiosity to the jurists who flourished under the Antonines.

Then as to Grotius's use of the Roman law, he certainly quotes the words of Gaius already set out; but almost in the same breath he quotes the Old Testament, Plato, Xenophon, and Aristotle (*op. cit.* III. vi. ii. § 4). He denies (iv. § 1) that enemy's land can be acquired by mere invasion short of permanent occupation in force. He seems to think private plundering admissible in strict right, but elsewhere, under the head of *temperaments*—a kind of counsels of perfection to mitigate the rigour of war, most of which have since been adopted as rules—he suggests that captured property should be restored on the conclusion of peace, so far as practicable (III. xiii., "temperamentum circa res captas"). Again, an early trait of Grotius, "De Iure Praedae," published only in our own time (ed. Hamaker, Hag. Com. 1868), altogether repudiates the occupation theory of the right to spoil of war. He likens it to the right of judicial execution, and explains away the dictum of Gaius by holding that the captor takes only as the servant and in the name of the State; and he fortifies his doctrine, after the manner of the time, which he continued to follow in his own later work, with Hebrew, Homeric, and other Greek examples. It is difficult to find here much adoption of the Roman law of Occupancy. Perhaps other publicists of the seventeenth or eighteenth century may have been less discriminating than Grotius. If this is to

be verified, it must be by some one more familiar with their writings than myself. No further light is thrown on the point in Maine's Cambridge lectures on international law, which he did not live to revise finally for publication. These questions, however, have long been antiquarian; modern practice has abrogated the old harsh customs of war, and the seizure of movables or other personal property in its bare form has, except in a very few cases, become illegal (Hall, "Intern. Law," 5th ed. p. 427: the whole chapter should be consulted).

Maine observes at p. 248 that the Roman law of Occupancy was altogether unequal to the task of settling disputes of title between different nations claiming new territories in right of their respective subjects who had discovered and more or less taken possession of them. Undoubtedly this is true, and it could not be otherwise. The difficulties have arisen in almost every case, down to the recent boundary question between Venezuela and British Guiana, from attempts to treat isolated, slight, and partial acts of dominion as equivalent to effective possession. Roman law knows nothing of any "occupation" which does not amount to full and actual control. Hence the learning of occupation had to be supplemented by that of possession. Roman law, like the Common Law, recognises the fact that a man cannot physically hold or control at the same time every square foot of a parcel of land, and therefore it allows legal possession to be acquired by entry on a part in the name of the whole and with intent to possess everything included in the boundaries. "Quod autem diximus et corpore et animo adquirere nos debere possessionem, non utique ita accipiendum est, ut qui fundum possidere velit omnes glebas circumambulet: sed sufficit quamlibet partem eius fundi introire, dum mente et cogitatione hac sit, uti totum fundum usque ad terminum velit possidere" (Paulus in D. 41, 2, *de adq. vel amitt. poss.* 3, §1). In order to apply this rule, however, we have to assume that the boundaries are known or ascertainable, and also that there is no effective opposition; and when the facts to which the application is to be made are those alleged to amount to a national occupation of unsettled territory, it is often far from easy to say whether these conditions are satisfied. In case of dispute whether possession has been established, we must resort to the rule of common sense, which is expressly adopted by the authorities of the Common Law, and does not contradict anything in the Roman Law, namely that regard must be had to the kind of use and control of which the subject-matter is capable (authorities collected in Pollock and Wright on Possession, pp. 31-5). On the question what is the "terminus" in the occupation of unsettled territory, certain conventional rules, which must be sought in the regular text-books of international law, have been more or less generally adopted by the custom of nations, and in some cases express agreements have been made (Hall, *op. cit.* p. 114). The

doctrine that occupancy produces ownership is of course not of the highest antiquity. Besides the reasons given by Maine, the conception of individual ownership as a legal right, the *dominium* of Roman law, is itself relatively modern. How and why Roman law developed that conception as early as it did is a historical problem which, so far as I have learnt, we cannot solve with our materials. We only know that Roman property law, for whatever reason, was already quite individualist at the time of the Twelve Tables. I am not sure that I fully understand Maine's passing remark about the influence of Natural Law in this point (p. 258). At all events the transformation of the Hindu Joint Family to its modern type can hardly be set down to any such influence, and, so far as it has gone, the example appears fairly parallel.

