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THE COLLECTED PAPERS

OF

FREDERIC WILLIAM MAITLAND

IN THREE VOLUMES

VOLUME I

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THE COLLECTED PAPERS

OF

FREDERIC WILLIAM MAITLAND

DOWNING PROFESSOR OF THE LAWS OF ENGLAND

EDITED BY

H. A. L. FISHER

VOLUME I

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at the University Press
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INTRODUCTION

WITH one important exception the three volumes here published practically represent the whole mass of Maitland's scattered writing. A few very short notices have been omitted, but wherever an article, however brief, contains a new grain of historical knowledge or reveals Maitland's original thought upon some problem of law or history, it has been included in this collection. We begin with a philosophical dissertation submitted by a young Cambridge graduate to the examiners for a Trinity Fellowship and end with the tribute to the memory of a pupil composed only a few days before his last illness by a great master of history, by one of the greatest scholars in the annals of English scholarship. These papers cover a wide surface. Some are philosophical, others biographical, but for the most part they belong to Maitland's special sphere of legal and social history. Some pieces are confessedly popular, such as the brilliant outline of English legal history which concludes the second volume; others, and of such is the bulk of the collection, are concerned with problems the simplest terms of which are not apprehended without special study. It would have

been tempting to separate the more technical essays from the work of a simpler and larger pattern with which they are here intermingled; but there were valid reasons against adopting such a course, and perhaps the convenience of the young student or general reader will be adequately consulted if the papers of a more popular character are marked by an asterisk in the table of contents. In any case it is well to remember that Maitland was both a great discoverer in history and an incomparable populariser of his own and of other men's knowledge. The size of the frame seemed to make little difference to him. Whether he worked in miniature or on a large canvas, his strokes were bold, certain and effective. 'The gladsome light of Jurisprudence' shone upon his toil

We have noted an important exception. Maitland contributed eight prefaces to as many volumes of the Selden Society as well as an introduction to the Memoranda de Parliamento or Records of a Parliament holden at Westminster in 1305, a volume published under the direction of the Master of the Rolls. These treatises, which are sufficient in themselves to furnish a substantial volume, are not included in this collection. They are easily accessible to students and could not without injury be wrenched from the texts which they are intended to introduce. Nor is there any fear that these masterly contributions to historical science will be neglected by those who are concerned with the study of our legal antiquities. The student who would know something of medieval law-reporting, or of the

Anglo-French language, or of the early history of the King's Court, or of the growth, extent and decline of manorial jurisdiction must have recourse to the learned and subtle discourses of the first literary Director of the Selden Society, And constitutional history in a wider sense is deep in his debt. If we would really understand our medieval parliamentary life, we must go first to the collection of records which Maitland edited for the Rolls series and out of which, placing ourselves at the threshold of the fourteenth century, we may apprehend the multitudinous clamours of medieval men, the form and shape of a medieval parliament and the course and conduct of its public operations.

Save where a slight displacement might secure a convenient continuity of subject, the papers in this collection are arranged in the chronological order of their appearance. The first volume concludes with the Inaugural Lecture delivered upon Maitland's appointment to the Downing Chair of the Laws of England in October, 1888, the second contains the scattered work of the Downing Professor previous to the appearance of the History of English Law in 1895, the third collects the gleanings of the last eleven years.

As we leave the great History behind us we observe the flowering of fresh interests out of the massive fabric of the older knowledge. The third volume exhibits the full span of Maitland's versatile energy. Now he is handling the delicacies of the Elizabethan Church-

settlement, a subject far removed from his ordinary studies into which he was drawn by the seductions of Lord Acton; now he is deep in the metaphysics of the Corporation; now he appraises the latest achievements of Germany either in the codification of her own modern law or in the editing of our neglected Anglo-Saxon dooms. There is no annotation either here or elsewhere on the part of the Editor, for though much has been written on social and legal history during the last thirty years, it does not in any appreciable degree affect the permanent value of Maitland's work. He wrote little, perhaps nothing, in early manhood which he would have cancelled in later years. He was always learned, always original, and- in ninety-nine cases out of a hundred he was transparently right.

With two exceptions the pieces here given have been previously published. The thanks of the Editor are due to the courtesy of Messrs Methuen who have kindly permitted the re-publication of the Deacon and the Jewess, a paper which forms part of *Roman Canon Law in the Church of England,* and to Messrs Cassell for their generous permission to make use of Maitland's contributions to *Social England.* He would also desire to express his gratitude to Messrs Longman, the publishers and to Mr R. L. Poole the editor of the *English Historical Review;* to Messrs Stevens the publishers and to Sir Frederick Pollock the editor of the *Law Quarterly Review,* to Messrs Chapman and Hall the publishers and to Mr W. L. Courtney, the

editor of the *Fortnightly Review,* to Mr C. R. Dv the editor of the *Independent Review,* to Mr J. Sidney Stone, the editor of the *Harvard Law Review,* to Professor Munroe Smith, the editor of the *Political Science Quarterly,* to Mr John Murray the publisher of the *Quarterly Review,* to the editors of the *Athenaeum,* of the *Law Magazine and Review,* of the *Westminster Review,* to the Council of the British Archaeological Association, to the Executive Committee of the Society of Comparative Legislation, and to Messrs Sweet and Maxwell, the publishers of the *Encyclopedia of the Laws of England* for their kind permission to republish articles which appeared in the periodicals or books with which they are respectively connected.

Finally, kind help has been received from Sir Frederick Pollock, and much assistance from the useful bibliography of Maitland's works appended to Mr A. L. Smith's two Oxford lectures. For the crimes of the Index the editor is solely responsible.

H. F.

***February* 1911.**

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of government, without first considering the end for which all government should exist. They did not wish to compare, as Aristotle had done, the good and evil of various polities, but rather to shew that such a comparison is unnecessary. Such a procedure was unphilosophical. It is not possible to decide who ought to govern until we know what a government ought to do. By reversing the natural order of these questions political philosophy involved itself in a maze of fictions.

These fictions were introduced as substitutes for an answer to the question :—What is it that governments ought to do? They were really ethical doctrines disguised as pieces of history. This mixture of ethics and history was very disastrous. When the limits of the royal power are under discussion, it is often hard to say whether the question is as to the limits which *have been* placed to the royal power, or as to the limits which *ought to be* placed to the royal power. In fact we can distinguish no less than four questions as involved, viz.: What limits do (1) positive law, (2) positive morality, (3) ideal law, (4) ideal morality, set to the royal power? At the present day it would be easy to distinguish these. We can say what power law and opinion allow to the king, without trespassing on the realm of what ought to be. But in the seventeenth century this was harder to do, for several reasons—

(1) The constitution of this country was not nearly so well defined as it now is; there were gaps in it—points on which there was no case to appeal to. The question, "Who is sovereign?" could scarcely be answered, the fact being that sometimes the king,

sometimes the king and Parliament had behaved as sovereign, and been acknowledged as such.

(2) The confusion as to who was sovereign was increased by that curious doctrine of our Constitution which was being slowly formulated, namely, that though the king is subject to no law, he cannot absolve any other person from the laws made by king and Parliament; that royal immunity is coupled with ministerial responsibility.

(3) The legal fiction of the perfection of the English Common Law, the supposition that there is somewhere a code of perfect law, by means of which an English judge may supplement the statutes (though at one stage of our progress necessary for the administration of substantial justice), produced injurious effects on political theory. Controversialists could so easily pass from the existing law to that law of perfect reason to which our judges appealed when in want of a new principle. This should be remembered when we hear Austin talking of "jargon" and "fustian." It may now be inexcusable to confuse law as it ought to be with law as it is, the ideal with the positive; but in the seventeenth century it was almost impossible to draw this line, for the ideal was constantly becoming the positive. Our judges were obliged to introduce new principles, and were obliged to introduce them *as if they were parts of a pre-existing law.*

In all these ways ethics were mixed with history, the ideal with the positive, until it is difficult to see how far an author is describing what is, how far he is giving an opinion as to what ought to be.

The main question which the philosophers of the

seventeenth century had to answer was, How can one man, or body of men, acquire an authority over others which these latter ought to obey, and ought to be made to obey ? The answers which were given to this question were two. (i) God (or nature) has given to some men a title to rule, independent of all consent. (2) A title to rule can only be acquired by consent. These answers took many different forms, and sometimes we find intermediate theories, but the twofold division must serve our present purpose. These two theories of the rightful title to rule we may call *the natural* and *the conventional.*

I. Those who asserted that some men have a title to rule others, which does not depend upon consent, were frequent in their appeals to Aristotle. Aristotle was, for many reasons, the most popular of the classical writers on politics. In no department of philosophy, except perhaps that of deductive logic, has the influence of Aristotle been so long and so strongly felt as in that of politics. No history of the British Constitution would be complete which did not point out how much its growth has been affected by ideas derived from Aristotle. The common sayings about the excellence of a mixture of the simple forms of government, about subjecting the rulers to the laws, have an Aristotelian as well as an empirical origin, and accepted commonplaces are powerful agents in moulding a constitution. We cannot indeed ascribe any one very definite tendency to Aristotle's influence, for his Politics are singularly undogmatic; but his disinterested curiosity discovered many-sided truths, some portions of which every school of political philosophers has been willing

to accept. On this very question of the title to rule he could not fairly be appealed to by any of our seventeenth century controversialists, save perhaps Algernon Sydney. It is true that Aristotle held that some men have a title to rule others even when the consent of the latter has not been asked, but his idea of a natural title to rule scarcely suited the Caroline divines and lawyers. The classical, ideal polity, whether as conceived by Aristotle or as conceived by Plato, is an aristocracy, or monarchy of merit. The test of a man's natural title to rule is the possession of the power and will to rule well. No other test of a natural title was (as far as I know) ever dreamt of by a Greek philosopher. Now Sir Robert Filmer and his friends were glad enough to find Aristotle maintaining that some men are born to rule, and others to serve; but this doctrine has its dangerous side—it leads to such speculations as those of Sydney, about the right of the virtuous man to rule. What Filmer and his colleagues had to justify was the feudal notion of hereditary right. A justification of feudalism was not to be obtained from Aristotle, so they turned to the other great source of authority—the Bible.

It was said that God has given the sovereignty of the whole world to Adam and his heirs (or heirs males) for ever; that the heir of Adam, or failing him, the heir of the last person who filled the place of Adam's heir, is rightfully king. This is as accurate a statement as I can make of a theory which, though legal in its pretensions, was never stated with legal accuracy. With this was combined the theory that civil power is in its origin paternal or patriarchal power. Now, as

far as history is concerned, the Divine Right School were nearer the truth than their opponents. Modern writers have taught us that the first rulers are fathers of families, that the fiction of relationship between the governors and the governed is kept up long after the fact has ceased, and that, on the death of the father of the family, common consent allows his power to devolve upon his eldest son. The Bible supplied these facts, and was supposed to supply them as precedents. But much more than this was wanted. It was necessary to shew that God has decreed that the power of a dead monarch shall devolve according to certain ascertainable canons of inheritance; to shew *(e.g.)* that the Salic law is or is not such a canon, or that it is so in France, but not in England. It is needless to say that nothing of the sort could be done. The law which regulates the Royal Succession in England is only a law of God, if the whole of our common and statute law is a law of God. It is not even a part of *Jus Gentium*, the law common to all nations. Every Christian, it is true, looks upon his duties as divinely appointed ; obedience to rulers is, within certain limits, a duty, and, a Christian would say, a duty set us by God; but this does not imply that God has singled out this or that man to rule, unless we use the words in a sense which makes every event, good or bad, the result of Divine will The appeal to the Bible was singularly unfortunate. The Old Testament is the history of a nation which sinned in asking for a king, and which more than once interfered with the hereditary succession of the royal line. Many Puritans believed that they had precisely the same justification for killing Charles that Jehu had

for killing Ahab, The New Testament contains many commands of obedience to *de facto* governments, not one rule for selecting a sovereign *de jure*; it is the powers that be, not the powers that ought to be, that we are to obey; indeed, quotations from the New Testament come better from Hobbes, the supporter of *de facto* governments, than from the preachers of the Divine right of hereditary monarchy. It is almost impossible to believe that some of the arguments drawn from Scripture by the friends of the Stuarts were put forward in good faith. In the whole history of delusion there is nothing stranger than the claim of sovereignty for Adam's heir. Many people seem to think that this claim was a fiction of Whigs like Locke, got up to discredit the Tories; but as a fact we find the argument repeated by writer after writer of undoubted probity. Failing the support of the Scriptures, there was nothing for the theory to rest on save expedience, and this was too low a ground for the preachers of Divine right. No one (as far as I know) has asserted that we perceive intuitively that hereditary monarchy is at all times, and in all places, the one right form of government. The nearest approach to such an assertion that I can find is in the j*us Regium* of Sir George Mackenzie, a reply to Buchanan's *De Jure Regniy* where it is said that hereditary succession is according to the law of nature; but, after all, the law of nature appears only to give us the truism that in a *hereditary* monarchy the *heir* should succeed[1]. This book of Mackenzie's, for which he received the thanks of the University of Oxford, is a most extraordinary

[1] ***Mackenzie's Works*, vol. 11. p. 472.**

display of the weakness of the Divine Right School, and makes the grave faults of Locke's works seem venial. If the purely Scriptural argument fails, then the whole question of the best form of government is again thrown open. If its defenders cannot shew that hereditary monarchy has been expressly commanded by God, they may be required to shew that it answers to some standard of political good, that it would make a nation moral or happy.

We may notice two forms of the theory: the stricter, which, giving to Adam absolute power, did not admit that any part of this had been alienated by him or his successors; and the milder, which allowed that successive kings had granted away portions of the originally complete power which could not be resumed

r themselves or their successors. The first form was ocated by Filmer, the second by Clarendon.

Filmer was an acute controversialist, and hit both yes and Milton some hard blows. But even he is and to admir that a prince is bound by his "own reason conventions"; the prince however *the* judge of their justice[1]. This concession lis apology for absolute monarchy weaker of Hobbes, who, by making the prince the norality as well as of law, sought to deprive of any ground from which they might rince's acts.

noderate believers in Divine hereditary spokesman in Clarendon. Filmer had *ve* "with no small content[2]," Clarendon

the *Power of Kings*, etc.
***observations on Aristotle's Politics*, etc.**

had never read a "book containing so much sedition, treason, and impiety as this *Leviathan*[1]" Like Roger Coke, and others, he thought that Hobbes had damaged the king's cause. The king, he held, had been invested by God and Nature with complete power, but some of this had been irrevocably granted away by charters, and so forth; he speaks of monarchical power as a trust, and holds the king bound by his own and his ancestors' promises[2]. Sir George Mackenzie made a similar damaging admission; he goes further; the king may not interfere with the rights of property[8]. Now this is to surrender the stronghold of Divine right. If power be a trust, if it be possible to diminish it by grant, we must, as Hobbes knew well, retire from the high ground of natural right to the low ground of advisability. For the question arises—Is *cestui a trust* to have no remedy against his trustee in case a breach of trust? What if the king attempt to re his surrendered rights? Thus unless we can the strictest form of the theory, and to beyond ' himself in freeing kings from al promise question is again thrown open. Though *C* have given the sovereignty upon trust to his heirs, may they not forfeit it? Claren was really a heavy blow to the straiter Divine Right School, for he brings into p discrepancies between Hobbism and c and Hobbes' conclusions, though no were dear to the most thorough of l party. In many respects it is a very :

[1] ***A brief View ..the Leviathan,*** **p. 319.**

[2] **pp. 72, 122.** [3] **Vol. 11. p:9**

Hobbes, it is the protest of a historian against Hobbes' practice of deciding historical and constitutional questions "by speculation and deduction," from psychological generalities. It is like Macaulay's protest against James Mill's Essay.

Mediaeval feudalism masquerading in a Hebrew dress was a strange apparition. Of such a fiction as the original contract we may say it was never invented, it grew; but somebody must have invented this claim for Adam's heir—and to whom the honour belongs I cannot say. There seems no evidence of its having been put forward prior to the accession of the Stuarts, and it appears to be of English origin. In the *Political Discourses* of James Tyrrell, a book in which the rival theories of government are discussed with much moderation, it is not suggested that any early ecclesiastical authority could be found for this doctrine. It disappeared as suddenly as it appeared. Sydney and Locke exposed the ineptitudes of Filmer's Old Testament history so thoroughly, that the work has never wanted doing again. But their arguments were powerfully backed up by the conduct of the clergy. Hobbes had seen that the alliance between the Church and absolute monarchy was accidental, and tried to justify the latter on non-religious as well as religious grounds. The clergy had made a large mental reservation when preaching the Divine right of kings, as was shewn when they refused to read the Declaration.

But below the talk about Adam's heir there lay a just protest against the theory, then rising into power, which admits of no title to rule, but a title by consent. This, which I call the conventional theory, did not

fairly start on its course until the time of Locke, but we see it in Hooker, Milton, and Sydney, struggling with the theory that some men have a title to rule others without first obtaining their consent—that we have a duty to obey governments to which we have not consented. This theory of a natural title to rule had been mixed with the absurdities of Filmer, Heylin, and Mackenzie, and fell into bad repute; but we find it rising again in Hume, who does not require the consent of the governed in order to make government just. The utilitarian may have to admit a title to rule not derived from consent; and though for a moment the results of utilitarianism and of the conventional theory appeared to coincide when James Mill and Bentham put forward "the junction-of-interests principle," as a deduction from "the greater happiness principle," they have since fallen asunder, and will not again be easily united. But of this more hereafter.

II. We must now pass to the conventional theory of government, having described the antagonist with which, at the outset, it had to contend. Filmer and Clarendon did not admit that Liberty was on their opponents' side, but it must be allowed that there is nothing in the bare idea of a government *not* based upon consent that can be said to answer to our idea of freedom; the upholders of the conventional theory can much more speciously claim that the government which they would establish is "a free government."

Filmer and his friends might protest, with what truth remains to be seen, that the conventional theory leads not to Liberty but to license, but this theory has been generally known as the theory of Civil Liberty.

It might be expressed thus—Men have a right to be under no government save that to which they have consented. Government ought to be founded on agreement or contract A word as to its origin—Christian theology contemplated the relations which exist between the Supreme Ruler and his subjects as partly dependent on a covenant, and it was natural (though not necessarily logical) that these should be taken as types of the relations which ought to exist between an earthly ruler and his subjects. Again, laws first appear in the history of mankind as the formulation of already existing customs, and not as the expression of the will of a superior. Hence the essential distinction between an agreement and a law is one which is slowly evolved, and we see that by some of our earlier philosophers a law was still looked upon as obtaining its binding force by being the outcome of a contract. We may add that the histories of Greece and Rome dazzled the eyes of those to whom the new learning was opened. From them, more especially from the history of Rome, men learnt to look upon the right to a share in the government (the right of self-government) as one of the privileges of a citizen, forgetting probably how small a portion of the inhabitants of Rome were citizens.

We may also remark that throughout the history of English ethics there runs a tendency to resolve all duties into the duties of speaking the truth, and of fulfilling contracts. It has been thought that there is a peculiar irrationality in letting our deeds and words contradict each other. Even Hobbes occasionally falls into this strain of language[1], an inconsistency which

[1] ***Works* (ed. Molesworth), lll. 119.**

did not escape the eye of Clarke[1]. The "rational" moralists, looking at a right action as a recognition of a proportion or fitness, were naturally led to identify right action and true affirmation. This tendency to resolve all duties into truthfulness and fidelity is observable in the attempt to ground all our duties to God on a solemn league and covenant, and in the attempt to base all our political duties on some agreement or contract. Perhaps the reason for this is, that "Speak truth" and "Keep promises" are supposed to admit of fewer exceptions than do other ethical maxims.

At any rate the theory that sovereignty ought to be founded on consent is laid down with great distinctness by Hooker, who contrasts it with the doctrine of Aristotle. He says that men knew that "strifes and troubles would be endless, except they gave their common consent all to be ordered by some whom they should agree upon: without which consent there was no reason that one man should take upon him to be lord, or judge over another; because, although there be according to the opinion of some very great and judicious men, a kind of natural right in the noble, and wise, and virtuous, to govern them which are of servile disposition; nevertheless, for manifestation of their right, and men's more peaceable contentment on both sides, the assent of them who are governed seemeth necessary[2]." Here we see the two theories lying side by side, and Hooker, in making his choice of that which requires the consent of the governed, was doing what was of more importance to the world than he can

[1] *Evidences*, etc (ed. 1728), p. 178. [2] *EccL Pol* 1. x.

have been aware of. This theory passed from Hooker to Locke, from Locke to Rousseau, and has profoundly affected the history of mankind. For some time after its appearance it remained comparatively powerless, for it was coupled with no very definite principle laying down whose consent it is that we must require, or what is to be considered evidence of such consent. It did not become really active until it was allied with the doctrine that all men are equal, and that therefore when the governed give their consent every man is to count for one. The alliance was not firmly established until the time of Locke; but long before this there is observable a tendency, especially among the Puritans, to look upon all men as equal, a tendency which had its origin in Christianity itself. Though submission to the powers that be is a cardinal virtue in the Christian scheme, and though it would be even harder to find the conventional than to find the hereditary theory of government in the Bible, there is in the Christian idea of all men as equal in the sight of Omniscience, a germ of that doctrine of natural equality which was required in order to give definiteness to the conventional theory. δῆμος μὲν γὰρ ἐγένετο ἐκ τοῦ ἴσους ὁτιοῦν ὄντας οἴεσθαι ἁπλῶς ἴσους εἶναι[1]. But the idea of Christian equality was not definite enough; and we do not find that Puritans, such, as Milton, accepted that equality of faculties which is the starting point of Locke's system.

The difficulty of reconciling the natural and conventional theories of authority is forced upon us in reading Milton's political works. For, on the one hand, he held that all sovereignty is from the people;

[1] **Arist. *PoL* v. i.**

on the other hand, he was far from accepting the democratic ideal, that in matters of government every man should have one vote, and that a majority must decide. He justifies the action of the army in interfering with the Parliament. "The soldiers judged better than the Great Council, and by arms saved the Commonwealth, which the Great Council had almost damned by their votes[1]." Indeed, it is difficult to see how Cromwell's proceedings could be justified by one who held that all government ought to rest upon the consent of the people. Filmer points out this difficulty forcibly, and justly. Here we see, he argues, what these Puritans mean by "the People," it is "the best principled" part, and the Army is the sole judge of good principles[2]. It is impossible to reconcile the Puritan ideal of a reign of the Saints with the ideal of a Government founded on consent; the Saints were to reign whether sinners liked it or not. If our great dogma that government ought to rest on consent be to differ from "the simple rule...the good old plan," the consent required must be more than a mere absence of resistance; and if we require more than this, Cromwell had as little title by consent as had Charles. How little Milton cared for the popular voice may be seen in his letter to Monk written just before the Restoration. He wishes that good republicans should be returned to Parliament, and if the people "refuse these fair and noble offers of an immediate Liberty," then Monk is to use his "faithful veteran army." And this is called "A ready and easy way to establish a free Government." A ready and easy way no doubt, but in what

[1] *Defence...against Salmasius.* [2] *Observations, etc.*

sense would a Government established by a military *coup d'etat* be ' free' ? But sometimes Milton throws aside the pretence of founding government upon the consent of the people. " More just it is doubtless, if it come to force, that a less number compel a greater to retain what can be no wrong to them, their liberty, than that a greater number, for the pleasure of their baseness, compel a less most injuriously to be their fellow slaves[1]." Here the conventional theory is thrown aside; those who can, and will preserve liberty *(i.e.,* a popular form of government), have a natural title to rule. Milton was in a great strait, for it was becoming evident that if the people agreed upon any government, it would be government by their old tyrants.