Blackstone's account of the origin of property is loose enough to deserve nearly all of Maine's criticism. He wholly fails to distinguish between physical control or "detention," possession in law, and ownership, and he talks as if our refined legal conceptions had come to primeval man ready made, and in exactly the form and language of eighteenth-century publicists. But perhaps it was needless cruelty to suggest that Blackstone either did not understand the technical meaning of Occupation or intended to impose on his readers by playing with a verbal ambiguity. The word *occupare* is, after all, not purely technical in Latin; it certainly has no technical meaning in the passage of Cicero which Blackstone quotes (Comm. ii. 4; Cic. de Fin. iii. 20, § 67). Cicero was neither an original philosopher nor a great jurist; but no one would charge him with supposing that the right of a spectator in a theatre to the place he has taken ("eum locum quem quisque occuparit") had anything to do with the permanent acquisition of *dominium*. It would be more plausible to credit him with an inkling of the historical truth pointed out by Maine in these pages, that the notion of absolute legal ownership, and still more the presumption that everything ought to have an owner, or that, as our own books say, "the law must needs reduce the properties of all goods to some man," are rather modern than primitive. Blackstone's neglect to observe that the detached individual man whom he postulates is a kind of person altogether unknown to archaic institutions is the common and fatal fault, as Maine has in effect said, of all individualist theories of society: of Hobbes's, which Locke's was intended to refute, no less than of Blackstone's, which is a slight modification of Locke's.

Incidentally, but with provoking brevity, Maine speaks of Savigny's aphorism that property is founded on adverse possession ripened by prescription. This aphorism is certainly true for English law. Property in goods is, in the terms and process of the Common Law, not distinguishable from a right, present or deferred, to possess them; and it is only under statutory provisions

of very recent introduction and partial application that we know any means of proving title to English land other than showing continuous undisturbed possession, under a consistent claim of title, for a time long enough to exclude any reasonable fear of adverse claims. The conventional fixing of that time first by the usage of conveyancers and latterly by positive law makes no difference to the principle, nor do the elaborate rules which have been developed in various matters of detail. Title-deeds, as I have said elsewhere, are nothing but the written history of the possession and of the right in which it has been exercised. This is essentially a Germanic institution, as any one who pursues the subject will find; and when we consider the ideas of early Germanic law, we shall perhaps be less apt to find any problem in the fact of a possessor's rights being recognised by Roman law than to wonder how Roman law came so early by the full and clear conception of an owner's rights as distinct from possession. As to the historical origin of the Roman doctrine of Possession there are now several theories in the field, and none of them can be said to be generally accepted, certainly not Savigny's, which was dominant when Maine wrote.

NOTE P

THE INDIAN VILLAGE COMMUNITY

AFTER Maine had acquired official knowledge of Indian affairs, he gave a hint in his lecture on "Village Communities" that the local customs of India are neither so simple nor so uniform in type as an ordinary European reader of "Ancient Law" might infer. "I shall have hereafter to explain," he said,[1] "that, though there are strong general resemblances between the Indian village communities wherever they are found in anything like completeness, they prove on close inspection to be not simple but composite bodies, including a number of classes with very various rights and claims." The publication in more than one form (most conveniently in "The Indian Village Community," Lond. 1896) of B. H. Baden-Powell's authoritative researches on the Land Systems of British India has since made it common or at least easily accessible[2] knowledge that Indian villages are divisible into two principal and widely different types, of which the "assemblage of co-proprietors," formerly assumed to be the only normal one,

[1] I cannot find any fulfilment of this intention in Maine's published work. See the Preface to the first edition of "Village Communities" for the probable explanation.

[2] Baden-Powell's work appears to have been wholly unknown to a learned gentleman resident at Madras, who published some notes on "Ancient Law" a few years ago.

is not the more ancient. Sir Alfred Lyall (L.Q.R. ix. 27) has approved Baden-Powell's "conclusion that the oldest form of village was *not*, as is usually supposed, a group of cultivators having joint or communistic interests, but a disconnected set of families who severally owned their separate holdings." There is a headman and there are village officers; we may say there is administrative unity for many purposes; but there is not communal ownership or tenure. There is no evidence that in villages of this kind, usually called *raiyatwāri*, and prevalent in Central and Southern India, the holdings were ever otherwise than separate and independent; "the so-called joint village followed, and did not precede, the village of separate holdings." In the joint or "landlord" villages of Oudh, the United (formerly North-West) Provinces, and the Panjāb, we find a dominant family or clan, oligarchs and in fact landlords as regards the inferior majority of inhabitants, and more or less democratic (for the shares are not always equal) among themselves. This type of village, which is in some ways curiously like a smaller reproduction of a Greek city-state, may be due to several causes. Conquest may produce it, or a deliberate new settlement, or joint inheritance among descendants of a single founder. In the case of conquest it may be superimposed on a former *raiyatwārī* village. Baden-Powell points out that all writers on the subject down to a time later than the publication not only of "Ancient Law" but of "Village Communities" had to generalise on incomplete materials.

"It can hardly be doubted that the information available when Sir H. S. Maine wrote was very far from being what it has since become. None of the reports on the Panjāb frontier tribal-villages were written—or at least were available in print; and the greater part of the best Settlement Reports of the North-West Provinces, Oudh and the Panjāb, are dated in years subsequent to the publication of 'Village Communities.' Further, the Settlement Reports of the Central Provinces, the District Manuals of Southern India, and the Survey Reports and Gazetteers of the Bombay districts were many of them not written, and the others were hardly known beyond the confines of their presidencies. In this fact I find the explanation of the total omission in Sir H. S. Maine's pages of any specific mention of the *raiyatwārī* form of village, and the little notice he takes of the tribal or clan constitution of Indian races in general, and of the frontier tribal villages in the Panjāb" ("The Indian Village Community," p. 4).

It will be quite a mistake, however, as we may learn at large from Baden-Powell, to assume that the family tenure or property which is the unit of the *raiyatwārī* village system is equivalent to individual ownership or any kind of ownership as understood in modern Western law. What is certain is that there is no such thing as *the* village community of Hindu times, any more than

there is any such thing as *the* village community of the Middle Ages in Europe. But there remains much profit to be derived from comparing the effects of more or less similar causes in fixing the customs of land tenure in the East and the West, whether those effects are, as they sometimes are, closely similar, or varied by the presence of other and different conditions. We no longer expect to find complete and parallel survivals of a common prehistoric stock of institutions, but it is not less interesting to find how easily parallel types may be developed at very distant times and places; and we are free to hold as a pious opinion that the Indian village council still known as the Five (*panchâyat*)—though that has long ceased to be the usual number in practice, and the institution belongs only to the "landlord" type of village—may go back to the same origin as our own reeve and four men, who flourish in Canada to this day. Robuster faith might be needed to find more than accident in the number of five hearths and five lawful men on Horace's estate ("habitatum quinque focis et Quinque bonos solitum Variam dimittere patres," Ep. i. 14). A system of dividing land so as to give every man a share of every quality, which resembles our medieval common-field system even in minute detail, is described by Baden-Powell (*op. cit.* pp. 191, 414).

With regard to the supposed corporate or quasi-corporate ownership of European and especially English village communities, Professor Maitland's section thereon in "Domesday Book and Beyond," pp. 340-56, gives a sound and much needed criticism of the loose language which was current among historical writers a generation ago.

NOTE Q

RES MANCIPI; ALIENATION IN EARLY LAW

MAINE'S opinion that the *res mancipi* of ancient Roman law were "the instruments of agricultural labour, the commodities of first consequence to a primitive people" is entirely confirmed by the best recent authors. Professor Girard, agreeing with Ihering, Sohm, and Cuq, considers the soundest explanation ("la doctrine la moins aventureuse") to be that the category consists of the necessary elements of the original Roman farmer's goods, to which alone, therefore, the early "Roman forms of alienation" were applicable. It is further suggested that at first only *res mancipi* were the subjects of full ownership, and that, at a time before individual property in land was alienable, the distinction *mancipi—nec mancipi* coincided with that of *familia* and *pecunia*, which had become obsolete at the date of the Twelve Tables (Girard, "Manuel," p. 247). Muirhead's explanation ("Private Law of Rome," p. 63) is similar, adding that the things constituting the *familia* were those which

determined a Roman citizen's political qualification after the Servian reforms. Alienation of such things might affect the owner's political standing, and was therefore of public importance; but I am not clear that this reason is not superfluous. Muirhead observes, deliberately not following Gaius, that the fundamental notion of *mancipium* is *manum*—not *manu—capere*, the acquirement of *manus* in the sense of legal dominion (*op. cit.* p. 61), which seems highly probable.