The same difficulty occurs in Algernon Sydney's *Discourses Concerning Government.* The title by nature is not here the Puritan title of God's elect, but the philosophic title of the wise and virtuous man. Sydney often insists on the natural inequality of men. " That equality which is just among equals is just only among equals; but such as are base, ignorant, vicious, slothful, or cowardly, are not equal in natural or acquired virtues to the generous, wise, valiant, and industrious; nor equally useful to the societies in which they live; they cannot therefore have an equal part in the government of them ; they cannot equally provide for the common good; and it is not a personal but a public benefit that is sought in their constitution and continuance....If the nature of man be reason, 'detur digniori,' in matters of this kind, is the voice of nature[2]" Here is the natural theory, but when we

[1] ***A Ready and Easy Way,*** **etc.** [2] ***Discourses,*** **ch. 11. § i.**

turn to Sydney's definition of liberty we find:—" I desire it may not be forgotten, that the liberty asserted is not a licentiousness of doing what is pleasing to every one against the command of God, but an exemption from all human laws, to which they have not given their assent[1]." Here is a particularly strong statement of the conventional theory, it is stronger than Locke's definition. "The liberty of man in society is to be under no other legislative power, but that established by consent in the Commonwealth; nor under the dominion of any will, or restraint of any law, but what the legislative shall enact according to the trust put in it[2]." Sydney requires the assent of the people *to the laws,* Locke requires that the government established shall have been consented to, and shall legislate according to certain rules which have also been consented to. But though Sydney uses this very strong expression, an expression which at once identifies Civil Liberty and Democracy, this is not his usual language. He would, I think, have been content if the legislative body were elected by the people, or even if the outlines of government were consented to by the people. But even this requirement of popular consent is scarcely to be harmonized with the "detur digniori" which he elsewhere makes his motto.

Locke and Sydney speak as if civil governments ought to be based on consent, and they also assert that good governments have as a fact been the result of an agreement between the rulers and the ruled. Hobbes also makes his Commonwealth rest upon a covenant. We may ask how far these authors supposed

[1] ***Discourses,*** **ch. i. § ii,** [2] ***Essays on Government,*** **II 22.**

that governments have been the result of agreement, how far the original contract was for them a fact? Here we must draw a distinction. Hobbes, the defender of established governments, speaks very positively about a contract being the foundation of all dominion, but he does not make it clear whether this contract was made once for all, or whether it is renewed by each generation of citizens. He knows nothing of a tacit .contract, nor does he speak as if the contract was made for self and posterity, or for self, heirs, and assigns in respect of property possessed. He always speaks as if every citizen covenanted for himself, and for himself only. But at the same time he speaks as if the social contract had been made once for all. I do not think that Hobbes believed that any such contract has really been made; he looked upon the conventional theory as an apt fiction, expressing the duties of governors and governed. But with Sydney and Locke the case was different, they really thought that all rightful government had been the result of an agreement between the rulers and the ruled; they did not for one moment admit that the conventional theory was only a convenient fiction; they maintained that where there had been good government, that government was the result of a social contract, and that no government could be good which did not rest on such a contract.

Now, as a piece of history, the conventional theory has no foundation, and is far inferior to the patriarchal theory. Not one single instance of a covenant by a whole nation, or even by that part of a nation which is not under what may be called natural disabilities, can be produced. It is not until a late period in the history

of men that the idea of settling their social relations by contract arises. The constitutions of the American States cannot be appealed to in support of the historical truth of the theory, for they were the results of a belief in the theory.

Clarendon and Filmer triumphantly ask for one solitary example of a social contract, and Sydney and Locke did try hard to produce one. Sydney promises to prove that these contracts are historical facts, "real, solemn and obligatory." But it is not unworthy of remark that this promise is followed by a hiatus in his manuscript, and is never fulfilled[1]. Locke again tries to find an answer, but is compelled to content himself for the most part with saying that there is no evidence to the contrary[2]. Elsewhere he admits the patriarchal origin of Government[8]. Then he argues for the probability a, *priori* of there having been a social contract[4], and finally he changes his ground, the compact was not made once for all when men left the state of nature, but is made by every citizen[5].

But on the whole, though Milton and Sydney admit the conventional theory to be true, and sometimes state it in strong terms, their use of it is not so much constructive as destructive. They appeal to it in order to put the Divine Right School out of court, and, when this is done, they fall back upon the natural inequality of men; the Saints, those who would "reform the Reformation," or the wise and virtuous have a natural title to rule, and it is hard to see how they would reconcile this with that conventional theory

[1] *Discourses,* II xxxii. [2] *Gov.* IL IOI.
[8] II 76. [4] II 112. [5] 11. 117.

which only gained its full strength when Locke, following Hobbes, preached that men are by nature equal.

Here, in a sort of parenthesis, we may notice one of the greatest of our great Commonwealthsmen. Harrington was one of the first to oppose Hobbes on what would now be called utilitarian grounds. Accepting Hobbes' identification of reason and interest, he decides that it is not the interest of the individual, but the interest of mankind, which is Right Reason[1]. The argument is rather fanciful, and assumes that the different parts of inanimate nature fly to each other's assistance, so that the whole may be perfect; and man, he thinks, must not be "less just than the creature." "Now compute well," he says, "for if the interest of popular government come the nearest to the interest of mankind, then the reason of popular government must be the nearest to Right Reason." This he decides, by rather inconclusive reasoning, must be the case. Democracy, moderated by allowing to an aristocracy the power of proposing, though not of making laws, is the best form of government. He is far from having arrived at Locke's point of view, and will do all he can to give authority to the best and wisest. He does not ignore good birth and good breeding as qualifications for power. "For so it is in the universal series of story, that if any man founded a Commonwealth he was first a gentleman," his examples include Moses, Romulus, and others[2]. However, the people or their representatives ought to have the power of making laws.

[1] ***Harringtons Works*** **(ed. Toland), p. 44.** [2] **p. 56.**

Harrington is a very interesting figure in the history of political philosophy. At a time when Hobbes would content himself with nothing under a universal proposition, a proposition applicable, not to these or those men, but to Man, Harrington saw the importance of consulting the history of that nation for which we are setting up an ideal. Again, he saw how few political ideals are realizable, and while his contemporaries were talking as if we had only to choose the best form of government, and then to try and establish it by direct means, Harrington decided that as long as the distribution of property remains constant, only one form of government is possible; the balance of power depends on the balance of property[1]. Most certainly this is not a complete analysis of the positive conditions which make the establishment of a government possible, and Hume's criticisms on Harrington are just[2], but it was a step in the right direction, and Hume recognized it as such. In fact Harrington is particularly interesting because he would seem to have exercised a considerable influence on Hume. Hume says that the Oceana " is the only valuable model of a Commonwealth that has yet been offered to the public[3]," and, even remembering Plato's great work, there is much truth in this praise; for Harrington tried always to remember that an ideal which requires an essential alteration in the nature of man has but little value.

Something must here be said of Hobbes' apology for *de facto* governments and existing laws, an apology which is the centre of his philosophy. In Hobbes'

[1] ***Harrington's Works*** **(ed. Toland), pp. 40** ***et seq.***

[2] ***Hume's Essays,*** **1. vii.** [3] ***Hume's Essays,*** **11. xvi.**

day such an apology was by no means unnecessary. Puritanism asserting the claims of conscience and the rights of private judgment, had rushed into a sort of anti-nomianism. No laws were to be obeyed which did not come up to some standard of ideal justice. It must be doubtful which is the greatest error in theory, the assertion of Hobbes that positive laws are the measure of justice, or the Puritan doctrine that laws which are not good are not to be obeyed, though there can be little doubt that the latter is the more dangerous. The Puritans set up an ideal law of God, discoverable partly by study of the Scriptures, partly by the light of reason, and positive laws which did not agree with this law of God were looked upon as void.

The jural conception of morality has always been common ; if we do not find it in Greek philosophy, we at least find it in Greek poetry[1]. With the Bible before him, this is the conception most natural to the Christian. Now, if we take the jural view of morality, there appears more probability of a conflict between civil law and morality than if we take an aesthetic view. But this was not all. "*Jus Natures* " had meant much more than is meant by our expression "the moral law." The idea of *Jus Natura* sprang from *the Jus Gentium* of Rome, when brought into contact with the later Stoic philosophy. *Jus Gentium* was the law administered to strangers at Rome, a law drawn from the observances common to those nations to which the strangers belonged. A law which is found in all communities may be looked upon as natural; the laws of this or that state may be due to caprice, to casual local circum-

[1] **Soph. *Antig.* vv. 445 *et seq.***

stances, in a word, they are artificial; but a law which is found in all states must be due to the very nature of man. Having gone thus far, it is easy to look upon *Jus Gentium* as more truly a Divine law than the laws of any one state can be. It is the result of man's nature as God made it. And thus we pass *horn Jus Gentium,* a real positive law—just as positive as the maxims of our modern Court of Chancery—to the *Jus Natura,* a Divine law, to which all civil law *ought,* at least in its outlines, to conform. In a word, the law of nature comes to mean ideal law—law as it ought to be. But another change lay before it. By the time of which we are speaking, the idea of *Jus Gentium* is fast fading away; scarcely a trace of it remains in Grotius' celebrated definition; the law of nature is fast becoming a synonym for the moral law, *i.e.,* a code of ideal morality. The law of nature of Butler's Sermons is no longer even ideal law; it is ideal morality. But among the political writers of whom we are speaking, " the law of nature " retained some of its old force—it still meant something more legal and more " positive " than our "morality." The law of nature might still be appealed to in our courts of justice as supplementing and even overriding the statutes of the realm. The courts, particularly the Court of Chancery, were by no means averse to administering what passed as "natural law," Under this disguise they frequently introduced their new principles. The fiction "aequitas est perfecta quoedam ratio, quoe jus scriptum interpretatur *et emendat*" was still kept up, and this *perfecta ratio* was a faculty discovering the law of nature. It is not uninteresting to notice that Cumberland dedicates

his book *De Legibus Natura*—a work on what we should call morality—to the Chancellor, as the proper custodian of the law of nature, so fused were the ideas of law and morality in the idea of natural law. Thus the law of nature was sometimes an ideal for the law maker, sometimes an ideal for the moralist, sometimes an ideal for the law administrator, the judge. Between these different meanings it was easy to flit, and confusion was the result

This conception of natural law led to a disrespect of positive law, to that sort of anti-nomianism which we find in Milton's works. Milton defended the regicides against Salmasius by saying that the king's execution was *legal,* it was according to the law of God, Reason, and Nature. If a statute can be produced giving tyrannical power to a king, this being contrary to God's will, to Reason, and to Nature, " is not of force with us." It will be observed that he does not say that if the king's execution be contrary to the positive law of the land it is *illegal,* but at the same time it is *morally good.* No, he says, though it be opposed to our statutes it is *legal,* for it is according to the law of God; thus it is just as *legal* as the execution of a murderer under our common law. And Milton could justify himself by appealing to the procedure of law courts which daily professed to administer the law of nature. Sydney, again, heads a chapter with the startling statement " that which is not just is not law, and that which is not law ought not to be obeyed[1]." Milton and Sydney would probably not have said that we can never have a duty to obey positive law as

[1] ***Discourses,* etc., iii. xi.**

positive law, that we can never have a duty to obey positive law when it commands some action which, were it not for that law, would be bad, but they habitually use language placing no limit to our duty of disobeying unjust laws. All men, when not engaged in controversy, would probably say that the truth lies between Hobbes and Milton, that the mere fact that positive law commands an action is *some* reason why we should do it; that we have a duty to pbey the law of the land because it is the law of the land; but that this duty may conflict with other duties, and in such cases we must appeal to some higher rule of ethics. To the utilitarian this is obvious, and most non-utilitarian moralists would admit a special duty of Order or Obedience to Law. Thus we cannot say with Hobbes that we never have a duty to disobey positive law, nor with the Puritans that positive law cannot make it our duty to do what, in the absence of positive law, would have been indifferent, or even bad.

It has scarcely been sufficiently noticed that Hobbes was, to some extent, an eclectic in politics. The premises are the premises of Sydney and Locke, but the conclusion is the conclusion of Filmer. He justifies absolute monarchy by referring, not to the natural inequality of men, but to their natural equality. He will not say with Aristotle that some men are made to rule, others to serve, for this is contrary to both reason and experience[1]. He knew well that the arguments of the Divine Right School would never stand examination, and he conceived the grand idea of basing politics on a true system of ethics, which should itself rest on a

[1] ***Hobbes' English Works*** **(ed. Molesworth), vol. iii. 140, 141.**

true psychology. He grants to the Commonwealthsman all that he seems to require. Men are born with equal faculties; they are born free; all government ought to rest upon consent But he attempts to turn the ideas of natural liberty and natural equality into a defence of *de facto* governments. He does not succeed in this, for the social covenant on which he allows government to rest is obviously a mere fiction, and he would have found it hard to answer the Commonwealthsman who said, "You admit that I was born free, and that I have a natural right to be under no government save that to which I have consented. Now I affirm that I have not consented to King Charles' government". If I understand Hobbes aright, he meant that the mere fact of the existence of a government must be taken as conclusive evidence of the consent to it of all those who enjoy its protection, all express declarations to the contrary notwithstanding, and that men are morally and religiously bound by their supposed consent. But such a theory is very unstable, the premises are the legitimate property of the democrat, not of the apologist for *de facto* governments. If it be allowed that all men are naturally free and equal, if all rightful government is founded on consent, men will not be put off with a fictitious consent; they will say, "You admit that consent is necessary, a *fictitious* consent cannot be necessary, the necessary consent must be real."

Undoubtedly the main doctrine of Hobbes' politics is that we ought always to obey the existing government, and our duty of obedience arises from the fact, or rather the fiction, that we have covenanted with our

fellows to do so. This being so, we should naturally expect that Hobbes had some peculiar notion of the superior obligation of the duty of fidelity when compared with other duties. But we find that it is only self-love, or rather a desire for self-preservation, which obliges us to enter into the social covenant, and abide by it when made. He has to shew that prudence, or the desire for a tolerable life, counsels us to surrender our natural right to all things, hand it over to some sovereign, one or many, and abstain from all attempts to resume it. Hallam thinks Hobbes' assertion, that all men have by nature equal capacities, not requisite to his theory[1]. To me it appears not only requisite, but absolutely necessary. Hobbes' chief concern is to prove that men are equal *in their power of hurting others*, so that he may shew that it is to the advantage not only of the weak but also of the strong to enter civil society. "They are equals," he says, "who can do equal things one against the other; but they who can do the greatest thing, namely, kill, can do equal things. All men among themselves are by nature equal[2]." He certainly does go further than this, and affirms that all men are equal in their mental faculties, but this also was necessary, for it was incumbent on him to get rid of the Aristotelian natural title to rule. What however concerns him most is to shew that no man is so strong in body or mind that it will profit him to remain in the state of nature. He ought however to prove not only that every man will find it profitable to enter the civil state, but also that prudence, or the desire of self-preservation, counsels us to

[1] *Hist. Lit.*, vol. n., p. 538. [2] *Hobbes' English Works*, vol. ii. 7.

refrain from occasional backslidings towards the state of nature. This is one of his attempts at proof. Men, he says, are so equal in their power of hurting each other that it will not profit any man, however strong in body or mind, to remain in or return to the state of nature. But to this he adds a consideration which is rather out of place in his system. There would be a sort of absurdity in breaking our covenants, a sort of self-contradiction[1]. He does not however make it clear that prudence, or the desire for self-preservation, can never counsel us to contradict ourselves; and this he was bound to do.

Thus, instead of giving us peculiarly strong reasons for keeping our covenants, he gives us very weak reasons, for it is far from being self-evident that we can never be gainers by a breach of the laws. The absurdity of basing an absolute and indefeasible duty of obedience to positive law on our duty of self-preservation, comes out strongly in a passage to which we must in a moment refer; but at first Hobbes takes care not to depart too widely from common sense. In several passages he speaks of some of our " natural rights " as inalienable, and in one (to Filmer's disgust) he seems to open a wide door for disobedience, by justifying it in cases where obedience would defeat the end for which our rights are aliened, namely, "the security of a man's person in his life, and in the means of so preserving life as not to be weary of it[2]." But this is exceptional, and on the whole Hobbes' doctrine

[1] ***Hobbes' English Works*, vol. in. 119. (This, I think, is introduced for the first time in the *Leviathan*, the parallel passages being 11. 17, and iv. 88.)** [2] **iii. 120.**

appears to be that a man ought always to obey the law, but that if he have broken the law, he cannot be expected to submit without resistance to the punishment[1]. In the *Behemoth* he decides that a son ought to kill his own father if commanded by law to do so[2]. But even the *liberty of resisting* punishment is withdrawn in the development of his system. In the religious portions of his political treatises (which may I think be appealed to, as I see no sufficient reason for believing, with some of his critics, that Hobbes' professions of religion are hypocritical) he decides that a Christian prince, that is, a prince who believes the fundamental article of Christianity, that Jesus is the Christ[8], is supreme in all matters spiritual, as well as temporal. An infidel prince however is to be obeyed only in temporal matters, not in matters relating to Divine worship. " But what ? Must we resist princes when we cannot obey them ? Truly, no; for this is contrary to our civil covenant. What must we do then? Go to Christ by martyrdom"

I quote this *firstly* in order to show that Hobbes is not consistent in teaching that we may not disobey law, but may resist punishment, for here the doctrine is exactly reversed, we are to disobey and submit to punishment; *secondly,* because we seem here to have reached a *reductio ad absurdum* of Hobbism. We are not to resist when the infidel prince would make martyrs of us. Why ? Because to resist would be " contrary to our civil covenants." But why should

[1] ***Hobbe' English works,*** **vol. ll. 25, 26.** [2] **vi. 227.**

[3] **11. 306, 307, iii- 590, lv 179.**

[4] **11. 314-316, iii. 600-602, iv. 186-188.**

we keep our civil covenants? Because we ought to preserve our lives so as not to be weary of them. Thus the desire of self-preservation counsels us to submit to martyrdom. This shews how difficult it is to render the conventional theory conservative.

Hobbes added to the difficulties which lay in his way by maintaining a peculiar psychology, which he has tersely summed up thus, "Now what seems good is pleasant, and relates either to the senses or to the mind. But all the mind's pleasure is glory (or to have a good opinion of one's self), or refers to glory in the end; the rest are sensual or conducing to sensuality[1]." He greatly exaggerates the force of emulation. Man, according to him, "can relish nothing but what is eminent." He leaves the social desires out of consideration. He did not, as James Mill thinks, mean merely that all our desires *once were* purely self-regarding, but have become social by a process of "mental chemistry" such as Hartley and his school imagined; no, according to Hobbes, our desires always continue to be self-regarding. Thus the whole weight of our duty of keeping our covenants is thrown on reason, that is, the cool settled desire of self-preservation. Man is not naturally a social animal, his joy consists in glory, in comparing himself with other men, and thus he has no social instincts leading him to the civil state, he is only brought to it by a perception that otherwise his life will be "nasty, brutish, short."

I am inclined to think (though there is great risk of such speculations being wrong) that Hobbes was led to exaggerate his account of man's naturally unsocial

[1] ***Hobbes' English Works*, vol. ii. 5.**

character by a desire to bring "the state of nature" into discredit. The "state of nature" was the state in which God had created man, it was an ideal state to which civil society should be made to conform. Hobbes thought that there should be no ideal to which political reformers could appeal when preaching disobedience and anarchy. So he pronounced that the state of nature is a state of war. This scandalized Clarendon and other orthodox thinkers, it was calling "nasty" and "brutish" what God had called "verygood"; but if we examine the theory calmly it does not seem very objectionable. We have no sooner heard that man is naturally in a state of war than we hear of a faculty called reason, which prompts man to seek peace, and we are told that this faculty is just as natural as any other faculty. So the whole theory amounts but to this. If men were irrational, they would quarrel and fight and never form civil states, but *by nature* they are rational, and reason counsels them to seek peace. In fact we have here, as Hume says, only a decomposition of forces. "Human nature being composed of two principal parts, which are requisite in all its actions, the affections and understanding, it is certain that the blind motions of the former, without the direction of the latter, incapacitate men for society; and it may be allowed to consider separately the effects that result from the separate operations of these two component parts of the mind[1]." Hobbes really only performs what Hume thinks "may be allowed." But he lays great stress on the "preposterous conclusions" which, according to Iago, would result "if the balance

[1] *Treatise*, etc., in. ii. 2.

of our lives had not one scale of reason to poise another of sensuality," and calls the state of men, when deprived of their natural faculty of reason, the " state of nature/' because he wishes to discredit one of the "sacramental phrases" of the reforming party, and thus strike a blow at anti-nomianism and anarchy.

Hitherto we have spoken of Hobbes as an apologist for *de facto* governments, and as such he ought to be considered. Though the *Behemoth* is a justification of the Stuarts, he ends it by saying that the sovereignty had passed by a circular motion from Charles I. to the Long Parliament, thence to the Rump, thence to Cromwell, thence back again to the Long Parliament, thence to Charles Il So the Rump and Cromwell had really been sovereigns, and the covenants of the nation must, during their rule, have been applicable to them. There appears to me insufficient evidence for saying that Hobbes changed his opinions, he steadily refused to allow of any title to rule save the title of a *de facto* government. He does not enter at length into the nice question of when a *de facto* sovereignty ceases, but, apart from a *de facto,* he knows of no *de jure* sovereign. The subjects, we learn, cannot get rid of the sovereign by agreement among themselves, for the sovereign has rights under the social covenant[1]. In the *de Cive* we learn that the subjects are free if the land be conquered, if the sovereign abdicate, or if the succession fail[3]. In the *Leviathan* this doctrine is extended, and the subjects are made free when the king can no longer protect them[8]. The 20th law of nature, added in a postscript to the other nineteen, makes

[1] ***English Works ii.*** **91, 92.** [2] ***ibid, ii,*** **107,** [3] ***ibid.*** **iii. 208.**

him who protects the subjects sovereign[1]; and this is what Clarendon called "a sly address" to Cromwell

It should not however be forgotten that Hobbes does try to prove that a limited monarchy is an absurdity, a contradiction in terms, and in the *Behemoth* and the *Dialogue on the Laws* does try to prove that Charles I. was an absolute monarch; and "an absolute monarch" with Hobbes means a good deal. Such an one is subject to no laws, and to no positive morality.