As to the fetters on alienation usually found in early systems of property law, Maine set it down as "remarkable that the Anglo-Saxon customs seem to have been an exception" to the prevailing Germanic usage which forbade alienation of land without the consent of the family or at least the sons of the grantor. Maine's insight is now justified. The freedom which he thought anomalous, though it was accepted as a fact by the best authorities then accessible on Anglo-Saxon law, was really very partial indeed, being confined to land, or rather lordship over land, held by privileged persons and bodies under the privileged instruments known to contemporaries as "books" and to us as charters. Only after the Norman Conquest did the charter become a "common assurance." As I tried not long ago to sum up in the simplest form practicable what is known and not known about customary land tenure before the Conquest, I may as well repeat my words:—

"We know next to nothing of the rules under which free men whether of greater or lesser substance, held 'folk-land,' that is, estates governed by the old customary law. Probably there was not much buying and selling of such land. There is no reason to suppose that alienation was easier than in other archaic societies, and some local customs found surviving long after the Conquest point to the conclusion that often the consent of the village as well as of the family was a necessary condition of a sale. Indeed, it is not certain that folk-land, generally speaking, could be sold at all. There is equally no reason to think that ordinary free landholders could dispose of their land by will, or were in the habit of making wills for any purpose. Anglo-Saxon wills (or rather documents more like a modern will than a modern deed) exist, but they are the wills of great folk, such as were accustomed to witness the king's charters, had their own wills witnessed or confirmed by bishops and kings, and held charters of their own; and it is by no means clear that the lands dealt with in these wills were held as ordinary folk-land. In some cases it looks as if a special licence or consent had been required; we also hear of persistent attempts by the heirs to dispute even gifts to great churches" ("The Expansion of the Common Law," pp. 156-7).

The analogy which Maine points out (p. 289) between the Roman *cessio in iure* and the Fines and Recoveries of medieval English law is of course genuine; but much earlier Germanic examples

of a like device may be found, though not in England. *Auflassung* is the modern German term. Methods of this kind, when once ascertained to be efficient, are often used merely by way of abundant caution in spite of the additional trouble and expense involved. But in the classical real property law of the fifteenth century Fine and Recovery were already taking their places as regular specialised parts of a technical machinery.

NOTE TO CHAPTER IX

NOTE R

CONTRACT IN EARLY LAW

REMEMBERING that Maine did not profess to write a treatise on Roman law, we shall not follow this brilliant and suggestive chapter with a critical eye for details. But we must note that Savigny's explanation of the Stipulation as an "imperfect conveyance"—a truncated form of the Nexum (about which, by the way, little seems to be really known)—is not accepted by any recent author. The origin is now sought in an earlier religious obligation, probably by oath; opinions differ, as might be expected, as to the conjectural details (Muirhead, 22-7; Girard, 481, sqq.; Pacchioni, "Actio ex sponsu," Bologna, 1888; Zocco-Rosa in Annuario dello Istituto di storia di diritto Romano, vol. 8, Catania, 1902; Sohm's note, "Institutes," tr. Ledlie, 3rd ed., p. 64). To such an origin the fact that the words "spondes? spondeo" could be used only by Roman citizens appears to point, though Savigny strangely failed to see this; and in medieval English law we actually find the religious sanction of the spiritual courts interposed, in the name of correcting the sinful breach of plighted faith *(fidei læsio)*, to enforce promises which were still mere words for temporal courts, bound as they were to the archaic categories of forms of action. English example also shows how improbable it is that contract should be derived from an imperfect conveyance. In medieval English law a debt is constituted not by the debtor's promise to repay, but by a supposed grant of the sum to the creditor, and the creditor's action alleges no promise, but is in exactly the same form as an action to recover land, and is expressly called an action of property. Here we have conveyance enough. But the action of debt was quite incompetent to become the starting-point of any true law of contract, and when a way was found to sue on informal promises outside its limits, that way was altogether different. All this is in no degree prejudicial to the substance of Maine's argument, which is to show that the law of contract, or, to be exact, any comprehensive doctrine of contract, appears everywhere only at an advanced stage of legal development. This is undoubtedly sound. Even the classical Roman law in its final form never attained a really

general theory of contracts. Ultimately the want was supplied, but it would hardly be too much to say of the canonists on the Continent, certainly not too much to say of the common lawyers in England, that they took the kingdom of heaven by violence (cp. my "Oxford Lectures," 1890, pp. 59-62; details and references for the English history in Pollock on Contract, 7th ed. 136, 170; the use of the specially English term Consideration to represent the Roman *causa* is too dangerous a liberty to be allowed to any lesser man than Maine).

Maine censures unnamed English critics (p. 343) for identifying the quasi-contracts of the Civil Law (the term is, of course, not classical) with the implied contracts of the Common Law. But the truth is that this latter expression is, or very lately was, ambiguous. Real agreements manifested by acts and conduct, and not by words, were constantly spoken of as "implied" contracts in English books, as Maine says, at the time when he wrote and long afterwards. Thus the Indian Contract Act of 1872 declares that a promise made otherwise than in words is said to be implied. Here a real agreement is inferred as a fact. But also many "relations resembling those created by contract" (to use again the language of the Indian Act) arise from facts which in Roman law would produce an obligation *quasi ex contractu*. Such facts, under the Common Law, may produce an obligation ascribed in the old system of pleading to a fictitious promise, which promise was said to be "implied" by the law. There are therefore so-called implied contracts in our law which may quite properly be compared with the quasi-contracts of the Roman law; they cover, indeed, much of the same ground. Of late years the term Quasi-contract has been fully naturalised in the American law schools, and by this time it is fairly well known in England. "Constructive contract" would have been correct and in harmony with the general usage of the Common Law, but no one seems ever to have used it.

One result, and a somewhat important one of observing how late and slow of growth any general doctrine of contract has been in any system of civilized law is to strengthen the conviction that a huge anachronism is involved in those political theories which seek to make contract the foundation of all positive law and even of government itself. It should be noted that the doctrine of the Social Contract is much earlier than appears in Maine's statement, and that the theory of the divine right of kings, to which Maine alludes very briefly, was in its origin directed not against popular liberty but against papal and ecclesiastical claims to supremacy in temporal as well as spiritual affairs, as Mr. J. Neville Figgis has shown at large in his learned and acute monograph ("The Theory of the Divine Right of Kings," Cambridge, 1896).

We have said that the classical Roman system of contracts was

not theoretically complete; but this did not prevent the discovery that rights could be freely and largely modified by contract (for a discovery this was to the men of the Middle Ages, when the revived study of Roman law made the fact prominent) from exercising a fascination which is not at all exaggerated in Maine's remarks at the end of this chapter. For a time there was a tendency to assume that estates and interests in land could be modified without limit at the will of parties, and this was not effectually checked in England until the latter part of the thirteenth century.

NOTE TO CHAPTER X

NOTE S

ARCHAIC PROCEDURE

THE account given by Maine of the symbolism involved in the Legis Actio Sacramenti may be taken as generally correct. The Sacramentum itself, however, seems, according to the generally received modern opinion, to have had the definite and practical purpose of bringing the matter in dispute within the highest jurisdiction. Each party swears to the justice of his cause under a conventional forfeit, and thus the king, who is also chief priest, is brought in to decide which of them is perjured: "il faut au roi, chef de la religion et de la justice criminelle, chercher qui a raison." The separation of civil and spiritual jurisdiction under the Republic led to the abolition of the oath (Girard, "Manuel," pp. 13, 977). If this opinion is right, the Praetor does not represent a discreet passer-by, nor yet (as might also be conjectured) the village elders, but intervenes as the minister of the king's justice, conceived in the first instance (as it was in England in the early Middle Ages) as an extraordinary justice applicable only for special reasons. English readers hardly need to be reminded of the fictions by which the King's Bench and Exchequer extended their jurisdiction to ordinary pleas between subjects.