Charles was king. The king of England is an absolute monarch: he cannot forfeit one jot of the sovereign power. To attempt to limit his authority was not only a crime, but a sin; it was the sin of rebellion, which sums up in itself all sins, and excludes the sinner from salvation. All of this is to be found in Hobbes' writings; but, says Austin, to call this an apology for tyranny is "rant."

Hobbes tried to stop the natural course of the conventional theory, but with ill success; it was too strong for him, and swept on towards modern democracy. We have seen this theory in the works of Hooker, Milton, and Sydney, trying to live at peace with the theory that some men are worthier to rule than others, and that *detur digniori* is the voice of reason. As long as this was the case the conventional theory could never become constructive; it was at best an engine for destroying the claims of hereditary monarchy. We must have some principle which shall decide whose consent it is that we shall require; and this Locke provides. All men, he says, are "creatures

[1] *English Works* iii. 703.

of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties," and therefore they ought to be " equal one amongst another, without subordination or subjection, unless the Lord and Master of them all should by any manifest declaration of His will, set one above another[1]." Of the truth of the assertion* that all men are born with the same faculties, and of the legitimacy of the conclusion that therefore there is by nature no subordination or subjection between them, I must again speak. Here let us refer to the way in which Locke obtains his ethical first principles, the principle, for instance, that those to whom God has given equal faculties are by Him intended to be free from all subjection, save that to which they have consented. A short statement of Locke's ethical opinions will not be out of place, as it will shew the way in which the first great apostle of the Rights of Man obtained the premises of his politics.

Things are called good and evil only in reference to pleasure and pain[2]. What is apt to produce pleasure in us we call *good,* for no other reason than because it is apt to produce pleasure[8]. Moral good is the conformity of our voluntary actions to some law whereby good is drawn on us by the will of the law-giver[4]. The only true touchstone of rectitude is the law of God, whereby He directs us to what is best: this law bearing sanctions not only in a future life, but in this life also. This law we discover by the light of nature and by revelation[8]. Apart from revelation, it is reason

[1] ***On Govt* II 4.** [2] ***Hum. Under,* II XX. 2.** [8] **ii. xxi. 42.**
[4] **ii xxviii. 5.** *** IL xxviii. 8-11.**

which discovers this law; in fact, reason *is* the law of nature[1]. The laws of God can be deduced with demonstrative certainty from our idea of a Supreme Being, infinite in power, goodness, and wisdom, on whom we depend, and the idea of ourselves as understanding, rational beings. Our knowledge of the Supreme Being is derived from our intuitive knowledge of our own existence, and our knowledge that there must be some eternal cause of our existence, power, and knowledge[8]. Of the ethical propositions which can be thus deduced with demonstrative certainty, he gives two examples—"Where there is no property there is no injustice," and "No government allows absolute liberty[3]." (Very true, but very useless.) It requires study and reasoning to discover this divine law, but it is easily intelligible and plain to all, for men are furnished with the same faculties[4]. The sum of this is: Men ought to obey the laws of God, deduced by reason from the knowledge we have of God and of ourselves; such obedience being good because it brings us pleasure. But here is a difficulty. Such obedience may be good, but how are we to say that the laws or their Maker are good? Locke calls God good, though he does not, when formally proving the existence of a Supreme Being, prove that goodness is one of His attributes. He should shew that these laws are themselves fitted to secure the pleasure of mankind, or how can he, with his definition of goodness, call them or their Maker good? It is certain, however, that Locke regarded our duties as set us by the laws of God, which can be deduced by

[1] *On Govt. 11*, 6. [2] *Hum. Under*, iv. x.
[3] iv. iii. 18, [4] *On Govt*, II 4, 6, 12.

reason, and, when laying down a maxim as such a law, he does not make a calculation of consequences, but appeals to the law as discoverable from our knowledge of God. And indeed he held that a man who does not believe in a God cannot know of any moral duties[1], and thus morality is merged in natural religion.

I believe however that Locke would not have objected to saying that the laws of God direct us to those actions which most conduce to the greatest happiness of the greatest number, and it is probably to this fact that he would have appealed if asked to shew that God is good. But he attempts to transcend utilitarianism by deducing moral laws from our idea of God. In short, his politics are as "meta-political" (to use Coleridge's happy phrase) of those of Kant himself.

What therefore Locke has to do is to deduce the right of every man to be under no government to which he has not consented, from the ideas of God as infinitely wise, good, and powerful, and of ourselves as understanding, rational creatures. He proceeds to shew that men being the workmanship of God, and being His property whose workmanship they are, have no right to destroy themselves or others. They must preserve themselves and not quit their station wilfully, and, when their own preservation comes not into competition, they must preserve the liberty, health, limbs, and goods of others[2]. We have however a right to punish offenders; we may retribute to them what is proportionate to their transgressions, which is so much as may serve for reparation and restraint[3]. But what

[1] *First Letter on Toleration.* [2] *On Govt* II 6. [a] IL 8.

are the offences which we may punish? Apparently any breaches of the laws of nature, the particulars of which laws it would, Locke thinks, be beside his purpose to enter into[1]. The highest crime of which a man can be guilty is the attempt to get another man into his absolute power, for it may reasonably be concluded that he who would get me into his power without my consent would destroy me if he had a fancy to it[2]. Hence we ought to be free from all absolute power to which we have not given our consent[3].

Such is the argument by which Locke would deduce the conventional theory from our ideas of God and of ourselves. We are God's property, not our own, therefore we may not destroy ourselves or each other; he who attempts to assume the sovereignty without the consent of the ruled, must be supposed to be intent on destroying them, and therefore commits the greatest of all sins against the law of nature.

Government therefore ought to rest upon the consent of the governed, and the consent of every man is equally valuable. But what are we to consent to? It is of the greatest importance that we should have an exact answer.

Unfortunately, Locke here assumes the place of the historian, and begins to tell us what men *have done*; he allows fictitious history to intrude upon ethics. But we must take the doctrine as we find it. We are told that when any number of men have by the consent of every individual made a community, they have thereby made the community one body with power to act as one body, which is only by the will and deter-

[1] *On Govt* 11. 7-12. [2] 11. 17-21. [3] 11. *22.*

mination of the majority. So when once the state is formed, the whole body is to be concluded by the majority. This assertion of the divine right of majorities is most important, and here is the reasoning on which it is based. That which acts any community, being only the consent of the individuals of it, and it being necessary for that which is one body to move one way, it is necessary for that which is one body to move that way whither the great force carries it, which is the consent of the majority: or else it is impossible to act or continue one body, one community, which the consent of every individual united into it agreed that it should, and so every one is bound by that consent to be concluded by the majority[1]. At first this looks like a piece of Social Mechanics, this talk about necessity seems to imply that we are to take a fatalist view of the matter, and say that a body politic *will* always move as the majority of citizens would have it move. Even here the physical analogy breaks down ; a body acted on by two unequal opposite forces does not move as if the lesser force did not exist. This however is not what Locke meant, he is not really speaking of what *must* happen, but of what *ought to* happen, and doubtless it is his opinion that men's faculties are equal, which makes him see in the principle that a majority can bind a minority the one possible principle of just government

But how about after generations ? Does the consent of the fathers bind the children to be concluded by the majority ? Burke tries to shew that the original contract binds posterity, but Locke resolutely answers

[1] *On Govt* 11. 95, 96.

that the son is altogether as free as the father. At this point however in Locke's argument, there is a little vacillation. At first we are told that every citizen enters into the covenant when he comes of age. But, it is argued, no government can permit any part of its dominions to be enjoyed by those who do not belong to the community. The original contract is thus supposed " to run with the land," to use a lawyer's phrase. Every person who has possession or enjoyment of any land within the dominions of the government has given his consent to its laws. So far the idea is that, the land being bound by the covenant, every one who has possession or enjoyment of the land gives a tacit consent to the government[1] " *by becoming a member of the society*[2]*."* But in a few lines all is changed. These tacit covenantors are not members of the society, their obligation begins and ends with the enjoyment of the land[3], and we are introduced to a fresh set of covenantors who, by actual agreement and express declaration, have given their consent to be of the commonwealth, and are perpetually and indispensably obliged to be and remain unalterably subjects to it: and nothing can make a man a member of the commonwealth but his actually entering into it, by *positive engagement and express promise and compact*[4]. Thus having been told that the son becomes a member of the society by merely enjoying the possessions of his father, we now learn that he is not a member of the community unless he has entered into it by express promise and compact.

I have dwelt at some length on this point because

[1] *On Govt,* II 116-119. [2] 11. 117. [3] 11. 120. [4] IL 121.

I would shew the exact steps by which the conventional theory leads us to democracy. If men can bind their posterity, then the conventional theory may be perfectly conservative, but then how are we to say that all men are born free? If we are prepared to reject natural freedom we have no need of the conventional theory. If we will not do this, we must say with Locke, that the son is born as free as the father. Then Locke finds a momentary resting-place in the notion of a covenant which binds, not posterity, but the land which posterity occupies. But this will not do, for even if our ethics were bounded by Real Property Law we should admit that not all conditions with which a man may try to burden his successors in title are valid. The moralist would go at least as far as the lawyer in abhorring a perpetuity. Locke tells us that the earth has been given to men in common, and shall one generation be able to deprive its successors of the use of it? So Locke surrenders this doctrine, and seems to think it only necessary as accounting for the way in which *alien residents* become subject to our laws; and then he boldly proclaims that nothing can make any man a subject or member of the commonwealth but his actually entering into it, by positive agreement, and express promise and compact.

One barrier still remains between us and democracy. The majority may institute some legislative body, and surrender certain of the natural rights of the people to this body. It may even give the power to one man[1]. After this grant of power the legislator or prince may have certain rights. He holds his power under an

[1] ***On Govt* 11. 132.**

agreement, and apparently cannot be cashiered as long as he performs his part of the agreement. I take the following words of Dr Hutcheson to be a correct account of the proceedings at the Original Convention, as imagined by Locke: "To constitute a state or civil polity in a regular manner these three deeds are necessary—First, a *contract* of each one with all that they should unite into one society to be governed by one counsel; and next, a *decree* or *ordinance* of the people concerning the plan of government, and the nomination of governors; and lastly, another *covenant* or *contract* between these governors and the people, binding the rulers to a faithful administration of their trust and the people to obedience[1]." Here is some little defence against democracy, for by this latter covenant the people are obliged to obedience as long as the rulers do not break their half of the engagement, and it is admitted that the power *may* have been granted to the rulers *for ever*. Even Hobbes is not excluded. He could still say that all rights *have* been surrendered for ever, and that the rulers have on their part made no covenant at all. But Locke is not going to permit the revival of such pretensions. We can learn the conditions of the contract between the rulers and the ruled by considering why it was that men left the state of nature for the social state. It was because they wanted—(i) a known and settled law to decide their controversies; (2) known and indifferent judges; (3) power to enforce the law against criminals[2]. But it is with the intention the better to preserve himself,

[1] ***Hutcheson's Introduction to Mor. Phil III.* 5.**

[9] ***On Govt* 11. 124.**

his life, liberty, and property, that every man consents to enter the society, and therefore the power of the society ought never to be supposed to extend further than the common good, and is obliged to secure to every man his property *(i.e.,* life, liberty, and estate) by guarding against those defects in the state of nature which induced men to form communities[1]. Hence it follows that the legislative body instituted by the majority of the community—(1) must govern by established laws, (2) must design its laws for no other end ultimately but the good *(i.e.,* pleasure) of the people, (3) must not raise taxes without the consent of the people, for it must not take from any one his property without "*his own consent, i.e., the consent of the majority*[2]" (4) must not delegate its legislative power[3]. But supposing that there is a dispute between the prince and the people as to whether these conditions have been broken (and surely there well may be such a dispute, for men are not apt to agree as to whether a prince's laws are designed for no other end but the good of the people), who is to decide? "Who shall be judge whether the prince or legislative act contrary to their trust? To this I reply, the people shall be judge[4]."

Thus just when the conventional theory might have been appealed to on the Conservative side, Locke practically abandons it and falls back on Utilitarianism. One of the conditions of their tenure of office is that the rulers shall make laws for no other end ultimately but the good of the people, and if the rulers break this condition, they have no further rights under the

[1] *On Govt* 11. 123-131. [2] 11. 140. [3] II. 134-141. [4] 11. 240.

contract. This is to go nearly as far as Hutcheson, who, though he also admits a contract between rulers and ruled, says outright that if greater and more lasting mischiefs are likely to arise from the continuance of a government than from a violent effort to change it, such an effort is both lawful and honourable. Rousseau, we shall see, manages the matter more cleverly, for he admits of no contract between the rulers and the ruled. But at any rate, the barrier between Locke and democracy is a very weak one.

Though Locke comes with a system of rights to liberty and equality deduced from the very idea of God, there runs throughout his politics a tendency to admit that the Utilitarian measure of right and wrong is the true one. "The end of government is the good of mankind[1]." "The public good is the rule and measure of all law-making[2]." And good is pleasure. Locke resembles Hobbes[3] in this respect. He requires his sovereign to be a utilitarian, but holds that we can decide who ought to be sovereign by some surer and readier method than by considering who will make the best laws. Now it is by no means evident that "the end of government" will be attained, or the "measure of all law-making" satisfied, when the governors are appointed by the majority of the people. Thus we may have to say that the only right government (that is, one established by a majority of the people) is not the one best suited to attain the end for which all governments are instituted. Of course, the laws of morality *may* not be harmonious among themselves, but this is a conclusion which we can scarcely come to,

[1] ***On Govt* II 229.** [2] ***First Letter on Toleration.*** [3] ***Op. Cit,* in. 322.**

if we look upon these laws as deduced from the idea of a Being infinite in power, goodness, and wisdom.

Burke has vehemently asserted that the French Liberte was not the Liberty for which our own Whig patriarchs pleaded[1]; but Burke would have found it difficult to show that there was any single article in the Declaration of the Rights of Man for which ample authority could not be found in the writings of the most popular of all English philosophers. It is surprising how little Rousseau added to the essential part of the conventional theory as it was delivered to him by Locke. Of course there is a great external difference between the writings of the cautious, candid Englishman, and those of the brilliant French romance writer, but the difference is external. In Locke we find a constant desire not to "go beyond his brief," while Rousseau will at all hazard turn out a perfectly neat and logical piece of work ; but Locke had been obliged to proclaim principles which covered not only his own case, but also the case of Rousseau. The chief improvements which Rousseau introduced into the conventional theory must be shortly noticed.

Locke, we have seen, emphatically asserts that a father cannot alienate the liberty of his children[2]; Rousseau agrees, " un tel don est contraire aux fins de la nature, et passe les droits de la paternity[3]." But Locke holds that the land being bound by the contract, occupation of the land must be taken as evidence of a tacit consent to the government. He however wavers, and requires an express consent in order that a man

[1] *Reflections on the Revolution,* etc. [2] *Chu Govt. ii.* 116.
[3] *Du Contrat Social,* i. iv.

may become a subject of the State, Rousseau is at one with him. Unanimity is necessary for the *contrat social*, if any one will not consent he remains outside the State ; but, "quand I'Etat est institue le consentement est dans la residence ; habiter le territoire c'est se soumettre a la souverainete[1]." This doctrine however would allow that tyranny may become rightful by prescription, so a very characteristic note is added[2]: "Ceci doit toujours s'entendre d'un Etat libre; car d'ailleurs la famille, les biens, le defaut d'asyle, la necessity, la violence, peuvent retenir un habitant dans le pays malgre lui, et alors son sejour seul ne suppose plus son consentement au contrat, ou a la violation du contrat." This ingenuity is beyond Locke, who, when speaking of residence as a tacit consent, does not make it applicable only to the case of a "free" state; but then he elsewhere does what is almost equivalent, for he will not allow that an usurper—one who obtains power by other ways than those which the laws of the community have prescribed—can have any authority until he has obtained the *actual* consent of the people[8].

But Rousseau's grand improvement on Locke is that he gets rid of the third of Hutcheson's "three deeds"; he will have no contract between the rulers and the ruled. The first deed, the contract of association, is the only social contract[4]. Here Rousseau is at one with Hobbes, who, though for a very different reason, will have no contract between the sovereign and the subjects. Hobbes' account of the proceeding is that the subjects covenant among themselves, the

[1] *Cont. Soc.* v. ii. [2] *ibid.* note.
[3] *Civ. Govt.* u. 198. [4] *Cont. Soc.* iv. 16.

sovereign not being a party[1]. From this we should expect that the sovereign can have no rights under the covenant, and that the covenantors could by mutual agreement annul the contract. But this was not at all what Hobbes wanted, so he imagines, not a contract between rulers and ruled, but a *grant* to the ruler[2]. Rousseau does not admit the contract or the grant; the rulers hold their power not only by, but also during the will of the sovereign people. Now this is a great improvement in the theory: there can be no question as to whether the rulers have kept their part of the engagement. If they be not wanted they may go. After all, however, Locke had gone nearly as far as this, for the rulers may be sent about their business if they make laws for any other end but the good of the people, and Hutcheson had gone quite as far. In fact, with the latter the "third deed" is a mere survival; it is not useful, and must drop off in time.

But Rousseau, in his practical application, does go much further towards democracy than Locke did. "Toute loi," he says, "qui le peuple en personne n'a pas ratifiee est nulle; ce n'est point une loi. Le peuple Anglais pense etre libre; il se trompe fort, il ne Test que durant l'eection des membres du Parlement ; si-tot qu'ils sont elus il est esclave, il n'est rien." How, let us ask, would Locke have answered this ? He would probably have said that undoubtedly the people of England have a God-given right to make their own laws, but that they do not think it expedient to insist on this right: they cannot, however, lose the right by lapse of time ; if they choose to insist on it no one can

[1] *Op. Cit* in. 161. [2] *Op. Cit ii.* 91.

rightfully object. But though he might make use of an appeal to expediency to stop democracy in practice, he cannot use it to resist the theory that all men have a right which they may enforce if they please, to be under no laws save those to which they have consented. It will be noticed that Locke does not admit that the consent of our representatives is all that we can insist on, for a representative assembly he thinks *may* (though it probably *will* not) infringe the natural rights of the people, *e.g.*, by raising taxes without their consent[1].

We have seen how Locke gets over the difficulty of identifying the consent of the majority with the consent of the whole; we must have agreed to be concluded by the majority because a body politic must move in one way. And when speaking of taxation he says that a man's property may not be taken without "his own consent, *Le.*, the consent of the majority[2].' This simple *id est* is too clumsy for Rousseau: he rises to the occasion, and produces a splendid sophism, which I quote at length, because it shows the difficulty of hiding the weak point of the conventional theory:—

Mais[3] on demande comment un homme peut etre libre, et force de se conformer a des volontes qui ne sont pas les siennes. Comment les opposans sont-ils libres et soumis a des loix auxquelles ils n'ont pas consenti? Je reponds que la question est mal posee. Le citoyen consent a toutes les loix, mgme a celles qu'on passe malgre lui, et merae a celles qui le punissent quand il ose en violer quelqu'une. La volonte constante de tous les membres de l'Etat est la volonte generate; e'est par elle qu'ils sont citoyens et libres. Quand on propose line loi dans Passembtee du peuple, ce qu'on leur demande n'est pas precisement s'ils approuvent la proposition ou s'ils la rejettent; mais si elle est conforme ou non a la volonte

[1] *Civ. Govt* **n. 138.** [2] **11. 140.** [3] *Cont. Soc.* **v. ii.**

generate qui est la leur; chacun en donnant son suffrage, dit son avis la-dessus, et du calcul des voix se tire la declaration de la volonte generate. Quand done I'avis contraire au mien Pemporte, cela ne preuve autre chose sinon que je m'etois trompe et que ce que j'estimois etre la volonte generate, ne I'etoit pas. *Si mon avis particulier Veut emporte, faurois fait autre chose que ce que favois voulu, c'est alors que je n'aurois pas ete litre.*

Now when Sydney says that civil liberty is an exemption from all laws to which we have not consented, this sounds plausible. Liberty is absence of restraint imposed upon us by other men, and it is plausible to say that we cannot require a liberty from self-imposed restraint. But when Rousseau tells us that a man is not free, though he be under no restraints whatsoever, unless the majority of the people wish that he should be under no restraint, we seem to have wandered far out of the right road. The question must force itself upon us, Have we not been pursuing an object which constantly retires before us ? We say that men should be under no laws save those to which they have given their consent; we say that Hobbes' fictitious consent will not do. Consent must be real—it must be the consent of all, and, trying to make the consent real and universal, we land ourselves in democracy ; and yet we find that an individual may still be under many restraints to which only an ingenious sophistry can say that he has consented. If what we want be freedom from all restraint not strictly self-imposed, democracy cannot be the ultimate ideal of the conventional theory.

Even in Rousseau we already see rising an opinion that democracy does not give us any security for that

liberty which is valuable, or else what is the meaning of his eulogy on the state of nature, the state in which there were no laws? But the world could only be convinced that democracy is not necessarily a security for that liberty which men desire, by a great practical experiment.

We must now return to England, and we notice that during the quiet time which succeeded our Revolution the conventional theory is put away, and even falls into discredit. One of the first blows struck at the Original Contract came from Locke's pupil Shaftesbury, who, looking at the interests of mankind as harmonious, and constantly dwelling on our social instincts, thought that civil societies might well arise and continue without any contract. Ascribing the perception of moral differences to a sense, or taste, rather than to reason, he opposes that tendency of "rational" moralists to resolve all our duties into truthfulness or fidelity, which tendency had added force to the conventional theory. "The natural knave," he says, "has the same reason to be a civil one, and may dispense with his politic capacity as oft as he sees occasion. 'Tis only his word stands in his way. A man is obliged to keep his word. Why? Because he has given his word to keep it. Is not this a notable account of the original of moral justice and the rise of civil government and allegiance[1]!" Again, Shaftesbury was brought by another road to resist the principles of Locke, for Locke derived our political rights from the idea of God, and this founding of morality on religion Shaftesbury condemned with unusual asperity, it throws

[1] *Freedom of Wit and Humour,* Pt 3, Sec 1.

"all order and virtue out of the world[1]." His aesthetic ethics were much less likely to lead to inalienable, indefeasible rights than the jural, religious, semi-Puritan ethics of his master.

But in no book is the reaction against the politics which give Divine rights to kings or to majorities more marked than in the *Essay on Man.* That reaction must have been at its height when Pope wrote—

> For forms of government let fools contest:
> Whate'er is best administer'd is best.

It is the prevailing optimism of the time, the optimism so well illustrated by Shaftesbury and Pope, which led to this contempt of political speculation. Good government appears to these optimists a matter of no great difficulty. After all, governments can do but little towards making men happy or unhappy. Virtue, thinks Pope, alone gives the best happiness ; external goods, the only goods which governments can provide, are comparatively worthless. This optimism I believe to be a great exaggeration.