Maine's reference to the trial scene described in the Iliad, Σ. 497-508, as adorning the shield of Achilles, is very brief; but the whole scene is of such interest for early legal history that we may be allowed to dwell on it a little. The point specially made by Maine is that the two talents of gold are a fee for the member of the court who shall be thought to speak the law best. On this he is confirmed by Dr. W. Leaf's very careful interpretation of the passage in his notes *ad loc.*, and his earlier paper in Journ. Hell. Stud. viii. 122. There is no difficulty about the magnitude of the sum, for the Homeric talent represents only the value of one ox (Ridgeway in Journ. Hell. Stud. viii. 133). We shall now give Dr. Leaf's version.

"The people were gathered in the place of assembly, and there had sprung up a strife; two men were striving about the price of a man slain. The one averred that he had paid in full [namely

by tender of the blood-fine then and there before the assembly, but Dr. Leaf's alternative in his later notes to the Iliad, Appendix I., 'claimed to pay,' is as good or better for the grammar of εὔχετο πάντ' ἀποδοῦναι, and makes better sense], and made declaration thereof to the people, but the other refused to accept aught [this is the proper idiomatic meaning of ἀναίνετο μηδὲν ἑλέσθαι: 'denied that he had received anything' is, even apart from the context, barely admissible]; and both were desirous to take an issue at the hand of a daysman [this person, ἵστωρ, summons the council and presides, but the judgment has to be theirs; he is more like the sheriff in the old county court than a modern judge or referee]; and the people were shouting for both, taking part for either side [not unlike such glimpses as Bracton's Note Book and other sources afford us of the behaviour of medieval county courts]. And the heralds were restraining the people, and the elders sate on polished stones in the holy circle [such stones may be seen on Dartmoor to this day], and in their hands they held the clear-voiced herald's staves. With these they rose up and gave sentence in turn; and in their midst lay two talents of gold to give to him among them that spake the justest doom."

In addition to Dr. Leaf's reasons for rejecting the view formerly current that the dispute is on the mere question of fact whether a blood-fine admitted to be due has been paid or not, we may observe that such a payment would surely be made in a notorious manner and with ample witness, to say nothing of the physical difficulty of handing over some score of cattle (for such would be the most likely form of payment) as privately as modern debtors hand over cash or post a cheque.

The result is that we are confronted with an ancient Greek blood-feud in an interesting stage of transition, that in which the slain man's kindred are no longer free to accept or refuse compensation at their will, but are expected to abandon the feud, in a proper case, on receiving a sum fixed either by custom or by the judgment of the assembly. Homicide aggravated by treachery or the like would probably not fall within such a rule; and the amount of the fine, if we may judge by the practice of Iceland as described in the Sagas, might give matter enough for discussion among the wise men even if no preliminary question arose. Indications of a similar stage, though not clear enough to amount to proof if they stood alone, may be found in the Anglo-Saxon laws.

There is no question in the Homeric text of a formally compulsory jurisdiction; the parties have agreed to put themselves on the judgment of the assembly whether in all the circumstances, whatever they were, tender of the customary fine ought to be accepted. But when such voluntary references have become common practice we are near the point at which they cease to be voluntary, and the party who stands out for what formerly

would have been his right incurs, at all events, public reprobation which will be an efficient sanction for most purposes.

Maine's opinion that in the infancy of criminal jurisdiction the sum paid to the king, or the State, was not penal, but a fee for hearing and determining the cause at the request of the parties, "the fair price of its time and trouble," is borne out by later researches in the antiquities of Germanic law. Such was probably at one time the *wíte* of the Anglo-Saxon laws, though it is treated as penal in the earliest documents we have. If one feature in early procedure may be fixed on more than another as marking the recognition of criminal and civil responsibility as distinct in character, though one and the same act may be and quite commonly is both a wrong and an offence, perhaps it is the appearance of a special fine for breaking the peace. The development of the king's peace in England from a privilege attached to certain persons, places, and occasions, to the common right of every lawful man belongs to another and later stage.

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