> That true self-love and social are the same,

requires more proof than has yet been given of it, and Shaftesbury's attempt to find such a proof is to this day one of the best as well as the most ingenious. But it-was high time that the social part of our nature should be brought into prominence, and that we should be shewn to have other motives leading us to civil intercourse, besides our sense of a duty owed to God, and our fear of God, and our fellow-men.

The harmony of the time was broken by Mande-

[1] *Letter to a Student,* VII.

ville's assertion that civil society is far from an unmixed good, that crafty politicians have for their own purposes induced men to subject themselves to laws. Thus Mandeville assisted Rousseau in setting up a state in which there is no civil government as an ideal. Men, said Rousseau and Mandeville, have been coerced, or cozened into submitting to law, and the question arises as to whether civil society is not a mistake. It was this line of thought which did much towards proving that the ultimate ideal of those who would free men from all restraints not strictly self-imposed is not to be found in democracy. Burke makes use of arguments with which Mandeville had familiarized the world when he insists against Bolingbroke that all that can be said for natural as against revealed religion, can equally well be said for natural as against civil society. " Shew me an absurdity in religion, and I will undertake to shew you a hundred for one in political laws and institutions[1]." Now, so well did Burke put the arguments against civil society, that there were some who thought that he spent his whole life in vainly attempting to answer them. Such an one was Godwin, the author of the *Political Justice,* a book, now chiefly known as the exciting cause of *Malthus on Population,* but one of the best productions of English democracy. Godwin *expressly* accepts Burke's *reductio adabsurdum* of Bolingbroke as a really sound argument[2]. This, coupled with the doctrine of (the perfectibility of man, due to the fact that his voluntary actions spring from opinion and that he is rapidly attaining true opinion,

[1] Burke, *Vindication of Natural Society.*
[2] *Political Justice,* B; l.

led Godwin to look upon democracy as merely a stage on the road to liberty—a road which will end in the complete abolition of government. I have said this in order to shew how the teaching of Mandeville and Rousseau, that men made an error in letting themselves be deprived of their natural liberty, affected that stream of thought which, starting from our commonwealthsmen and Locke, at first takes its course towards democracy.

Before we speak of Hume, who fitly closes that period of our "Political Philosophy which lies between the two revolutions, we must refer shortly to the course of ethical speculation in England. During the time of civil strife our political philosophers were too eager to find some answer to the question, "Who ought to rule?" They tried to supply the place of an answer to the more fundamental question, "What ought a ruler to do?" by some piece of fictitious history, a direct grant from God to some man and his heirs, or an original contract. But we can scarcely hope to answer this latter question until we have settled what is to be the supreme principle of ethics. For if there be some one supreme principle according*to which all men ought always to act (and our philosophers, Bentham no less than those whom he ridicules, always assume that this is the case), then the answer to the fundamental question of ethics, what ought men to do, must be, or include an answer to the fundamental question of politics, how ought men to act in their civil relations. "Le but de Tassociation, quelque nombreuse qu'elle soit, ne peut etre essentiellenient autre que le but de chacun des etres associes ; et la loi supreme de

I'individu sera la loi supreme de I'etat[1]." Hence, for the progress of political philosophy, it was necessary that the various possible answers to the question of ethics should be unravelled and distinguished. Whether we get any nearer to a settlement of this question may be doubted, but it is certainly more possible to understand what the exact issue is in these days than it was when Hobbes opened the controversy. Hobbes found the orthodox unprepared. He startled the world by his proclamation of "glory" and "sensuality" as our only motives, and of the will of the sovereign as the only standard of right, and his opponents caught up the first weapons which came to their hand without being nice in their choice. It was retorted that there is a difference between right and wrong, independent of all positive law, a difference pointed to by Revealed and Natural Religion, Reason, Conscience, the interest of mankind, and even enlightened Selfishness, and an indiscriminate use was made of these as a defence for morality, and civil liberty. Political writers like Clarendon, found no difficulty in withstanding Hobbes by appealing to numerous principles, which the moralist sees are not necessarily compatible with each other.

In the first place it became necessary to exclude revealed religion from the coalition. Both Cumberland and Clarke keep religious considerations out of sight when setting up their criteria of right action ; for the truth of religion can scarcely be proved without the help of some independent standard of right. Again, the difficulty of calling God good—if His will be the measure of goodness—made the establishment of a

[1] Saint-Hilaire, *Politique d'Aristote,* p. xi.

moral system based on natural religion seem to most men illegitimate; Locke is here an exception. But a further disruption was necessary. Clarke held that "the good of the universal creation does always coincide with the necessary truth and reason of things," and that, were we in possession of an infinite understanding, all morality might be founded on "considerations of public utility[1]." But Butler on the one hand, and Hume on the other, made a lasting breach between the morality of conscience and the morality of general utility.

To Hume fairly belongs the credit, or blame, of being the founder of modern Utilitarianism. It is true that the opposition to Utilitarianism was roused, not so much by his writings as by those of Paley and Bentham. This was likely to be the case, for Hume approached ethics much more in the spirit of Aristotle than in that of a moral preacher. Morality was an existing fact, to be explained if possible. He scarcely draws any distinction between *what ought to be* and *what men think ought to be*\ for, as he says, with regard to morals, general opinion is the only standard by which controversy can be decided[2]. It was because he took this view of the matter that his attack on the conventional theory did not produce so great an effect as the attacks of Paley and Bentham. Still there can be no doubt that both Paley and Bentham owed their conception of morality to Hume. And when they make their attempts to shew that the ordinary rules of morality really aim at utility, they can only follow Hume, and follow him at a considerable distance. The

[1] ***Evidences,* p. 223.** [a] ***Essays,* 11. xii.|**

Benthamites have been rather ungrateful to Hume, apparently because he differed from them on the purely psychological question of the origin of the moral sense[1], but the fact remains that all that can be called a "proof" of Utilitarianism is due to the suggestions of Hume, and that in this line of argument he has never been surpassed.

Directly Utilitarianism has fairly separated itself from other moral systems it begins its attack on the original contract. Hutcheson can scarcely be called an Utilitarian in ethics, but when he comes to politics he becomes distinctly Utilitarian. "The end of all civil power is acknowledged by all to be the safety and happiness of the whole body; any power not naturally conducive to that end is unjust[2]" He still maintains that there ought to be an original contract with its "three deeds," but this has become a mere fiction. When we turn to Hume's works we can see the gradual process by which he freed himself from the conventional theory. We have two editions of his ethical opinions. A change, if not in his views, at least in his language, is discoverable as we pass from the one to the other. In the *Treatise on Human Naturee*, though he expressly states that our political duties do not and cannot depend on promises, he uses words only fitted to express the old theory of the original contract. Thus, when considering the duty of justice, he speaks of "a convention entered into by all the members of the society to bestow stability on the

[1] *E.g.*, James Mill, *Fragment on Mackintosh* (ed. 1870), p. 264. J. S. Mill, *Dissert, and Discuss.* (2nd ed.), vol. 11. p. 455.

[2] *Introduction to Moral Philosophy.*

possession of external goods,' &c.—the old phrases lingering on after their meaning has vanished[1]. But these expressions are not to be found in the *Inquiry concerning the Principles of Morals.* He had published an essay on the original contract[2], which puts forward the arguments afterwards used by Paley+ and Bentham[4] in their most telling form. Hume had not yet made the acquaintance of Rousseau, he only knew of the conventional theory as a piece of Whiggism, for since Locke's time the theory had been asleep in England. But the argument is equally fitted to meet the democratic doctrine, and the conservative imitation of it. From Hume's day we may date the rise of a definite philosophical antagonism to the conventional theory. Such an antagonism had never before existed, for since Filmer and Mackenzie (who can scarcely be called philosophers) had been conquered by Locke and Sydney, the only choice for the politician had been between different forms of the conventional theory. Doubtless there had been many men who had seen through the pretensions of this theory (Shaftesbury had), but they had not provided a substitute, and Utilitarianism is a substitute.

One more word as to Hume. He proclaimed that politics might be made a science[5]. This was no new assertion, for Hobbes and Locke had gone this length. But Hobbes and Locke thought that geometry should be the model for politics. Neither the one nor the other had shewn the least appreciation of the use of

[1] *Treatise,* etc., lll. ii. [2] *Essays, II.* xii.

[3] *Mor. and PoI PhiI.,* vi. iii.

[4] *Fragment on Govt.,* I. xxxvi., *and note.* [B] *Essays,* I. iii.

history. Like their contemporaries, they looked upon history not as an account of certain general streams of tendency, but as a collection of anecdotes from which apt illustrations of *a priori* theories might now and then be gleaned. We might describe Hobbes' method, in Mill's language, as the deduction of ethology from psychology, without a verification from history. The seventeenth century revolt against Aristotle is often looked upon as the revolt of induction against deduction. But however true this may be of metaphysics it is wholly untrue of politics. The deductive mind of Hobbes revolted against the cautious induction of Aristotle. Hallam[1] notwithstanding, there is no philosopher who has shewn so little appreciation of the inductive method as Hobbes[2]. In Hume we see the first beginnings (if we except the remarkable work of Harrington) of a scientific use of history. Psychology and history provide evidence for a science of politics. We cannot afford to neglect either; we cannot afford to neglect history with Hobbes, or to plead for the pure Baconian method with Macaulay[8]. Hume, in his short Essays on Politics, tries to use both kinds of evidence, and, though without any parade of system, follows that method which John Mill has described as the proper one for social and political investigations.

To return. At last there appears that outcome of the conventional theory, the *Declaration of the Rights of Man.* It has often been said that there should have been a Declaration of the Duties of Man as well.

[1] ***Hist. Lit.)*** **vol. III. ch. iii.**

[2] **Hobbes describes his own method, *Op. Cit., III.* xi.-xii.**

[8] ***Utilitarian Theory of Government.***

The reply that the one implies the other is obvious, but unsatisfactory. There are many good reasons why a political philosopher should concern himself with duties and not with rights.

(1) It is certain that the rights of Man are not legal rights. They must be what are called moral rights. But supposing that we can attach any definite meaning to the phrase "moral rights", nothing that we can do will ever deprive the word "rights" of its legal savour. We have seen how the expression "laws of nature" may lead to anarchy, but the word "rights" is far more *positive* than even the word "laws."

(2) But if we rigorously exclude the idea of positive legal rights, we have still a whole bundle of ambiguities. An example will shew this. We say that *A* has a moral right to receive *£5* from *B*. We may mean simply that it is *B's* duty to pay that sum. Or that if *A* chooses to force *B* to pay, no one ought to prevent him. Or that other people ought to force *B* to pay, and this they ought to do either by the force of law, or by the force of public opinion. Let me for a moment invent a term or two. If we merely mean that *B* ought to pay, then *A* has a *moral claim.* If we mean that if *A* forces *B* to pay, no one ought to interfere, or that other people ought to force *B* to pay by the sanction of popular opinion, then *A* has *a moral right.* If we mean that third parties ought to oblige *B* to pay by making some law to that effect, then *A* has an *ideal legal right.* This analysis is not complete but must suffice.

(3) Our moral claims and moral rights depend in some measure on positive law. We say that *A* has a

moral right to *£5* from *B*. We may mean that *B* ought to pay, and public opinion ought to make him pay, *the law of the land being what it is*; or that *B* ought to pay, and public opinion ought to make him pay, *whatever may be the law of the land.*

For all these reasons "rights" should be left to their proper owners, the lawyers. If the rights of man mean anything definite, they can be translated into terms of duty, and it is very advisable that this should be done. Let us take an actual case. Locke and Rousseau would agree in saying that men have a right to be equal. Now this may mean that no one ought to do anything tending to inequality; or that public opinion ought to prevent anyone from doing anything tending to inequality; or that a law ought to be made to punish those who do anything tending to inequality. Again, it may mean that the first, or the first and second of these propositions are true, *law being What it is,* or are true *whatever law may be.*

This is extremely brief and incomplete, the ambiguities of "moral rights" are not exhausted, they are scarcely exhaustible; but enough has been said to shew that we should look on a philosophy of rights with suspicion.

We must now consider what were the philosophic weapons which Englishmen had to oppose to the Rights of Man. It would be unfair to say that Burke used any one weapon, for he used all, and Coleridge is right in saying that he was not very consistent in his use of them. He could be a maintainer of inalienable rights against the calculators, a reckoner of expediency against the preachers of inalienable rights. But Burke

has, and has justly, the reputation of being a great philosophic statesman; he shews a desire to get to first principles, and this is the desire of the philosopher. So we may fairly dissect his theories as if they were but the theories of a system-maker.

Now, throughout his works on the Revolution, the two most successful lines of argument are the religious and the utilitarian. He could easily shew that the revolution was opposed to Christianity. He could shew that a great deal of unhappiness resulted from the subversion of the old social order. But he tried to do more than this. Like Hobbes he tried to wrest the conventional theory out of his adversaries[1] hands. In his *Reflections on the Revolution,* he takes pains to prove, as against Dr Price, that the rights of choosing our governors, and of cashiering them for misconduct, were not claimed by this nation in 1688. Again, in the Appeal to the old Whigs, he would shew that the party to which he still professed to belong was not committed to the principles of 1789. To a certain extent he was successful. He could shew that Somers in drawing the Bill of Rights was careful to base the English Revolution on necessity. He could say that he did not wish to be a better Whig than Somers, who held that the revolt against James could only be justified by a *privilegium,* and *privilegium non transit in exemplum.* He could shew that the managers of Sacheverell's trial had been at pains to accuse the Doctor on special, not on general grounds; it was not Revolution, but the Revolution of 1688 which was justifiable. But then this proves little. Somers had to scrape together a majority, he wanted (as Macaulay

says) not to frame a valid syllogism, but to secure 200 votes by his major and 200 more by his conclusion[1]. That James had broken the original contract, that he had abdicated, that he had left the country, were all put forward as reasons for calling in William. Besides, as Mackintosh shews[2], Somers and Maynard, when pressed by the Tory Lords, admitted that William was an elected king. Nor was it likely that Walpole and Jekyl would argue for sweeping principles when all they wanted was a conviction. More than this is required if Burke would convince us of the thorough novelty of the French doctrines. We may not wish to be better Whig statesmen than Somers, we cannot hope to be more truly Whig philosophers than Somers' friend Locke, Coleridge was far more right than Burke, he knew that the French doctrines of liberty and equality were of no sudden growth. Even Coleridge does not trace these doctrines to their source. Coleridge's friend Sydney had gone nearly as far as Coleridge's enemy Locke. Locke did not invent many new political doctrines, his materials were ready to hand; he did but define them more sharply, systematize them more accurately, and reject all that was inconsistent with them. Burke is really much hampered by this notion that he is attacking principles of mushroom growth, the fancies of a few atheistic "garreteers"; this prevents his striking at the real root of the doctrines he hated. He will not break loose from the original contract. Like Hobbes, he will try to shew that we have surrendered some parts of our natural liberty once for all. Only he will find a historic

[1] *Hist. Engl* [2] *Vindiciae Gallica.*

support for this theory. The original contract was confirmed at the Revolution, and was reconfirmed by the Acts of Settlement. And here is a real fact to rest upon, Parliament did profess to bind themselves their heirs and posterities for ever, therefore we are for ever bound[1].

Hume had answered this argument some thirty years in advance: "Let not the establishment of the Revolution deceive us....It was only the majority of seven hundred who determined that change for near ten millions. I doubt not, indeed, but the bulk of these ten millions acquiesced willingly in the determination, but was the matter left in the least to their choice[2]?" Burke, of course, would reply that the majority of seven hundred was constitutionally competent to bind the rest. But how came this about? Why were they constitutionally competent to do this? The only answer that the conventional theory can supply is, that they were so under the terms of some older compact. So at last we get back to the *original* contract, for obviously no subsequent ratification which is only binding because made under the terms of that contract can add any force to our original obligation.

So Burke must hold that previous to any social contract the father can bind the son, or else the original contract and all proceedings founded thereon are not obligatory on us. Burke said that he was a Whig; but here he is at issue with the great apostle of Whiggism, who states with emphasis that the father cannot bind the son. Now Hobbes, in trying to make the conventional theory Conservative artfully slurs over this

[1] *Reflections,* etc. [2] *Essays,* 11. xii.

point, managing to speak as if the covenant had been made once for all, and at the same time as if it was made by each successive generation. But Burke distinctly holds that the father can bind the son, thinking however that this is the result of the original contract, which, as I say, it cannot be. The power of binding posterity must be independent of the contract, or else the contract itself has no force.

We must now face this difficulty: "Can a father bind his posterity by his contracts?" Burke and Dr Whewell say "Yes," Locke and the Utilitarians say "No." Let us see what popular opinion says. That a father can bind his children to the full extent of what they receive from him by bequest or inheritance is a principle of law which has generally, though not always, the support of positive morality. But that a father can bind his children beyond this extent could never be made law. *A* covenants to build a school, and, his children being otherwise provided for, bequeaths all his property to a hospital, leaving his covenant unfulfilled. Popular opinion would sanction a law obliging the hospital trustees to build the school, but it would certainly not sanction a law obliging the children to build the school, nor would it consider it *morally* obligatory on them to do so, even if the hospital trustees evaded their obligation. Common morality does not require the son to keep his father's covenants *qua* son, but *qua* heir, devisee, or legatee. And it will be noticed that in Dr Whewell's argument against Paley the cases of hereditary obligation chosen are cases in which the ancestor's property has passed to his descendants. So if popular opinion allow the

force of these lasting covenants, it is only when "they "run with" the possession of property. This is the straw at which Locke catches, just before he makes up his mind to require an *express* consent from every citizen. But what says the English law? Any number of lives in being twenty-one years and a few months, that is the limit to your power over real property. But it may be said that this is the outcome of the contract, and is not prior thereto. But will popular morality go further than the English law? Certainly not at present; if the length of time for which settlements are valid is altered, it will not be lengthened. For centuries the law has abhorred a perpetuity. And why? Because it is "contrary to public policy/' Are we then to believe that it is not contrary to public policy that we should be bound by a contract made by our ancestors when they first left that state of nature which they probably were never in? I must repeat that any subsequent proceeding of those who, under the original contract had power to settle the government of this country, cannot be binding on us, unless the contract under which they held the power could be binding on us.

Paine'perhaps exaggerates when he says, "There never did, there never will, and there never can exist a Parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding posterity 'to the end of time.'...and therefore all such clauses, acts, or declarations by which the makers attempt to do what they have neither the right nor the power to do, nor the power to execute, are themselves null

and void[1]," We should probably add these words—" if they do not conduce to the good, the happiness, or the morality of the nation." Such clauses are rather "voidable" than "void." But Paine is far nearer common sense than Burke is ; those "primary morals," "untaught feelings unvitiated by pedantry," to which Burke appeals are quite against him. No man really conceives that his duty to obey the Queen or the laws depends even in the least degree on the fact that some ancestor of his may possibly have promised that he should do so.

But Burke himself was not satisfied with this, and falls back into a sort of scepticism. To this he had always been prone. In his first work we see its germ in a distrust of human reason, which can easily " make the wisdom and power of God in his creation appear to many no better than foolishness[2]." This germ developes, until we find him railing against philosophy, appealing to "prejudices cherished all the more because they are prejudices," describing the heart of the metaphysician as pure, unmixed, defecated, dephlegmated evil[8]. But this strain of language, this assertion that in morals and politics, reason should yield to prejudice, is not natural to Burke. When he describes his own reforms, we do not hear that they were dictated by untaught feeling. No, "I have," he says, "ever abhorred...all the operations of opinion, fancy, inclination, and will in the affairs of government, where only a sovereign reason, paramount to all forms of legislation, should dictate[4]." The passage from which this

[1] ***Rights of Man.*** [2] ***Vindication,*** **etc.**
[8] ***Letter to a Noble Lord.*** [4] ***Ibid,***

is quoted was written near the close of his life, it shews Burke still proud of having been a philosophic reformer, still proud that great and learned economists (probably including Adam Smith) had communicated to him upon some points of "their immortal works," works not dictated by "cherished prejudices."

But Burke was like Reid, he thought that he could play the plain man among philosophers, and the philosopher among plain men. Why, we must ask, did Burke in arguing against the friends of the Jacobins descend from principles to prejudices? Burke has defended himself against the charge of quitting his party, but we do not need this apology to shew us how thorough a Whig he was to the last. No perception of the badness of its results could bring him to abandon the conventional theory. His scepticism is the result; he will neither give up the old doctrine, that all rightful government must rest on the consent of the ruled, nor accept the only legitimate deduction from this principle. So hiding his meaning in a cloud of words, he in effect repeats over and over again that the doctrine of the rights of man is true in theory but false in practice. Here is a specimen of his philosophy. "The pretended rights of these theorists are all extremes; and in proportion as they are metaphysically true, they are morally and politically false. The rights of men are in a sort of middle, incapable of definition, but not impossible to be discerned....Political reason is a computing principle, adding, subtracting, multiplying, and dividing morally and not metaphysically or mathematically true moral denominations[1]." Some examples

[1] *Reflections*, etc.

of principles metaphysically true, but morally and politically false, of moral as opposed to mathematical and metaphysical addition, would not have been thrown away. But what this and many other similar passages really mean is, that Burke will not surrender the premises but will reject the conclusion.

If Burke could but have brought himself to deny that these " metaphysic rights " have any existence, he would have struck the French philosophy the heaviest blow it ever received. But for a really convincing argument against the conventional theory we must turn from Burke to Bentham. Bentham's *Anarchical Fallacies*[1] is one of his best works. It was written before he, perhaps influenced by James Mill, took that peculiar view of human nature which made him think democracy the only form of government tolerable by the Utilitarian. Bentham hated the claim of " metaphysic rights" no less than Burke did, and bolder than Burke, he denied their existence. He insists on having every word in the French declaration explained. What is a right? Are you using "can," "is," and "ought to be" as synonyms? Such and such like questions he showers down, questions which Sieyes would have found it difficult to answer. The Third Article of the Declaration was a statement of the conventional theory. " The principle of every sovereignty resides essentially in the nation. No body of men, no single individual can exercise authority which does not expressly issue from thence." If this had been presented as a naked proposition, I believe that Locke, Sydney, Milton, and even Hooker would have accepted

[1] *Bentham's Works,* II 491.

it. Bentham replies,—The first sentence is perfectly-true, perfectly harmless, where there is no obedience there is no government. When we come to the second clause, we meet "the ambiguous and envenomed *'can'." Can* not rulers exercise more power than has been expressly committed to them by the nation? They do. This is not the meaning. It must mean that all laws hitherto made are void. What arc you going to do to prevent laws being void? The whole nation must consent—women, children, all. If women and children are not part of the nation, what are they? Cattle? " Indeed, how can a single soul be excluded when all men, all human creatures, are, and are to be equal in regard to rights, in regard to all such rights, without exception or reserve." There is much more of such argument, obvious perhaps, but tending to shew how unsatisfactory a support the rights of man afford for human happiness. The whole argument might be summed up in the question—If the assertion of these rights of man does not lead to human happiness, are you right in asserting them? If it is not right to assert them, in what sense can they be called rights?

Of course, it is in many ways absurd to compare Bentham with Burke, but Bentham supplies just the one thing which always seems wanting in Burke's denunciations of Jacobinism. Burke always feared lest in rooting up revolutionary principles he would root up the principles for which he and his forerunners had contended.

It may be added that this exposure of Anarchical Fallacies was intended as a pendent to **the** Book of

Fallacies, for if the two be read together it will be *seen* that there is little justice in either of the contradictory accusations that have lately been mads against Bentham ; (i) that he made law the measure of justice, (2) that in advocating law reforms of secondary importance he sacrificed what was of primary importance —respect for law.

The doctrine of the rights of man returned from France to England with all the latest improvements. We must once more refer to the argument on which it is based. Locke says in effect that God has made all men equal, and that this must be taken as evidence of God's intention that there should be no subordination among them save such as results from consent. Now there is much plausibility in this argument, and it was open to Locke and to Rousseau. But it was scarcely one which some of their followers could use, for the best of reasons, namely, that they did not believe that God had made man at all. Tom Paine could only use it by substituting " nature" for "God," and when this is done the argument ceases to be plausible. If we cease to believe that the original equality of man was produced by a Being infinite in goodness and wisdom, there seems to be no reason for treating men as equals when they have become unequals.

The defence of the doctrine in Mackintosh's answer to Burke is interesting, because it is a piece of philosophy in the transitional style ; it wavers between Locke and Hume. Mackintosh argues[1] that Burke admits the existence of natural equal rights in all men. Some of these we surrender, but as each surrenders an

[1] ***Vindicice Gallicae.***

equal portion, the remaining portions of all must be equal. All men have an equal right to share in the government. But then he turns round—he must have read Hume, and may have read Bentham's *Fragment.* He would leave out "prope " in the line, " Ipsa utilitas justi prope mater et sequi." " Justice is expediency," but he adds, " it is expediency speaking by general maxims into which reason has consecrated the experience of mankind. Every general principle of justice is demonstrably expedient, and it is utility alone that confers on us a moral obligation." But though these rights arise from expediency, " the moment the moral edifice is reared its basis is hid from the eye for ever."..." It then becomes the perfection of virtue to consider not whether an action be useful, but whether it be right." He then proceeds to argue in the familiar way that the expedience philosophy does not require us to always calculate the expedience of an action, such calculation being itself inexpedient

But this will not do. The rule forbidding calculation is not a rule for the philosopher laying down his middle axioms; it is a rule for the practical man who has to act in a hurry, and will very likely count himself for more than one. The principle of equality is a principle of justice. " Every principle of justice is demonstrably expedient" Then why not demonstrate the expedience of equality ? Because that men should be equal is a maxim into which reason has consecrated the experience of mankind ? Surely not We cannot, at all events, take so important a principle upon trust as being that basis of the moral edifice which is hidden from the eye for ever. If Utilitarianism be once

allowed to be at the base of the rights of man, Burke's reply would be crushing. Mackintosh, it may be noticed, afterwards surrendered both Utilitarianism and democracy.

But while the conventional theory was falling into discredit among English philosophers it was proclaimed as a necessary truth by no less a person than Kant. The key-stone of his jurisprudence is the idea of freedom. Law ought to minimize the external restraints to free action[1]. We however meet with another notion of freedom, and this a familiar one. "Freiheit..-ist die Befugniss, keinen aüsseren Gesetzen zu gehorchen, als zu denen ich meine Beistimmung habe geben konnenV Kant was a republican. The republican constitution is, he thinks, "die einzige, welche aus der Idee des ursprtinglichen Vertrags hervorgeht auf der alle rechtliche Gesetzgebung eines Volks gegriindet sein muss." But by republicanism he does not mean democracy. "Der Republicanism us ist das Staatsprincip der Absonderung der ausfiihrenden Gewalt (der Regierung) von der gesetzgebenden."

What exactly Kant meant by saying that all right laws must be grounded on the idea of an Original Contract, and that we are free when under no laws to which we could not have given our consent, must here be left undetermined. But doubtless it was in imitation of Kant that Coleridge refused to give up the conventional theory. Coleridge has elaborately exposed that "metapolitical" system which attempts to evolve an idea of government out of the pure reason. His attack is directed against Rousseau, but is still

[1] *Rechtslehre.* [2] *Entwurf zum ewigen Frieden.*

more applicable to Kant. He himself is in politics a Utilitarian, a zealous advocate for deriving the various forms and modes of government from human prudence, and of deeming that just which experience has found to be expedient[1]. This being so he does what we should expect, he throws over the original contract. But he cannot give up the last fragment of the conventional theory. He introduces an "ever-originating contract" between the subjects and the sovereign. "If there be any difference between a government and a band of robbers, an act of consent must be supposed on the part of the people governed[2]." Supposed! What would Coleridge have said if he had caught Paley affirming that the difference between right and wrong depends upon a supposition? If we are not going—and Coleridge most certainly was not—to require an actual consent, why ever should we require a supposed consent? Coleridge's sole support for this teaching is an argument addressed to Paley, namely, that whatever Hume might do, a clergyman ought to know that God has authorized the conventional theory by his own example: the relation of mankind as a body spiritual to the Saviour at its head is styled a covenant. But this is trifling. Christians believe that God has actually made promises to them, and that they have actually made promises to God. Are we to say that these promises are "supposed"?

Lastly, Dr Whewell espoused the cause of an "ever-originating" contract. He thinks "the social compact...expresses in one phrase the mutual relations

[1] *The Friend,* Essay iii. [2] Essay ll.

of the governors and governed, and of all classes one with another; the reciprocal character of their rights; the possibility of the obligations of one party ceasing, in consequence of some act done by another party; the duty of fidelity and respect to the Constitution; and the condemnation of those who violate or disregard such duties[1]." This is true, but the expression "social compact" implies much more than this, it implies that the duties of the governors and the governed depend upon the existence of some agreement; it implies that had there not been some social agreement, men's duties would not have been what they now are. The social compact is quite unnecessary to Dr Whewell's system, for he admits a special duty of Order; and this, not the duty of keeping promises, is the origin of our duty to respect the Constitution. And indeed he expressly says that "Government has rights which no contract among the subjects could give[2]." This being so, the consent of the subjects not being required in order to make a government rightful, it is surely a mistake to use an expression which was intended to imply, and does still imply, that men have "a right" to be under no government save one which exists by consent. It is also advisable that anti-Utilitarian moralists should cease to use a phrase which points to a defect in the systems of their predecessors, of which their own systems are not guilty. Hitherto the attacks on the conventional theory have come from professed Utilitarians, while their opponents have only surrendered the doctrine which bases the duty of obedience to civil law on the duty of

[1] *Elements, §* 849. [2] § 828.

keeping promises, with great reluctance. It would certainly be well that the anti-Utilitarians should clear themselves from the charge of not being able to give any account of our political duties, without falling back upon a principle which either lands us in democracy or has to be turned aside from its natural course by some fiction. It was not unnatural, we repeat, that the conventional theory should have found advocates among moralists who yet were no friends to democracy ; for (1) many moralists have been accustomed to see in the duty of keeping promises the duty most directly and obviously dictated by reason, and (2) those who take the jural view of morality, and include all duties in the general duty of obeying law *(i.e.,* divine or natural law), may easily omit to find a place for the special duty of obeying the law of the land. But Dr Whewell has admitted a special duty of Order—a duty of obeying civil law as civil law, and only clings to the social compact because it is an apt phrase. Again, when Dr Whewell says, " the social-compact is the constitution," surely this is misleading. It implies that Englishmen have consented to this constitution. Now this can only be true if their continued residence in this country be taken as evidence of consent, and residence can only be evidence of consent to one part of our law, if it be evidence of consent to all parts. We have only consented to the fundamental laws of the constitution if we have consented to every statute on the books. If our consent bar our repealing the one, it bars our repealing the other; and yet there are some statutes which we may certainly have a duty to repeal. There cannot be any real danger to

the great principles of our Constitution in admitting the fact that they do not depend upon consent. We do not wish to be better Whigs than Lord Macaulay, and he treated the original contract with contempt. There is much of truth in what another Whig, Samuel Johnson (Coleridge's "Cobbett-Burke") said: "To establish the throne upon a notorious untruth is to establish it upon Mr Milton's Vacuum, where it must fall ten thousand fathoms deep, and know no end of falling[1]."

But turning from the conventional theory as it is in Coleridge, a self-convicted fiction, a supposition, to the great principle which Locke took from Hooker, and Rousseau from Locke, we have yet to ask how far the ideal government of those who profess this theory can be called "free." It is certain that the gradual development of the conventional theory in the direction of democracy was perfectly logical; that is, that if Hooker would controvert the doctrines of Locke, he must modify some passages in his own writings, notably that passage which I have quoted; that if Locke would resist Rousseau and Tom Paine, he must contract some of his most essential propositions. Democracy seems a necessary point through which we must pass in attempting to make the consent of the governed more and more of a reality.

Since the French Revolution, the conventional theory has fallen into some discredit Looking back now, we may say that the anti-democratic panic which Burke did much to create, was not wholly reasonable, that to it were due some of the revolutionary excesses;

[1] *Abrogation of King James by the People of England*, etc.

but below this temporary reaction there was a reasonable feeling, that the French Liberte was not a good ideal for state action. " The liberty to which Mr Burke declared himself attached was not French Liberty[1]," and even when it puts out of sight the horrors and absurdities of Jacobinism, English opinion is at one with Mr Burke. The tyranny of the majority, of which De Tocqueville set the example of speaking, has become an object of dread. But still the conventional theory is popular, it crops up when men become excited; it appeared in 1832 and in 1866, it appears when any class desires to acquire a share in the government. The principal influence with which it has to contend is the influence of certain other ideals of liberty, with which it is maintained to be incompatible —for instance, religious liberty, or commercial liberty.

That there is something very plausible in calling a popular government a " free government" is certain. It has been so-called through ages. It is into the reasons for this that we must now enquire. Aristotle says—ὑπόθεσις μὲν οὖν τῆς δημοκρατικῆς πολιτείας ἐλευθερία. τοῦτο γὰρ λέγειν εἰώθασιν, ὡς ἐν μόνῃ τῇ πολιτείᾳ ταύτῃ μετέχοντας ἐλευθερίας[2]. He goes on to mention as one of the commonly ascribed attributes of a democracy, τὸ ζῆν ὡς βούλεταί τις. Milton also, we have seen, would call a government "free" if it was in form "popular," though it might be forced on the nation. And certainly when we speak of a free government we do mean, among other things, that this government has in it a considerable democratic element.

[1] *Appeal from the New Whigs,* etc. [2] *Pol.* vi. ii.

Now the type of a pure democratic constitution, such as Rousseau imagined, is one in which no laws are in force save those which a majority of the citizens approve, and in which all those laws which a majority of the citizens would approve are in force. What is it that we can say of the freedom of the citizens under such a government? We have seen that Rousseau declares that if a citizen voting in a minority did by some accident get a law repealed, he would curtail his freedom, though he might thereby escape some punishment which he would otherwise have suffered. But if we construe liberty into simpler terms, if liberty means absence of restraint, how shall we say that the citizen who is always out-voted in the National Assembly is more free than the subject of an absolute monarch? We are not asking whether democracy be good or bad, but simply whether it be a *free* government. If we come down to history we have many arguments on both sides, but treating the question *a priori*, should we expect to find in a democracy most freedom from restraint? τὸ ζῆν ὡς βούλεταί τις, is at first sight a fair description of perfect freedom. But to live as the majority wishes, seems to imply that unless we all agree, some of us must be under restraint, must be without liberty.

We may distinguish two sets of arguments on this point: (i) those which would shew that to be under the rule of the majority is perfect civil freedom; (2) those which would shew that under a popular government we are not likely to be oppressed by some of the worst forms of restraint. (1) The former class of arguments though they have been very popular, and

may, in times of political strife, be very popular again, seem false. Such an argument is that of Locke, proving that we ought to be under no government except that to which we have consented, and then proving that since men are equal, and since a body cannot move in more ways than one, therefore the body politic must be concluded by the majority. Such a one is that of Rousseau, who sets up the will of the majority as an idol, and calls it *la volonte generale.* We do not think ourselves *free* when we are coerced by the will of the majority, and the *esse* of liberty is surely *percipi* But the strangest of all such arguments is that of James Mill in his *Essay on Government,* and it is the strangest argument in that strange Essay. "The community," he says, "cannot have an interest opposite to its interests. . . . . One community may intend the evil of another: never its own. This is an indubitable proposition and one of great importance." Hence he concludes that democracy is the one good form of government. But is it not clear that a majority may have an interest opposed to the interest of the minority? Such arguments as these are the chief evidence in favour of Comte's theory that there is a metaphysical epoch in the history of human knowledge. We have the will of all, *la volonte generale,* the interest of the community, set before us as really existing things, but when we look closer we find that they do but mean the will of a part, the interest of a part As Kant says, the "all" which makes laws in a democracy is an "all" which is not "all[1]." In fact we have a specimen of a common logical fallacy;

[1] *Entwurf z. ewigen Frieden.*

(2) But beneath all this there was good solid reasoning. Doubtless the conventional theory gained some of its plausibility by these identifications of the majority and the whole, by Locke's simple *id est,* and by Rousseau's elaborate sophism,—but common sense is not often thus taken in ; it can distinguish between τὸ ζῆν ὡς βούλεταί τις and submission to a majority. The conventional theory was a great protest against certain forms of restraint, a protest which does not lose its value because the necessity of meeting the " exploded fanatics of slavery[1]" on their own ground caused it to assume a form which we cannot but think incorrect.

It was a protest against arbitrary power, or, more accurately, against the exercise of power in arbitrary ways. By arbitrary I here mean uncertain, incalculable. The exercise of power in ways which cannot be anticipated causes some of the greatest restraints, for restraint is most felt and therefore is greatest when it is least anticipated. We feel ourselves least free when we know that restraints may at any moment be placed on any of our actions, and yet we cannot anticipate these restraints. Hence along with the conventional theory we often find a protest against any forms of governmental restraints except such as result from known general laws. Remembering this, it is not difficult to see how " democratic " and " free " came to be thought synonymous. There has always been great practical danger of government becoming arbitrary. The Stuarts had taught us to identify monarchy and arbitrary government. The Court of Star Chamber, [11] a court of criminal equity," was constantly before our

[1] Burke.

commonwealthsmen when they argued for democracy as for a free government. Caprice is the worst vice of which the administration of justice can be guilty; known general laws, however bad, interfere less with freedom than decisions based on no previously known rule. Where such decisions are frequent, a man can never know what liberty he has, and liberty is only valuable when we know that we have it. An arbitrary government is thus opposed to liberty, and if a democracy is less likely to be arbitrary than other governments, then it has one title to be called free. It was natural to conclude that democracy would in this sense be free. It was seen how easily a monarch could take the first steps towards the exercise of power in an arbitrary way. James and Charles had given us a lesson on this subject. And indeed it may be argued *a priori* that a democracy is less likely to exercise arbitrary power than is a monarchy. The many minds of many men check each other, one would go this way, another that, so that the steady consistency which is required of those who would exercise power arbitrarily in the face of opposition must be wanting. Strafford's "Thorough/' it may be said, is not the motto of popular assemblies. We must not however go too far in this direction; we have learnt that it is possible for large masses of men to agree upon violent action, and " when they do agree, their unanimity is wonderful," Before democracies had actually been seen it was impossible to estimate the great force of contagious excitement. Here is an indication that the conventional theory, even when taken as a protest against arbitrary power, may miss its mark. If we suppose a

democracy so perfectly organized that all that the majority wish to be law must be law, and that there can be no law which the majority do not approve, we fail to find in it some of those safeguards against arbitrary, incalculable, interferences with freedom, which are to be found in governments less perfectly democratic. The ideal of democratic government seems to conflict with the ideal of a government which cannot rule in an arbitrary way. Rousseau does try to insist that the popular assembly must do nothing but pass general laws, for *la volontegenerale* cannot descend to particulars, but he has to make one very serious exception to this[1], and there is no reason in his own system why he should not make more. His general line of reasoning would justify a majority of the citizens in making *privilegia* or *ex post facto* laws.

It will be noticed that the bounds which Locke would set to the acts of government are applicable to all governments monarchical or democratic. But here there is some difficulty, for apparently the popular assembly, the majority of which is in case of breach of trust by the rulers the repository of power, is not made subject to these limits. It seems to follow from this that these limits are not to be applied to a pure democratic government, which the National Assembly can, if they please, establish, for in this case the governing body is identical with that assembly whose authority apparently has no bounds. Locke, led astray by his notion that the consent of the majority is in some way the consent of all, scarcely sees that there may be

[1] The appointment of certain persons as magistrates is a p*rivilegium.*

reasons why limits should be set to the power of a majority in a democracy.

The actual limits which Locke would set to governmental power have been already mentioned[1]. Of these, the first limits the sovereign power by making known general laws the only proper machinery of government. This is a defence against *arbitrary* power ; it is a limitation of *absolute* power, making the exercise of power in arbitrary ways unconstitutional. The third again makes it wrong for the governors to tax the governed without their consent. This also is a provision against arbitrary power. The steps to arbitrary power are not open to a poor king. He must have an army, and, as Harrington says, an army is a beast with a great belly, and must be fed[2].

On the whole we may say that the conventional theory as put forward by our early philosophers contained beneath its sweeping terms a protest against the exercise of governmental power in arbitrary ways, and a protest against any constitutional theory or "opinion of right" which allows to the ruler *absolute* power, this being *principally* objected to because it admits the exercise of *arbitrary* power.

But it was only while the conventional theory was but half developed that it was a protest against arbitrary government. In limiting a monarchical or aristocratic

[1] *Civ. Gov.*, 132—141.

[2] *Op. Cit* **There seems to me no absurdity in speaking of one form of government as more absolute than another, though Hobbes, Austin, and other analytical jurists think there is. That form of government is least absolute under which it may be expected that constitutional opinion, "opinion of right" (as Hume calls it), will allow to those who are ordinarily called the rulers the fewest powers.**

government by teaching that a certain amount of popular consent is required to make government rightful, we may very possibly prevent such governments having resort to arbitrary measures. It seems more easy to assume that the people have, by some original contract, given to the rulers the power to make "promulgated, standing laws," than that they have given the power of making *privilegia* or *ex post facto* laws. But after the conventional theory has gone beyond a certain point, it turns round and sets its face towards absolute power. If the conventional theory leads to an ideally perfect democracy—a state in which all that the majority wishes to be law, and nothing else, is law—then it leads to a form of government under which the arbitrary exercise of power is most certainly possible. Thus, as it progresses, the conventional theory seems to lose its title to be called the doctrine of civil liberty, for it ceases to be a protest against arbitrary forms of restraint.

Those who took the road to democracy to be the road to freedom mistook temporary means for an ultimate end. Undoubtedly, so long as there were Filmers and Heylins in the world—so long even as there was Grotius talking about "patrimonial" kingdoms—some steps towards democracy were steps towards freedom, because they rendered the exercise of power in an arbitrary way a matter of greater difficulty. But if what we are looking for be a state in which the greatest difficulty is placed before those who would exercise arbitrary power, we must turn from the democratic ideal. The introduction of a democratic element into governments has rendered us less subject to the

"inconstant, uncertain, unknown will of others," not because we are now under fewer laws to which we have not given our consent, but because the friction of the governmental machine has been increased, because it has become too unwieldy to be used in a capricious way. The exercise of arbitrary power is least possible, not in a democracy, but in a very complicated form of government. The philosophy of " checks " has become a little old-fashioned, and the modern protest against it was timely. Checks cannot be created *e nihilo,* they cannot be transplanted to foreign lands—they are only valuable when they are the outcome of opinions of right; but when all has been said on the other side, the fact remains that we owe our freedom from arbitrary restraints to that elaborate constitutional theory into which our opinions of right have, through long ages, been crystallizing.

Here we end our long account of the conventional theory of government. We start with Sydney's declaration that the Liberty which ought to be asserted is an exemption of all men from all laws to which they have not given their consent. The theory wants precision ; we must know how men are to be reckoned. Parallel with it there grows up the principle of the equality of all men, and this is the one principle which has been used to make the conventional theory definite. Then we start for democracy. We will make this consent more and more of a reality. We must exclude the consent of the dead ; it is the consent of the living, those under the laws, that we require. Hobbes and Burke try to snatch the weapon from the democrats, but in vain, the opponents of democracy cannot use it.

With Dr Whewell it is "a phrase," with Coleridge "a supposition/' But after all we are obliged to substitute the majority for all, our "all" is not "all." When we have got ourselves to a perfect ideal democracy, we find no reason for expecting a *priori* that we shall be under fewer restraints, or fewer governmental restraints, than if we had not insisted so strongly on making the consent of the majority a reality. We can say that a majority approves of every existing law, but we can say nothing more. We find however reason for thinking that the conventional theory in its undeveloped state did point towards freedom from a certain class of peculiarly heavy restraints, but that it did so only because it tended to complicate the machinery of government. It must be remembered that we have not been considering whether democracy be good or bad, but simply whether it be a free government, and there is small reason for calling it so.

It would now, I think, be admitted by most men that we cannot say who ought to make laws for us until we know what sort of laws ought to be made, that the best form of government is that which will best provide for the good (whatever that may mean) of its subjects, and that there are good reasons for thinking that no one form of government is the best *semper et ubique.*

But along with the protest against all laws to which the governed have not consented, and the protest against any governmental interference, save by known general laws, we find protests against laws restraining certain classes of action. .The two principal classes of action for which freedom from restraint has been claimed, are the religious and the commercial.

We ought perhaps to notice separately the protests against restrictions on the publication of opinions, but it is round the publication of religious opinions that the battle has always raged. The publication of heterodox opinions has always been considered the extreme case ; thus the arguments for freedom of the press are for the most part included among the arguments for religious toleration of which we must now speak.

Locke is here again the prominent figure, he has collected all the arguments for toleration into one imposing body. These arguments are so interwoven that they are somewhat difficult to analyze; what we require to know being the exact arguments for toleration, which we could address to a ruler who did not accept our religion. Some of these arguments are appeals to the religion of the ruler, others we may call non-religious, and of these we must first speak.

Locke's chief non-religious argument is, that the power committed to the magistrate extends only to the civil interests of the citizens—*i.e.* life, health, and indolency of body, and the possession of outward things; he has no power to interfere with religious matters[1]. Here and elsewhere Locke gives the weight of his name to the common theory which Warburton, following Locke, countenanced, that there are two spheres, the spiritual and the temporal, which can be definitely marked off; that within the latter the magistrate ought to be supreme, but within the former he should have no power. This however is not satis-

[1] *Letter Concerning Toleration.* [Locke's Works, 1751, vol. 11., p. 244.]

factory. The spheres over which religion and law claim to rule really intersect The only way in which we can draw a line between them is by making "spiritual" mean purely theoretical or speculative, and including all practice and all expression of theory under "temporal"; but this will not satisfy anyone. The religious man thinks not only that he ought to believe certain doctrines, but also that he ought to say and do certain things. If however "spiritual" include any matter of practice, then we require some criterion which shall mark off spiritual from temporal actions, and this has never been supplied. It will certainly not do to say that actions resulting from religious beliefs are spiritual, all others temporal, for we should certainly enforce the law against polygamy whether the offender were a Mormon or an infidel. Sometimes Locke admits all this[1], but the theory of the two spheres, which has since become so popular, occasionally leads him into paradoxes. He decides that a person is not to obey the law when what it enjoins appears unlawful to his conscience. Then he draws a distinction. If the law be bad, but within the proper sphere of the magistrate's power, we must disobey, but submit to punishment. If however the law "be concerning things that lie not within the verge of the magistrate's authority," men are not obliged to submit[3]. Here we have the two spheres, though Locke had acknowledged that moral actions belong to the jurisdiction of both the internal and external forum. Now to take his own case. Suppose that the magistrate, wishing his

[1] ***Letter Concerning Toleration,*** **[Locke's Works, 1751, vol. 11., pp. 259, 261.]** [2] **p. 260.**

subjects to embrace a strange religion, does not insist on any change of ritual or liturgy, but on a change of conduct in regard to civil matters, believing that this change will be for the good of his subjects—*e.g.* he commands polygamy, but does not propose belief in the Book of Mormon as a test—is this command within the verge of his authority ? It has to do with outward things. Most men would think resistance more excusable if the law commanded polygamy than if it commanded the use of the surplice ; and yet in the former case it would, according to Locke, fall well within the sphere of the magistrate's power, in the latter case it comes under express condemnation as trangressing the proper limit. Popular opinion would not bear Locke out in drawing this line between those bad laws which do not overstep the proper limits of the magistrate's authority, and those which do so by interfering with spiritual matters. When considering whether resistance would be justifiable, we do not so much inquire whether the law interferes with spiritual matters, as how bad the law is. We should justify resistance to some laws which do not, and condemn resistance to some laws which do touch spiritual matters.

The next argument is that persecution of religion must be unsuccessful But allowing to this all its proper force, we can only say that it proves that in order to be successful our persecution must be very thorough ; we must leave milder measures and resort to fire and sword. Supposing however that the ruler, to whom we address our argument, says that his religion justifies him in using all means, even the most stringent, for the coercion and conversion of heretics, what are

we to say? What are we to say if the ruler hold that, whether successful or unsuccessful, he has a religious duty to abstain from tolerating heterodoxy? There seem three lines of argument open, all of which have been used by our philosophers.

(i) We may say to the magistrate that his own religion does not really permit persecution; this is the strongest argument of Milton and Locke; and we may well say that if the magistrate profess any religion which we need consider, this argument is most powerful. At any rate, if the magistrate be a Christian, this argument ought to prevail to prevent his resorting to anything worthy of the name of persecution. And now we can argue that if he is really to produce any result, he must have recourse to measures which his religion cannot approve. But Locke pushes the religious argument further. He admits that the public good *(i.e.* pleasure) is the sole end for government. He also maintains that every man has an immortal soul, capable of eternal happiness and misery, whose happiness depends upon his believing and doing those things in this life which are necessary to the obtaining of God's favour, and are prescribed by God to that end, and the observance of these things is the highest obligation that lies upon mankind[1]. It might therefore be asked why the magistrate is to concern himself only with the temporal good of his subjects, this being so small when put beside their eternal happiness. Why. should not the magistrate provide also for the latter? Locke answers, Because he cannot. Although the

[1] ***Letter Concerning Toleration.*** **[Locke's Works, 1751, vol. ll., p. 259.]**

magistrate's opinion be sound, and the way that he appoints be truly evangelical; yet, if I be not thoroughly persuaded thereof in my own mind, there will be no safety for me in following it[1]. Now this is a distinctly religious doctrine, it asserts that right action and right belief will not profit us in another world, if they be forced upon us. This seems true, but we run into difficulties if we press the doctrine too far. We can scarcely imagine that any action or belief which is not purely voluntary can, from a religious point of view, be considered meritorious. This would lead us to say that no beliefs which are the result of the force of education or custom can be meritorious ; and yet most men would say that they ought to take some means to spread their religion. This duty may not be deducible from a duty to secure our neighbour's everlasting happiness, which may only be attainable by his own voluntary efforts, and yet it may be a plain duty. Thus it might be urged, in answer to Locke, that by using force to compel my neighbour to accept true religion, I do not make him more virtuous in the sight of God, but I do fulfil a plain duty. Perhaps the ordinary way of drawing a line is saying that I ought not to make my neighbour a hypocrite, but that, short of this, my religion obliges me to use all means to convert him. Thus, taking the common view of religion, there seem sufficient reasons why a man, be he a magistrate or not, should refrain from the coarser forms of persecution. Persecution by fire and sword, or by imposing disabilities, converts no one without

[1] *Letter Concerning Toleration.* [Locke's Works, 1751, vol. it., P- 253-]

making him a hypocrite ; but those more delicate forms of compulsion which consist in giving advantages by state machinery to what we consider true religion, do not seem condemnable.

(2) We may argue that the ruler could not prove the truth of his religion without first setting up some standard of right and wrong independent of that religion. Unfortunately, Locke was one of the few philosophers to whom this line of argument was not open. But if we accept our religion because we first accept some ethical creed, then we cannot say that we ought to enforce any commands of that religion which are flagrantly at variance with those moral doctrines on which the proof of our religion rests.

The third argument may be for a moment postponed. Here we will refer to Coleridge's criticism of Locke. " It would," he says, "require stronger arguments than any which I have heard as yet, to prove that men have not a right, involved in an imperative duty, to deter those under their control from teaching or countenancing doctrines which they believe to be damnable, and even to punish with death those who violate such prohibition. I am sure that Bellarmine would have had small difficulty in turning Locke round his finger's end upon this ground....The only true argument as it seems to me, apart from Christianity, for a discriminating toleration, is that it is of no use to attempt to stop heresy or schism by persecution, unless perhaps it be conducted upon the plan of direct warfare and massacre " This is in the main quite true. Locke's argument about the two spheres is faulty, and

[1] ***Table Talk,* 3rd Jan., 1834.**

having merged ethics in religion, he has nothing left to appeal to but the religion of the ruler; all he can say to the persecuting prince is that Christianity does not permit persecution. If the prince were not a Christian, Locke must content himself with saying that Christianity is "reasonable," and that therefore the prince ought to be a Christian. But Locke has one argument in reserve, and this is the really important argument, and this Coleridge fails to see. It must now be stated.

(3) Milton in the *Areopagitica* argues that the suppression of unlicensed books is "the stop of truth." Now what does this imply? Why, that governors cannot be certain that they know what the truth is. The *Areopagitica* sounds like a prolonged echo of Gamaliel's words, "Refrain from these men, and let them alone,...lest haply ye be found even to fight against God." This will bear translating from the religious language; it is advice not to persecute because we may be persecuting the truth. This argument is not put very prominently forward by Locke, but it runs through his whole work. Suppose now that we argue before the persecuting prince that (though, if he be absolutely certain of the truth of his religion, that religion alone can set bounds to his persecution) he ought not to be absolutely certain of his religion; that the evidence does not justify absolute certainty; we throw him back upon some independent moral creed. Perhaps he has no such creed to fall back upon? Then our case is hopeless, but at any rate he can no longer say that it is his religion which obliges him to persecute; if he will justify his acts at

all, he must justify them by some other standard than his religion ; if he will not justify them, argument is obviously thrown away. If however we can get him to accept any known ethical creed, then we have ground for a fresh plea for toleration.

Do we then say that it is the duty of rulers to doubt their religion, to think that other religions may be equally true ? Not quite. It was not the least of Butler s services to English philosophy that he insisted on probability being the real guide of our lives. Now probability essentially admits of degrees, and it is possible that we may hold some opinion to be sufficiently probable to justify us in acting on it in some cases, though not in all. We may have such a degree of assurance of the truth of some doctrine, that any known moral creed would oblige us to guide our more private actions by it, and yet would oblige us to refrain from forcing it upon our neighbours. We see indications that such thoughts as this have been present to the minds of those who have pleaded for toleration. This will serve to explain *and justify* the fact that the pleaders for toleration limit the field to which toleration is applicable, a fact otherwise only explicable by cynicism. We find that Milton and Locke will tolerate those opinions which seem to them just possibly true. Milton stops short at "poperyand open superstition... that also which is impious or evil absolutely either against faith or manners[1]." Locke stops short at popery and atheism[2]. Mill does not stop short at all.

[1] *Areop.*

[2] ***Letter Concerning Toleration.*** **[Locke's Works, 1751, vol. 11., pp. 260—261.]**

The question which these philosophers asked themselves was—Can the suppression of this or that opinion conceivably be "the stop of truth"? If so, this is one reason against any attempt at suppression. If once it be admitted that there is considerable chance of compulsion being exercised to promote not what is right, but what is wrong, then the arguments of Milton, Locke, and Mill become really forcible, and Bellarmine could scarcely make such short work of Locke as Coleridge imagined; for the persecutor requires it to be granted that if we accept a doctrine as true enough for some purposes, we must accept it as true enough for all purposes. But this is just what the reader of Butler will never grant.

Toleration is often pleaded for on too weak grounds. We can scarcely ask the ruler not to interfere, without suggesting to him that there is a chance of his own opinions being wrong. The really convincing part of Mill's argument is that in which he shows how often intolerance has been on the side of falsehood. Scepticism or doubt is the legitimate parent of toleration.

The opinions of so essentially religious a philosopher as Coleridge on this point have a peculiar value. If the passage just quoted from his *Table Talk* stood alone, we might suppose that he preferred the conclusions of Bellarmine to those of Locke, but this is the very reverse of the truth; he was prepared to go as far as Locke, though for different reasons. He speaks of himself as "I who have...so earnestly contended that religion cannot take on itself the character of law without *ipso facto* ceasing to be religion, and that law could

neither recognize the obligations of religion for its principles, nor become the pretended guardian and protector of the faith, without degenerating into inquisitorial tyranny[1]". If we put this passage by the side of the other, we shall come to the conclusion that Coleridge held that it is Christianity itself which forbids law to recognize the obligations of religion as its principles. This, no doubt, was his opinion, and it adds one more to the pleas for toleration. Coleridge certainly held that the outward object of virtue is the greatest producible sum of happiness of all men[2]. Law can only deal with what is outward, thus the greatest happiness of all men must be the end at which all law should aim[3]. At the same time he will not hear of Utilitarianism in private ethics, because Utilitarianism defeats its own end, because before we can attain the outward object of virtue, we must have an inward virtuous impulse which religion alone can supply. But religion in politics, like Utilitarianism in ethics, defeats its own end, for the outward object of virtue alone comes within the purview of the law. This will explain why it is that Coleridge directs his attack against Paley rather than Bentham ; he did not object to Utilitarianism as a principle of legislation, he did object to making the future life a matter of calculation. Bentham was incomplete, Paley was wrong.

This theory helps Coleridge to cut a difficult knot Warburton, holding that the State ought to form an alliance with *some* Church, pronounces that the Church

[1] *Church and State,* Advertisement.

[2] *Aids to Reflection,* Prud. Aph. ll. Comment.

[3] *The Friend,* Essay III..

which should be chosen, is that to which the mass of the subjects belong. With this Mr Gladstone expressed himself dissatisfied; the prince, he thought, is in duty bound to give every advantage to *his own* religion[1].

Coleridge, like Warburton and Mr Gladstone, would have an established Church, but he contends that religion itself obliges us to accept expedience as the measure for law, law must not recognize the obligations of religion for its principles, it must when treating of religion consider only its " this-worldian " effects. The national Church is not established to teach religion " in the spiritual sense of the word, as understood in reference to a future state[2]." It is merely a "blessed accident " that the national clerisy can be the teachers of religion in an exalted, spiritual sense ; this is not what they are paid for ; they are paid for making men better citizens, neighbours, subjects; their " this-worldian " utility is the measure of their services, and those whoever they be who can best perform the function of making the people good, in a Utilitarian sense, ought to be members of the national clerisy.

Now, if Coleridge's be the true Christian view of the matter, there seems to be a chance of reconciling those who are at issue about the duties of the State as regards religious bodies. Bentham and the Oxford tractators have scarce any ground in common, Bentham and Coleridge are agreed about a first principle.

There have never been wanting arguments for religious toleration, for Christianity itself was a standing

[1] ***The State in Relation to the Church,*** **ch. ii. § 16,**

[2] ***Church and State,***

protest against persecution, but when we turn from religious liberty to commercial liberty, the case is different. As long as the real operation of commerce was wholly misconceived, the now common arguments for *laisser faire* could not be brought forward. Some conception of the way in which wealth is produced and distributed must exist, before these arguments can become evident.

The immense difficulties which King William's government had to overcome in their reform of the coinage gave birth to modern political economy; the supply was occasioned by a demand. The action of money and the benefits of trade had already been the subject of speculation in Greece, in England, above all in Italy; but the first sketch of the science as it at present exists is, I believe, due to Locke, whose services in the matter of the currency the government had been wise enough to secure. As might be expected, Locke was not content until he had penetrated to first principles. In his *Considerations of the Lowering of Interest* he incidentally lays down twenty-one propositions which might be placed as headings to the various chapters of the *Wealth of Nations.*

We may notice, that directly the distribution of wealth becomes the subject of searching speculation, the protest against legislative interference with commerce at once begins. Locke argued, in the way now familiar, that it is futile to meddle with the rate of interest. It is not however true to say with Macaulay[1] that Locke went farther than Smith, and anticipated Bentham. No, the honour of having been the first

[1] ***Hist EngL.*, ch. xxi.**

consistent opponent of the usury laws fairly belongs to Bentham. In fact, this is a most striking triumph of systematic over unsystematic Utilitarianism. Locke, Smith, Paley, all condemn the principle of the usury laws, but they are not prepared to recommend their abolition ; they catch at some straw of popular prejudice. Usurers must not have a monopoly [1] projectors should not be favoured[3], governments should be able to borrow at a low rate[3]. Bentham's searching analysis, his ceaseless question, why ? swept such arguments aside. It was because he was determined to call no law good if it did not produce more pleasure than pain, that he was able to convert Adam Smith, to win exaggerated praises from so unsympathetic a critic as Mackintosh[4], and, as Hallam[8] says, to convince the thinking part of mankind.

To return. Hume's economic essays must also have influenced Adam Smith ; whatever Hume touched he illuminated. But when all is said, the *Wealth of Nations* is the first systematic book on what is now called political economy, it is also the first powerful plea for commercial freedom. The difficulty of the work which Smith set himself to do can scarcely be overrated. A society founded on custom had given way to a society founded on competition, but the operations of the new economic force had never been explained. Even Bacon's mind could not penetrate

[1] *Locke's Works,* vol. ii., p. 33.
[2] *Wealth of Nations,* Bk. 11., ch. iv.
[8] *Mor. and Pol. Phil., ii.* x.
[4] *Hist. Eth. Phil.* (3rd ed.), p. 240.
[5] *Hist. Lit* vol. iv., ch. iv.

the mists which hung over the taking of usury[1]. Here also fiction had to be expelled by science.

Adam Smith wrote the *Wealth of Nations* in part fulfilment of a promise to write a discourse "on the general principles of law and government." His purpose was to shew what laws ought to be made concerning "police, revenue, • arms[2]" Thus his conception of political economy obviously differs from that of Ricardo and his followers. Political economy is now looked upon as a science, teaching what is, or what in certain circumstances will be, the way in which wealth is produced and distributed. Doubtless it is well to separate the consideration of what is, and what will be, from the consideration of what ought to be, such a separation is dictated by logical convenience; but *if this* separation is to be made, it should be made consistently, and it never is made consistently. Even the scientific Ricardo breaks off his almost algebraic speculations to tell us what is the only justification for the poor laws[3]. As long as we are careful to keep ourselves from appealing to any ideal, as long as we neither justify nor condemn, there seem good reasons for separating the science of political economy from the general science of society, sociology, or ethology as it is called. The best reason is, that the former exists, that it has done good work, discovered valuable truths, truths verified by experience, and that there is no cause for thinking that its work is done, while on the other

[1] ***Essays •' Of Usury.***

[2] **Comp. *Moral Sentiments,* VII. iv., with preface to 6th edition of that work.**

[3] ***Pol Econ,* ch. v.**

hand, we know little more than the name of sociology. We may add that even when a social science becomes a reality there still may be room for a deductive science inquiring into the effects of the wealth-getting motives. As long as we carefully exclude the ideal, the moral, and concern ourselves only with what is, and what will be, there is little difficulty in answering the objections of Comte and Coleridge ; we merely appeal to experience ; we say, for instance, that the theory of foreign exchanges, as taught by Mill, really does explain those complicated phenomena of the money. market which were previously inexplicable. But if once we begin to say how the production and distribution of wealth *ought to be* carried on we can no longer confine our attention to facts about wealth. We have to decide how far wealth is desirable, we have to compare wealth with other desirable objects. We cannot say that *laisser faire* should be our rule until we are agreed upon subjects which are quite alien to the science of wealth. Our economists should make their choice, either they must give up talking about what ought to be, or they must take into consideration ethical and political doctrines on which the methods of the science of wealth throw no light. Of all our writers on political economy the most successful have been those who have most constantly kept in view the fact that when the economist begins to justify and condemn, he has passed the bounds of his own special science, he has become a moralist, and must behave as such. Aristotle introduces what he has to say about how men ought to act in distributing wealth, into the middle *of* that book of his Ethics which deals with the virtue of

justice. Sir A. Grant thinks that to make political economy a part of morals is a mistake we should never now fall into[1]. But surely the Greek philosopher is more right than his critic. If we say that wealth ought to be distributed in this or that way, we do set forth a distinctly moral theory, a theory which we are bound to defend in the lists of ethics. No amount of truths about what is, or what in certain circumstances will be, can make one truth as to what ought to be. Therefore we should object to the practice of some of our economists, who seem to press upon us the doctrine that the State ought not to interfere with commerce, as if this was deducible from the doctrine that all men try to buy as cheaply and sell as dearly as possible*.

The reasons which Mill has given for separating political economy from ethology appear perfectly valid, as long as political economy keeps clear of what ought to be[3]; but there is no reason for thinking that the ethics of the distribution of wealth can be separated from general ethics. Adam Smith and Mill have recognized this more clearly than many of their fellows, and they have their reward.

Now to consider the arguments in favour of commercial freedom. The first and most popular is based on a supposed harmony of economic interests. It is said that every man best provides for the economic interests of the whole by providing for his own

[1] *Essays,* App. C.

[3] Specimens of such a procedure could be extracted from several popular manuals ; they go far to justify Coleridge's opinion that Political Economy is solemn humbug. *{Table Talk,* March 17th, 1833.)

[3] *Logical,* ix. 3.

economic interests. Adam Smith started this argument. [u] As every individual therefore endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value, every individual necessarily labours to render the annual revenue of the society as great as he can,... he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the; society that it was no part of it By pursuing his interest he frequently promotes that of the society more effectually than when he intends to promote it" First let us notice the "invisible hand" ; these words point to the source of Adam Smith's ethics, the optimist school of Hobbes' opponents, those who thought that true self-love and social are the same, that it was derogatory to the honour of God Almighty that he should have left his master-workmanship Man in a state of war[1]. This is not unimportant, for this belief in a providence directing our selfish aims to social good, has formed one of the strongest arguments for *laisser faire.* liut passing this by, it will be seen that Adam Smith's belief in the harmony of economic interests did not carry him very far. In one place he admits that the interest of the capitalist is not consonant with the interests of the landlord and the labourer[15]. His grounds for thinking that the interests of the landlord are more consonant with those of the labourers than with those of the capitalist would now be considered unsound ; but this admission of a partial dissonance is

[1] ***Clarendon's Reply to Hobbes.*** [2] **i. xi. Conclusion.**

extremely damaging to the popular argument for *laisser faire*. The invisible hand has after all failed to harmonize our economic interests. It cannot be too much insisted on that Adam Smith threw really very little weight on these a *priori* arguments about harmony, in which Bastiat delights ; they are not essential parts of his argument against the mercantile theory, they are *obiter dicta.* The real leading argument is: you say that your system of interference enriches the country, by bringing into it gold and silver ; I will shew that gold and silver are not peculiarly desirable forms of wealth, that your system checks the growth of what you will admit is real wealth, that it does not even attain its own worthless object Adam Smith's argument is for the most part *ad homines,* his opponents justified a meddling policy as productive of wealth, and Adam Smith completely refuted this justification. But what is the really powerful part of the refutation ? Not the assertion about an invisible hand, but the detailed proof that all the restraints on free trade imposed or suggested had failed, and must fail. When we further notice that Adam Smith's assertions about the harmony of interests are chiefly meant to show that all men have an interest (not necessarily an equal interest) in the freedom of international trade, when we notice that in the conclusion of his first book in a sort of summary of its results, he warns us that the judgment of capitalists about the interests of society is to be taken with reserve, as it is warped by their judgment of their own interests, we cannot appeal to him as the father of those who see nothing but harmonies in political economy. What would Bastiat say to this :

the proposals made by capitalists come from " an order of men whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public " ? Above all, Adam Smith certainly did not believe that the economic interests of a nation are always harmonious with its other interests.

Have the additions to political economy made since Smith's day shewn our economic interests to be more harmonious than he thought them ? Surely the reverse. Malthus has pointed to a social force which, since it plays a great part in the distribution of wealth, may be called economic, and which would seem to cause a divergence between the interests of various classes of society. It is said that as a fact men do go on increasing their numbers until there is always a large class who can barely obtain the necessaries of life. Is it to the capitalist's economic interest that this should not be so ? The fact should be admitted. It is distinctly to the economic interest of the capitalist that there should be as many people as possible willing to work for as small wages as possible, always provided that the breed of labourers be not seriously damaged by overcrowding and insufficient food. Is this a new harmony?* It was a sound instinct that made those who hoped for the improvement ("melioration" was the word then) of mankind by trusting to the play of selfish but harmonious instincts to talk about " godless Malthusianism." Malthus did strike a blow at the eighteenth century conception of God, the Being who turns selfishness into benevolence.

What is the greatest discovery of modern economy ?

Most men would say Ricardo's *Law of Rent.* This again shews an obvious discord between the interests of the landlords and those of the labouring classes. It is to the landlord's economic interest that population should not be diminished, Bastiat saw the want of harmony here; he denied the truth of Ricardo's law. He might as well have denied the truth of Euclid. Again, no amount of the special pleading, of which he was a master, can get over this simple fact It is distinctly contrary to the economic interests of the capitalist that labourers should become any richer than they now are, their numbers remaining constant. Whatever view we may take of ethics, surely there is a strong *prima facie* case for saying with Carlyle that *laissez faire* and Malthus positively must part company[1] ? But only a *prima facie* case. The main argument of the *Wealth of Nations* remains to this day a valid reason for leaving trade free, and the main argument is that interference only makes bad worse. This has been forcibly repeated by post-Malthusian economists, who have argued that our present system of private property, freedom of contract, considerable testamentary powers, is in its broad outlines more likely to produce the happiness of mankind than any other legislative system yet sketched out. The argument is, briefly, that in our present system legislative interference is nearly at a minimum ; that any other system would require constant and meddling interferences ; that such interferences themselves cause pain ; that such interferences would be futile, the economic forces with which they have to contend being

[1] ***Chartism.***

too powerful to be turned from their course ; that self-reliance would be destroyed. But after all, the most powerful argument is that based on the ignorance, the necessary ignorance, of our rulers. The evil of governmental interference varies with the probability of the government being wrong, and until political economy is a very much more perfect science than there seems any chance of its being for a long time yet, we may fairly say that there is great probability that any governmental interference with commerce would be made on mistaken grounds, and would defeat its own end. Adam Smith shewed by the method of exhaustive failures that legislative interferences with foreign trade have been hurtful or futile, and his followers have successfully shewed that the same may be said of interferences with commercial transactions in general.

It is very necessary however that it should be seen that the principle of *laisser faire* does not rest on a belief in the harmony of interests. If such were the case, it would be possible to say that since a man will best consult the economic interests of the community by attending to no one's interest but his own, to buy cheap and sell dear is the whole economic duty of man. It is this supposed corollary that excites opposition to the principle, it is thought that the economic " Laissez faire " involves the Rabelaisian " Fay ce que voudras." That this is no necessary deduction, when the principle is placed on a sound foundation, will readily be seen. That the difficulty of opposing powerful economic forces, the danger of giving wide powers to government, the necessary ignorance of our governors, make

it inadvisable that law should meddle with the settlement of wages and prices, is no reason why the individual should forget, in the distribution of his wealth, that his own economic interests are frequently directly opposed to the economic interests of others.

Adam Smith has remarked that the laws made about religion and commerce have been peculiarly bad, and we may notice that laws on these two subjects were the first laws condemned as essentially going beyond the proper province of law. Religion and commerce seem ideas widely removed from each other, but yet in the eye of the statesman they have points in common, (i) It is difficult to make laws about them which shall not be futile. It is so easy to introduce and circulate both smuggled goods and smuggled opinions. The forces with which such laws have to contend are the most powerful forces of human nature. (2) Interference on the wrong side may produce the worst effects ; it may bring starvation, it may be "the stop of truth." (3) It is very probable that the interference will be on the wrong side. There are no subjects with which the statesman has to deal, the logic of which is so elaborate and so difficult. This last reason, though it is not often expressly insisted on (we do not like to confess our own ignorance, or impress on others their ignorance when we have nothing to substitute for it) is really all-important. The statesman has to consider the good he may do by interfering on the right side, the evil he may do by interfering on the wrong side, and also the probability of his knowing which the right side is. The most convincing pleas for *laisser faire,* and the most convincing pleas for

religious toleration, are those which insist *a priori* on the great " probable error " of any opinions on matters of religion, and matters of political economy, and those which relate *a posteriori* the history of the well-intentioned failures of wise and good men.

To return for a moment to democracy, the connection between the liberty of democracy and commercial liberty does not seem strong. We should say that there is no reason why a monarch should not see the folly of protection as soon as would the majority of the nation ; his interests on this point may well be at one with those of his subjects. The cases of France under Napoleon III, and of the United States at the present time shew that any connection which exists is but weak. Nor does it appear that democracies are peculiarly likely to be tolerant in matters of religion. Hobbes certainly thought otherwise ; indeed it is not improbable that a belief that an absolute monarchy would allow the greatest freedom of thought, was the motive power in making this bitter enemy of the clergy of all confessions an apologist for the royal martyr. However, it seems just plausible to say that though contagious enthusiasm may make a democracy intolerant, it will interfere first on this side, then on that, until successive failures teach it wisdom.

We must pass from these special cases of laws condemned as violations of liberty, to the more general question of how we are to know those laws which violate the desirable liberty. first let us mention one or two definitions of liberty. Harrington[1] says " the liberty of a commonwealth is the empire of the laws,"

[1] *Op. Cit,* p. 45.

not the laws made by consent, but simply "the laws." Liberty is here the absence of government by arbitrary methods. Next we have another group of definitions. Rutherforth, a commentator on Grotius, says that civil liberty is "as much liberty as is consistent with the obligation of the social compact[1]"—but of the social compact we have already said enough. Blackstone takes civil liberty to be "natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public[2]". With Paley, civil liberty is "the being restrained by no law but what in a greater degree conduces to the public welfare[3]." But these two last definitions amount merely to this, civil liberty is the absence of *bad* laws. Is it possible to go beyond this, to say not that liberty is the absence of bad laws, but that some laws are bad because they interfere with liberty? Let us examine the now common arguments against the multiplication of laws—arguments now common but once rare. Harrington is one of the few of our earlier philosophers who has said, "the best rule as to your laws is that they be few[4]." Milton objected to "the old entanglement of iniquity, their gibrish laws[5]," rather because they hide the law of God than because they interfere with Liberty.

(i) Bad laws may do a great deal of harm. This argument is independent of the Benthamite doctrine hereafter to be referred to, that all laws being restraints are painful. This argument is open to moralists of all

[1] *Institutes, ii.* viii. 7.
[2] *Comment, 1.* i.
[3] *Mor. and Pol Phil,* vi. x.
[4] *Op. Cit,* p. 60.
[5] *Tenure of Kings.*

schools, for bad laws will give pain, violate conscience, contradict true propositions; we can use what phrase we please. We only speak of the evils of *bad* laws.

(2) Laws are likely to be bad. The probable error of even well-intentioned statesmen is great. Here again all moralists can unite. We cannot trust our rulers' knowledge of right and wrong, whether that knowledge come from experience or from intuition. Perhaps however the argument is most forcible in the mouths of those who believe that calculation of consequences is necessary.

The great difference between Mill's *Essay on Liberty* and earlier writings on the same subject is, that Mill resists the presumption that uniformity of action is desirable. As long as the influence of Locke was dominant, so long the convenient psychological assumption that men are by nature very much alike, ran through our political philosophy. Now if the characters of men be alike, then when men are placed in the same circumstances they ought to do the same things ; this is the fundamental assumption of all moral philosophers. If men be very much alike, then uniformity of conduct is desirable ; there is a presumption that two men placed in the same external circumstances ought to act in the same way. This presumption fails if, as modern science teaches us, we are not endowed with equal faculties at starting. Mill broke away from the eighteenth-century tradition ; self-development " in its richest variety " was not an ideal for the followers of Locke, for there was a presumption against variety. The resistance of this presumption gave new force to the argument that laws will probably be bad. Law

can only deal with externals, it can scarcely concern itself with character and the more reason there is for insisting on the character of the agent as a necessary element in our consideration of the rightness of the action, the less reason is there for thinking external uniformity of action desirable. -

We may add that probability being the guide of life, the statesman is not obliged to assume that because he believes some doctrine to be true enough for some purposes, he ought to believe that it is true enough for all purposes.

(3) Bentham says, " every restriction imposed upon liberty is subject to be followed by a natural sentiment of pain, greater or less...He who proposes a coercive law ought to be ready to prove not only that there is a specific reason in favour of it, but that this reason is of more weight than the general reason against every such law[1]." This is certainly a correct deduction from Utilitarianism. To restrain or thwart a man is always to give him pain. It must be doubtful how far anti-Utilitarian moralists would admit that this raised any presumption against a new law. Sometimes they speak as if the only desirable freedom was to be found in right action. "Was ist die freieste Freiheit ? Recht zu thun V This leads us to look upon those laws which oblige us to act morally, as not really restraints; they do but bind us to a service which is perfect freedom. Hence there might be some difference on this point But if we put the question— Is the pain caused by legal restraint in itself an evil ? would it not be desirable to lessen this pain, if we

[1] ***Treatise* (Dumont), p. 94.** [2] **Goethe. Egmont.**

could, by other means secure the performance of the moral action ?—we should probably get but one answer. But, as a fact, this argument has come principally from professed Utilitarians. They can look at absence of restraint as *per se* desirable, for it is the absence of a certain class of pains. So the Utilitarian, at any rate, is not compelled to answer the question—" Who is at liberty to do what, and from what restraint is he liberated[1]?" before he expresses a desire for liberty. He wishes for freedom from the pain of restraint, just as he wishes for freedom from the pain of gout. It may be well for other people, or even for himself, that he should be under restraint, just as it may be well for them that he should have the gout ; but looked at by itself and apart from its consequences, the Utilitarian must hold that both for himself and for others, freedom from restraint is desirable.

With such materials as these, Mill attempted to establish a doctrine of Liberty as a middle axiom of Utilitarianism. He attempted to obtain a principle by reference to which we might condemn laws as interfering with Liberty, without ascending in every case to the supreme rule of Benthamism. In his *Essay on Liberty* he says, "The object of this essay is to assert one very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties? or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering

[1] J. F. Stephen, *Liberty*, etc., p. 175.

with the liberty of action of any of their number, is self-protection[1]." This seems quite opposed to what Mill had said in his *Political Economy,* namely, that the functions of government are not capable of being circumscribed by those very definite lines of demarcation which, in the considerateness of popular discussion, it is attempted to draw round them. There, he says, that to afford protection against force and fraud is too narrow a field. " There is a multitude of cases in which governments, with general approbation, assume powers and execute functions for which no reason can be assigned, except the simple one that they conduce to general convenience"." Nor can I think that the former passage was intended to over-rule the latter, for in the very *Essay on Liberty* it is admitted that " for such actions as are prejudicial to the interests of others the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection[3]" In this last passage the definiteness of " self-protection " vanishes. Society may use coercion in order to protect itself against actions prejudicial to its interests. In fact, we have to extend* self-protection until it means protection from any pain. The ordinary use of words scarcely permits this. Society could scarcely justify compulsory education by the plea of self-protection.

Bentham said, " The care of his enjoyments ought

[1] J. F. Stephen, *Liberty,* ch. i.

[2] *Pol, Econ.,* v. i. 2. There are even stronger expressions, too long to quote.

[3] Ch. v.

to be left almost entirely to the individual The principal function of government is to guard against pains[1]." The doctrine of Mill's essay (expanded, as it must be, so as to make self-protection mean protection against any pain) agrees with the passage, only the words "almost" and "principally" must be omitted. It is however doubtful whether the Utilitarian can spare these words. Mill certainly would not have objected to giving compulsory powers of purchase to railway companies, and yet railways rather increase our pleasures than diminish our pains. This is but a type of a large class of cases, many of which are expressly admitted in the *Political Economy* as being cases where interference is justifiable.

Nor is the Utilitarian justified in saying that we ought never to interfere with an individual for his own good. We should probably push away a blind man from the brink of a precipice. Neither can it be said that we may only interfere in these cases when a man is going to do what he does not want to do: this principle would be too elastic, for the drunkard does not want *delirium tremens.* The reason why we should employ force in the one case and not in the other, is not that in the one case the pain is not desired, while in the other it is, but rather that we, the interferers, are more certain of the impending evil in the one than in the other, and are far more likely to prevent the evil at a small expense of pain.

Thus, though Mill has done much towards making the arguments for non-interference more complete, he has not been able to establish a precise middle axiom of

[1] *Treatise,* p. 95.

Utilitarianism, The doctrine of his Political Economy, that no reason can be given for a multitude of governmental interferences, "except the simple one, that they conduce to general convenience," must be taken as the last word of Benthamism on the subject of Liberty.

All therefore that we get from Utilitarianism by way of a protest for liberty is the assertion that all restraint is painful, and therefore *prima facie* bad. Besides this we have much proof that interferences on the wrong side may do much evil, and that it is far from improbable that interferences will be on the wrong side. This being so, we can scarcely make the minimization of restraint our political ideal One of the strongest reasons for non-interference is one which we may hope will rather lose than gain in strength—we may hope that the "probable error" of legislation may in time be diminished.

There is however a newer philosophy which makes absence of restraint its ideal Mr Spencer's doctrines are in many ways thoroughly post-Coleridgean, but something may be said of their historical origin. Coleridge, in his sketch of political philosophy, mentions three systems: (i) that of Hobbes, based on fear; (2) that of expediency, to which Coleridge professed himself attached ; (3) that of the pure reason. In his description of the last he refers to Rousseau, but the doctrines as he sets them forth are more German than French in their form—they are more the doctrines of Kant than of Rousseau. The ideal of this system was, he says, that legislation should remove all obstructions to free action, and do nothing more, "The greatest possible happiness of a people is not accord-

ing to this system the object of a governor, but to preserve the freedom of all by coercing within the requisite bounds the freedom of each[1]." Such words are familiar to us now. Coleridge himself had been an ardent admirer of this system—he had founded on it his scheme of Pantisocracy ; to the end he treated it with regretful respect; but he found himself obliged to abandon and refute it, because he thought that it logically led him to absurd conclusions. It was too good for this world ; it is "under any form impracticable "; an attempt to realize it "would necessarily lead to general barbarism and the most grinding oppression." Coleridge's opinion is all the more valuable because he cannot be charged with empiricism—he loved whatever belonged to the pure reason.

Mr Spencer desires the minimization of *all* restraints. From this he passes to the recommendation of the abolition of all government as an ultimate ideal. Now here we do at last see the end of the conventional theory. We saw how when Rousseau had established his democracy, he was reduced to a sophism to prove that men, when punished, have given their consent to be punished. This could not last; if we are to be under no laws save those to which we have consented (and Sydney says that this ought to be the case), surely we ought to be able to annul a law by withdrawing our consent. We must make consent more real yet; we must pass Rousseau and join Mr Spencer, Mr Spencer has really a strong historical case. He might say that Hooker, Milton, Locke, Sydney, Rousseau, have laid down a maxim which leads to his

[1] *The Friend,* Essay IV.

theory, that Hobbes, Burke, and Conservatives in general have been obliged to invent a spurious imitation, that Coleridge and Whewell cannot bring themselves to quite abandon his principle. But then there is Hume, Bentham, Mill, and Coleridge (when he can forget his first love); what of these? Mr Spencer tries to fuse his system with Utilitarianism. If we will but leave action unrestrained, nature will do the rest, and will produce a race of men perfectly happy, because perfectly adapted to their environment; thus a scientifically sanctioned process is substituted for the Benthamite rule of thumb. Unfortunately, Mr Spencer refuses to deal with "moral therapeutics"—which are what the world must be concerned with for the next few million years—and constructs a philosophy of rights for men adapted to their environment; so it is hard to say what chance he has of converting the Utilitarian from his "moral infidelity[1]."

In order to gain over the Utilitarian he must shew not only that to set about minimizing restraints will ultimately produce a state of perfect bliss, but that, taking into consideration the present as well as the future, and properly discounting the future, the happiness of mankind would be added to by every diminution of restraint. This may be the case, and yet it will be difficult to prove that it is so, unless one simple proposition be true, namely, that each individual's happiness varies inversely with the restraints which he is under. If this be not true it does not indeed follow that Mr Spencer's rule may not be the best method of obtaining Bentham's object; it may be that though the

[1] *Social Statics*, ch. xx.

greatest freedom of all is the greatest happiness of all, yet the freest individual is not the happiest. But if this be the case'we can scarcely hope to shew the harmony between Bentham's Supreme Rule and the maxim of Liberty, the proof is quite beyond any methods at our command. And it certainly is not true that the individual's happiness varies with his freedom from restraints due to other men. From such restraints Alexander Selkirk was perfectly free, and yet he was not happy.

This being so, an empirical proof that the minimization of restraints produces the maximum of happiness seems impossible. As to the scientific proof from adaptation, it only shews that at some future time there will be a race of completely happy men, it cannot shew that the Utilitarian should sacrifice the happiness of present generations to the happiness of future, and so we most certainly require a scheme of moral therapeutics, of ethics for imperfect beings. Lastly, there is the theological argument from design, and this seems stronger. Systems of absolute rights require such a theological basis as Locke relied on. But this is scarcely cogent when we substitute the "Unknowable" of the *First Principles* for the "God" of the *Social Statics.*

If with Kant we attach some supreme value to the action of free will, thinking it the only good *per se,* it is natural to make the minimization of restraints on free will the supreme principle of law; but we cannot yet say that this is compatible with Utilitarianism, with which, very prudently, Kant will have nothing to do. His doctrine appears to be that since the law cannot

deal with anything but externals, and therefore is no judge of the internal freedom of an action, the minimization of restraints on *all* action is the proper jural means to the minimization of restraints on free action. The problem therefore is the minimization of all restraints (or of all restraints caused by human action) by law. But every law implies restraint Therefore we have to get rid of greater restraints by imposing smaller restraints. To do this we must have some measure of the greatness of a restraint. What shall this be ? We look in vain for an answer. There is only one measure which seems possible, and that is the greatness of the pain caused by the restraint. So our rule becomes,—Minimize the pain of restraint. Thus even the purest Kantian who takes the analysis of the idea of freedom as the means of discovering what law ought to be has to admit a calculus of pleasure and pain into his politics. This should be remembered when the philosophers who would deduce Ideal Law from the maxim of Liberty assert as against the Utilitarian that such a calculus is impossible. If it be impossible we have not yet found a first principle of Politics,

(6) EQUALITY.

EQUALITY has never been so universally accepted an ideal of politics as Liberty. Still, it would on all hands be admitted that "Equality before the law" is good. We require—(1) an impartial administration of justice, and (2) impartial laws—that is, laws making no distinctions save such as are necessary consequences of the principle according to which all laws should be framed[1]. But we must pass to more controverted matter, to the claims which have been made in favour of equality of political power, and equality of property

The premises from which Locke would deduce a system of morality are: the existence of a Supreme Being, infinite in power, goodness, and wisdom, whose workmanship we are, and on whom we depend ; and of ourselves as understanding, rational beings". But when we see him at work on his political system we find that he has obtained another premise, which is not a consequence of those just mentioned. Men are "promiscuously born to all the same advantages of nature, and the use of the same faculties[3]." Now in favour of this doctrine of the equality of men's natural faculties Locke has scarcely a word to say. This is the very corner-stone of Locke's politics; he quietly assumes it Whether Locke took it from Hobbes may be doubted; but it is noticeable that this assumption

[1] Sidgwick, *Method of Et hies,* in. v.
[2] *Hum. Under.)* iv. iii. 18. [3] *Gov.,* 11. iv.

is made by our first psychologist, and had its origin in the psychologist's belief that introspection gives us a clue to human action. At any rate, it was not until the study of psychology was supplemented by other studies that this belief was abandoned. The study of history was not sufficient; Adam Smith had not freed himself from it. That we now see it to be false is clue chiefly to those who have studied physiology as well as psychology.

Locke's denial of innate ideas and innate principles probably led, though it did not drive him to this opinion. Though antecedently to all experience a man's mind may be a blank, it does not follow that the same external influences will produce the same effects on all blank minds. It is not necessary to Locke's argument against innate ideas that similar characters should be formed by similar external circumstances acting on different minds.

But after all, this matters little. Let us grant that all men are equal at starting, must we say that they are always to be treated as equals ? Now, to say that those who come out of God's hand as equals should always be treated as equals, is just specious; but there is a difficulty which stares Locke in the face. How are we to justify paternal power ? Paternal power has been a standing protest against those who would found a system on natural equality. Locke has to admit that idiots, minors, and lunatics may be coerced without their consent being asked, and the reason he gives is, that such persons cannot know the law of nature. Those who have a natural right to be free and equal are those who have a capacity of knowing the law, and

this capacity all men of the age of twenty-one and upwards have, and have apparently in an equal degree, if we except idiots and lunatics[1]. Now of this, his fundamental proposition, Locke gives no proof whatsoever, he gives no proof that our faculty of knowing the law of nature is not a matter of degree. If all men are, after the age of twenty-one, capable of knowing the law of nature, what are we to say of atheists, who, as Locke says cannot, or will not, acknowledge such a law? Filmer's editor is triumphant; *Solvitur Legendo!* is in effect his reply. All men equal? Who can write like Sir Robert? Locke's friends have a better right to such an argument. It is particularly strange that Locke should speak as if all men had an equal capacity of perceiving the law of reason, for he is rather fond of dwelling on the differences between the moral conceptions of different men, on the crimes which men can commit with "confidence and serenity," and has been reproved for so doing[2]. And even if we have equal faculties for perceiving the moral law (and it is on the universality of "reason" that Locke lays most stress) it does not follow that we have equal faculties for doing what we know to be right. Thus, even granting that all men are born with equal faculties, we must still affirm that, at the age at which Locke would set them free from all government to which they have not consented, they are not equal in that faculty on which their conduct as citizens depends, much less in other faculties.

But it may be said that inequalities are adventitious,

[1] *Gov.,* 11. 52, et seq.

[2] *Hum. Und.,* 1. iii. 9. Whewell, *Hist. Mor. Phil.,* Lect. v.

that when we came from God's hand we were all equal, and that this is evidence of God's intention. Without entering deeply into theology, we may surely urge, in the first place, that we have no reason to say that God willed the equality of babies more than the inequality of men. We must do one of two things, either we must ascribe all events to God's will, or only good events, and if we choose the latter alternative we must know independently what goodness is. On the first supposition we must say that tigers being God's workmanship ought not to be destroyed. On the second, if we accept Locke's account of good and evil, we must say that equality of political power is only willed by God when it is productive of pleasure.

But if there is little to be said for this argument as it is in Locke, there is less to be said for it as it is in Tom Paine. Locke says, "the taking away of God, though but in thought, destroys all." Truly it destroys his system; we can argue about the intentions of God, we cannot argue about the intentions of Nature, even when we spell Nature with a capital letter.

Mr Spencer gets rid of one difficulty which troubled his predecessors, he denies a paternal right of coercion —we are to have a free nursery. In that complete democracy which he thinks the one passable form of government, lunatics, idiots, babies in arms are apparently to have the suffrage. Coleridge said that this was a legitimate deduction from the politics of pure reason. Perhaps he thought this a *reductio ad absurdum.*

Here appears one of the greatest difficulties which lie in the way of those who would transcend Utili-

tarianism, by setting up " the freedom of every man to do all that he wills, provided that he infringes not the equal freedom of any other man," as an Ideal of politics. For such philosophers hold that a purely democratic government " is the only one that is not intrinsically criminal[1]," and yet they would find it hard to prove that such a government is the one most likely to acknowledge their supreme principle. If reason directs us both to pure democracy and to the greatest freedom of all, there is some chance of reason being self-contradictory. Here is an antinomy, the recognition of one portion of the rightful freedom of all may render improbable the realization of our complete ideal. What we should do in this case may be a question not of ethics, but of moral therapeutics, but it is one which fairly tests the practical value of a philosophy.

We have however arguments for equality of political power coming from a very different quarter, coming from the strictest sect of empirical Utilitarians.

To determine the best form of government was according to Bentham a very simple matter. What we want is that the rulers shall be those only whose interests are bound up with the interests of the people, this is " the junction-of-interests principle." Any rulers who are not answerable to the people will have sinister interests, which will take the place of general interests in their minds. He saw in pure democracy the one way of securing rulers who have no sinister interests. But the junction-of-interests-principle would seem only fitted to secure " appropriate probity," and Bentham also required " appropriate intellectual aptitude," and

[1] *Soc. Stat.*, ch. xx.

"appropriate active talent." Blackstone himself held that virtue is the characteristic of democracy, but that we require an admixture of monarchy and aristocracy to give us strength and wisdom. But Bentham thought that democracy will provide not only appropriate probity (virtue), but also appropriate intellectual aptitude (wisdom), and appropriate active talent (strength). In his *Catechism of Parliamentary Reform* he does indeed seem to doubt whether pure democracy will provide sufficient wisdom; he would allow the king to nominate certain members of the Assembly who should have a right of speech, though no right of voting[1]. But in his Constitutional Code, " Corrupter General" has vanished, and we hear little of intellectual aptitude and active talent. The one thing is to secure governors who have no sinister interests[2].

The same theory, freed from all qualifications and thrown into a precise form, was elaborated by James Mill, The doctrine of his essay is so simple that it may be stated in a few lines. " The reason for which government exists is, that one man, if stronger than another, will take from him whatever the other possesses and he desires." There are three simple forms of government: monarchy, aristocracy, democracy. The two former are bad, because the rulers will engross all the materials of happiness. It might be thought that they would be easily satiable. But no, they are insatiable, for they require not only present pleasure, but security for future pleasure. They will therefore attempt to reduce their subjects into a state

[1] ***Bentham's Works,*** **vol. lll. pp. 542, 543.**

- Vol. ix. p. 3, et seq.

of complete dependence. They will leave them but the bare means of subsistence, they will keep them in the most intense terror. Democracy has not the same evils, for the rulers being all, the interests of the rulers are the interests of all. But democracy without a representative system is impossible. We should therefore try to obtain a representative government, which, by means of universal, equal suffrage, constant elections, and secret voting, should find its interest in acting in exactly the same way as that in which a complete assembly of the people would act, were it not too large to act at all.

This was an effort to construct a pure deductive science of government by the method of Hobbes. An attempt was made to justify it by citing the success of the same method when applied to political economy. Coleridge declared that a pure science of political economy was an impossibility; experience shews that he was wrong. But the pure deductive method which does seem applicable to the narrow subject-matter of plutology, is inapplicable in the wider science of politics. We can make a supposition about the distribution of wealth never very incorrect, in the case of great commercial transactions absolutely true—Men will buy as cheaply and sell as dearly as possible. On the other hand, we have no one proposition about what all rulers will do, sufficiently true to be the basis of a pure science. Even if we admit that all men seek their own interests, this is only true because it is vague. It is obviously far less definite than the proposition from which pure plutology starts.

Least of all can we admit James Mill's axioms.

He had taken his opinion of human nature from Mandeville and Hobbes, and thought it demonstrable that no king will be content until he has reduced his subjects into perfect slavery. It is certainly amazing that one who professed that he wished for the greatest happiness of the greatest number should have allowed no social impulses to any one else. If he imagined that were he king he could still be a well-wisher to mankind, the whole argument collapses. As it is, he falls into all sorts of absurdities. Only males of forty years old and upwards are to have votes. The interest of those under forty is taken to be identical with the interest of those over forty, and yet one man of forty will always, if not deterred by fear, take from another man of forty all that the latter has and the former desires. The fact is, that were men such as they are here painted, all discussion about government would be utterly in vain. Not only would the state of nature be a state of war, that is a trifle, it would be absolutely demonstrable that no other state could exist What would be the first action of the representative assembly? It would be a step towards reducing the rest of the nation to slavery. Would they be kept in terror by the prospect of losing their seats? Would they not rather take care that there should be no future election? The people might thwart the attempt: but then, the people can thwart the attempts of a king or of an aristocracy.

Above all, who is it that will really make laws in a democracy? The majority. Then is it not absolutely certain that they will reduce the minority into slavery?

This objection is powerful, but it must be admitted

that James Mill had some defence against it. Having assumed that, at any rate for the purposes of a science of government, we may look upon man simply as a being desiring the materials of happiness, he could maintain that in a democracy of such men there could never exist any permanent party divisions. There would be no permanent majority or minority. Combination to rob would have a limit. The poor majority would of course pass laws taking from the rich minority their wealth until wealth was equally distributed. Beyond this they would not go. When equality of power has given birth to equality of property, then all further combination would, on our hypothesis as to man's one motive, be impossible. *A* and *B* would have no more temptation for combining to rob *C,* than *A* and *C* have for combining to rob *B,* or *B* and *C* to rob *A.* An equal distribution of property would thus be a point of equilibrium.

But this shows the essential weakness of the position. The political combinations of which we read are seldom the results of a desire for wealth. Suppose that in the community the majority are Catholics, the minority Protestants, may not the former entirely exclude the latter from the possession of any legislative power? In such a case how would the Protestant be better off than if he were the subject of a Catholic prince? The laws made would be laws made by Catholics, not laws made partly by Protestants, partly by Catholics. The whole legislative force moves as the majority wishes, there is no diagonal between the ayes and the noes. Doubtless the grievances of the Protestants will be heard, and this is a real and power-

ful argument for representative government, men being what they are ; it would be no argument at all were men such as James Mill described them. That the community "cannot have an interest opposite to its interests," is doubtless true, but that a majority of the citizens can have an interest opposite to the interests of the whole, is equally true, and far more important.

James Mill however would reduce his opponents to an absurdity, by saying that if men are not what he represents them, then there is no necessity for government. A more easily exposed fallacy was never given to the world. We want government not because all men are what he represents them, but because some men are something like what he represents all men to be. Were there but one thousand of his "men" in the country, we should require a government. But this would not do for James Mill, he must have a universal proposition or nothing. What is true of one man is true of all ; this assumption of the psychologists has been the bane of our political philosophy.

In his *Fragment on Mackintosh* Mill defended his *Essay on Government.* He actually cites Plato and Hume as witnesses for the defence, because they held that there should be some community of interests between the rulers and the ruled. There was no need to bring philosophic authority in favour of so common a common-place. The questions of his opponents, which James Mill had really to answer, were : (1) Is a community of interest between the ruler and the ruled all that you require—is it not necessary that the ruler should have the power as well as the will to rule well ? (2) Is this power to be found in representative govern-

ments ? (3) Can you prove that the interests of the majority and the interests of the whole must be identical ? (4) Is it not demonstrable from your principles that peaceful government is an impossibility ? (5) Has not your theory been contradicted by the whole course of history ? In answering this last question " let him bethink himself of the age in which there was scarcely a throne in Europe which was not filled by a liberal and reforming king, a liberal and reforming emperor, or, strangest of all, a liberal and reforming pope[1]." There is scarcely a Tory who would not allow some force to the junction-of-interests principle, but there is not the slightest absurdity in believing with Plato and Hume, with men in general, that the ruler should be one who has the same interests as the ruled, and at the same time rejecting the democratic ideal.

As to the authority of Hume. Hume certainly says " political writers have established it as a maxim, that in contriving any system of government, and fixing the several checks and controls of the constitution, every man ought to be supposed a *knave,* and to have no other end in all his actions than private interest[2]". But common sense would tell us that we ought not to make our constitution one fitted only for perfectly wise and virtuous beings. The whole meaning of Hume's sentence depends on the meaning of self-interest. Interest is an elastic word. Hume would not have agreed to the following (which will shew how far James Mill could go). "We have seen that the principle of human nature, upon which the necessity of government is founded, the propensity of one man to

[1] J. S. Mill, *Represent Gov.* (ed. 3), p. 15. [2] *Essays, 1.* vi.

possess himself of the objects of desire at the cost of another leads on by infallible sequence, where power over a community is attained, and nothing checks, not only to that degree of plunder which leaves the members (excepting always the recipients and instruments of the plunder) the bare means of subsistence, but to that degree of cruelty which is necessary to keep in existence the most intense terrors." It is further to be gathered from the context that the qualifying words "where nothing checks," mean "where no fear checks."

This argument for equality of political power, though in many ways so different from Locke's doctrine, has its origin in the same tendency, the tendency to overlook the differences between men. We see this tendency at work as soon as ever an attack is made on the doctrine of innate ideas. Hobbes expressly announces that introspection gives us the true clue to human action, history is worthless[1]. This was not necessary to Locke in his argument against innate ideas; but it was extremely natural to assume that all blank minds are the same. Bentham and James Mill do not conclude from this that all men ought to be treated equally by introducing a theological doctrine; but the supposition colours all their philosophy. They could not conclude from this that all grown men when placed in the same circumstances will have the same desires, but they are led to exaggerate the force of external circumstances. Thus they do not contemplate the tyranny of a majority as possible, because they do not contemplate the possibility of there

[1] *Op. cit* iii., pp. xi.-xii.

being in a democracy bodies of men with interests permanently conflicting. The external circumstances as regards matters of government are the same for all, therefore the desires of all as regards matters of government will be the same.

The love of simplicity has done vast harm to English political philosophy. The question of how far the interests of all men are harmonious is of fundamental importance, and yet our philosophers have failed to find a satisfactory answer, because they have assumed that the answer must be simple. English philosophy has here forgotten its usual caution ; it has rushed from one extreme to the other. At one time it is ready to say that men are only kept from destroying each other by fear, at another that true self-love and social are the same. This comes of following the lead of Hobbes, of prefering to assume that all men are alike, to insisting that history must be called in to verify *a priori* theories. One of the strangest instances of this rushing into extremes occurred when Macaulay's Westminster Reviewer changed the principle of James Mill just discussed into an assertion, that the greatest happiness of the individual is in the long run to be obtained by pursuing the greatest happiness of the aggregate.

But the pupil may be excused when the master is inconsistent. Bentham, writing on international law, had said that there is a difficulty as to whose happiness the statesman should seek. Shall it be that of his subjects or that of the whole human race ? The answer is, that practically the two are to be obtained by the same means. If a sovereign were to consult only his

own subjects' happiness, he might think it necessary to serve other nations as he actually serves the beasts. "Yet in proceeding in this career, he cannot fail always to experience a certain resistance." He will find that the line of action which aims at the happiness of all nations is "the line of least resistance." "For, in conclusion, the line of common utility once drawn, this would be the direction towards which the conduct of all nations would tend, in which their common efforts would find least resistance, in which they would operate with the greatest force, and in which the equilibrium, once established, would be maintained with the least difficulty." These words are capable of overturning Bentham's theory of government. He admits that what is true of international relations is true of governmental relations. "The end of the conduct which a sovereign ought to observe relative to his own subjects .... ought to be the greatest happiness of the society concerned. . . . It is the straight line—the shortest line—the most natural line by which it is possible for a sovereign to direct his course." Why so? Because "this is the end which individuals will unite in approving, if they approve of any[1]." What then becomes of our denunciation of kings and oligarchs? Why should their interests be always sinister when the line of least resistance, their most natural course, is that which leads to their subjects' happiness?

The fact is that neither opinion is true. Sometimes our line of least resistance leads to the public good, sometimes it does not. But Bentham had a hankering after mathematics, vagueness was an abomi-

[1] *Principles of Internal. Law* (Works, vol. IL, p. 536 *et seq.).*

nation, so he makes now one simple (and therefore improbable) supposition about human nature, and now another. On the whole, the longer he lived the less well he thought of mankind. The famous note, " So thought Anno 1780 and 1789, not so Anno 1814, J. Bentham[1]," illustrates this change. It was a change for the worse, and James Mill was but too ready to go beyond Bentham, though even James Mill was very far from being consistent.

The essay by James Mill is important because it marks an epoch in the history of English philosophy. It was a grand attempt to found politics on empirical psychology unverified by history. At present it looks like a last attempt to fulfil what Hobbes proposed. Its extravagancies roused a storm of opposition. But it should be noticed that what was attacked was not Bentham's first principle that the greatest happiness of the greatest number is the one desirable end for all action, but his teaching about the dissonance of interests. The defeat of the Utilitarians (and they were defeated) was no triumph for the intuitive moralists. Let us take three champions of very different schools who attacked Mill's work. Macaulay was apparently a believer in Paley[2], and shocked Mackintosh (who had recanted his Utilitarianism) by ethical heresies[3]. Coleridge was "a zealous advocate for . . . . deeming that to be just which experience has proved to be expedient." Mr Disraeli, in a defence of our constitution modelled on Burke, expressly says that it is not the

[1] *Principles of Intern at. Law* (Works, vol. l, p. 5).

[2] *Essay on Westminster Reviewer's Defences*

[3] Mackintosh, *Hist Eth. Phil.,* Note W.

Benthamite supreme rule which is objectionable, this is really conservative, but the theory of the sinister interests of rulers. In fact the protest was directed against any attempt to found a pure science of government upon psychology. Coleridge pleads for the study of history, Macaulay for the Baconian method. We know now that it was this conflict of history and psychology which gave birth to the completest account of the logic of social science that we have. It was Macaulay's essay that roused John Mill from his trust in his fathers geometrical method[1]. From the school of Coleridge he learned to value history. Then he arrived at his conception of the inverse deductive method[2] as the method of social science, a conception that has yet to be supplanted.

Some of James Mill's opponents erred in their enthusiasm for history. Macaulay would have found the pure Baconian method impracticable ; he unfortunately set up Bacon's inquiry into the nature of heat as a model, an inquiry which Bacon's warmest friends condemn. Besides we have read that "That is the best government which desires to make the people happy, and knows how to make them happy. . . . . Pure democracy, and pure democracy alone, satisfies the former condition of this great problem. That the governors may be solicitous only for the interests of the governed, it is necessary that the interests of the governors and of the governed should be the same. This cannot often be the case where power is entrusted to one or to a few." It was not James Mill who wrote

[1] J. S. Mill, *Autob.,* p. 158.
[2] *Logic,* vi. x.

this, it was Macaulay[1], and yet the method of reasoning is scarcely Baconian.

The collapse of James Mill's theory marks one of the few great advances in English Political Philosophy. Since that time we have heard little of one distribution of political power as *semper et ubique* the only good one. Those who still argue that there is but one form of government not criminal are not Utilitarians—not followers of Hume, but followers of Locke, Rousseau, and Coleridge's friend Major Cartwright. We have for the most part returned to the position of Sir Thomas Smyth, "According to the nature of the people, so the commonwealth is to it fit and proper[2]," and we look for the nature of the people in its history. We have got rid of the assumption of Hobbes that for political purposes men may be treated as equals. It was necessary that the force of education should be brought into prominence, but our seventeenth century philosophers attended too little to the original differences between men. Perhaps there is some one form of government which will ultimately be found the best for all communities, but any useful ideal of government must be relative—relative to the people for whom we propose it, relative to their history. John Mill's *Essay on Representative Government* proposed a relative ideal, an ideal for the English Constitution. James Mill's *Essay on Government* proposed an absolute ideal. We may notice that by abandoning the traditional method, John Mill was brought to recognize many important facts hidden from our earlier philosophers ;

[1] *Essay on Mitford's History.*

[2] *De Republica Anglorum,* p. 17.

such, for instance, as the immense influence which government exercises on the life of the nation outside the sphere of direct governmental interference. This led to a new plea for a wide distribution of power as a means of education.

Of Coleridge's peculiar doctrine of representation we must speak very shortly. He professed to discover from history that "the idea" of English government consisted in a representation of the interests of permanence and progression. The landed interest—"the realty"—is the interest of permanence; the personal interest—"the personalty"—is the interest of progression. This "idea," whatever else it is intended to be (and this is not clear, for Coleridge, in his Kantian moments, declares that an idea expressed in words is always a "contradiction in terms") is also an ideal. We are to strive to realize the, idea in any alteration of our constitution. Looking then at Coleridge's idea of a state simply as a constitution to be aimed at, we find it open to the gravest objections. The exact proposal was that the House of Lords should be taken to represent the realty, that the suffrage should be so distributed that the majority of seats in the Lower House should belong to the personalty, the realty having a strong minority[1].

(i) A representation of interests as opposed to a representation of numbers (against which Coleridge rages)[2] comes to mean a representation of classes, for the law can only take notice of obvious external distinctions. Surely it is bad to insist on the discord of

[1] *Church and State.*

[2] *Table Talk,* 19 Sept., 1830.

class interests unless it is absolutely necessary; legal recognition of the discord will aggravate it

(2) The distinction of interests into permanent and progressive is bad. There never has been a party which could make standing still its whole programme. We all want to move,, but we want to move in many different directions. The real conflict is not between those who would stand still and those who would move, but between those who would go this way and those who would go that.

(3) Had Coleridge known more of that political economy which he despised and called semi-infidel, he would have seen that to place in one class landlords, tenant-farmers, and agricultural labourers, in another lawyers, capitalists, artizans, and others, is a thoroughly worthless distinction. Whether a man gets his income from land or not is quite unimportant; the really important question is, What influences does his income depend on ? Coleridge would have found that the agricultural labourer and the artizan have much more interest in common than the agricultural labourer and the farmer. The old distinction of high and low, rich and poor, goes nearer to the root of the matter than that of realty and personalty.

(4) Some of the personalty have no peculiar interest in progression. The conveyancer's interest is more allied to permanence of a particular kind than even the landowners.

(5) Some of the realty have no peculiar interest *in* permanence. Coleridge puts together the content-ment of the wealthy landowner and the obdurate-ness of prejudice against change " characteristic of the

humbler tillers of the soil." But while wealthy men will probably be tolerably contented whether they be landowners or not, he would be a rash man who trusted to the agricultural labourers, now that communication is easy, showing any peculiar aversion to change. The fact is, Coleridge was led away by the talk of the Protectionists, who made believe that farmers and agricultural labourers would be injured by free trade. How wrong they were is well evidenced by the fact that the once familiar phrase " the landed interest " has dropped out of our political vocabulary.

(6) Coleridge should have known that human interests are not so simple as James Mill thought them; he was here following the school which he disliked. Men do not want to vote only in their economic character, they want to vote as Churchmen, as Dissenters, as Total Abstainers, as friends of Peace at any price. The line dividing the realty from the personalty does not even roughly coincide with some of the most important distinctions. The consequence would be that in Coleridge's scheme some men, *e.g.* merchants, would be refused votes because if they had them their class would be over represented. A merchant will say that he does not want to vote *qua* merchant but *qua* Ritualist, and he will feel his exclusion as arbitrary. *Some* merchants must be left out; but why should it not be his Evangelical neighbours ? Unless some such arbitrary lines are drawn, the results of Coleridge's plan would coincide with those of a representation of numbers.

A consideration of the complexity of interests at greater length would bring us to the conclusion that, in

a community fully conscious of the way in which it is governed, no system of representation can be stable which does not proceed on few and simple rules. Every addition to the number of rules leads to distinctions which must be felt as arbitrary. All changes in our representative system which are to be final or successful will be movements towards greater simplicity, not necessarily towards greater simplicity in the machinery of election, but towards greater simplicity in the distribution of voting power. We shall move towards the scheme advocated by John Mill, not towards the scheme advocated by Coleridge. It might be different could we label men as belonging to different " interests," but this becomes more and more difficult every day.

Harrington started an interesting line of speculation when he said that the balance of power depends on the balance of property, and it is a pity that this has not been followed up. His own theory was far too simple, he thought monarchy in England had become impossible because landed property was so widely distributed; it proved otherwise. Still we may say that any change in the balance of power which is not brought about by force, and which is not a restoration, will tend to place the balance of power in the same hands as the balance of property. We can say also that equality of political power tends to produce equality of property, for where there are no hereditary distinctions one motive for saving is absent. But unfortunately we have no speculations on this subject.

In the early days of our political philosophy, the right to property was not made the matter of such

frequent dispute as the right to rule. There was less difference between practical men as to the former right. But even in the days of Hobbes there were levellers abroad, who "were casting how to share the land among the godly, meaning themselves, and such others as they pleased[1]." They looked for the speedy establishment of the fifth monarchy; there was among them that religious enthusiasm which might have made socialism possible. Even Harrington, who was no enthusiast, would set a limit to property in the interests of popular government. Hobbes of course could defend existing property law, as he could defend all existing law; we have consented to it. The great continental jurists also made consent, or occupation and consent, the foundation of a right to property. Locke however tried to find a title to property independent of consent, for he wished to insist that this was one of our rights which had not been surrendered to the legislative body. He deduces it from the common right of all men to the gifts of God, and the exclusive right of every man to his own labour.

The gifts of God to be used must be consumed, and consumption involves appropriation[2]. Things must be considered appropriated when labour has been spent upon them. He shows clearly that much of the value of wealth is due to labour, and holds that the propriety of labour overbalances the community of land. Hallam contrasts this "excellent chapter" most favorably with the teaching of Grotius and Puffendorf, and the "puerile rant of Rousseau[3]." "That property owes

[1] Hobbes, *Op. cit.*, vi. 365. [2] *Chu Gov.*, 11. 25-51.
[3] *Hist. Lit*, iv. iv.

its origin to occupancy accompanied with labour is," he thinks, "now generally admitted." What property owes its origin to is one question, what is its justification is another. These questions Locke, in the manner of his age, confounds; but he certainly meant to give not only an historical account, but a deduction of right. He thinks that in former times, when there was enough for all, " right and conveniency went together ;" before the invention of money (the influence of which Locke always exaggerated) men had no temptation to enlarge their possessions beyond their wants. But (and here he abandons his first theory) since the invention of money, " it is plain that men have agreed to a disproportionate and unequal possession of the earth ; they having, by a tacit and voluntary consent, found out a way how a man may fairly possess more land than he himself can use the product of'.' So after all, Locke rests the natural right to property as it at present exists on a tacit consent, evidenced by the use of money.

Dr Rutherforth, who belonged to the English Grotian school, criticized Locke's theory with justice[1]. He thinks that even if Locke can show that labour has a title to $^{99}/_{100}$ of the value of property, there is still a $^{1}/_{100}$ part to which labour has no right; it comes from nature. He lays stress on Locke's falling back upon consent, and argues that consent, evidenced by occupation, is the real foundation of the right. Thus both Locke and the Grotians, in the last resort, rely on a title by tacit consent.

Such was the state of the argument when Rousseau began his tirade against inequality. He would not

[1] *Institutes,* i, iii. 10.

recommend a return to natural equality ; he only wishes for a state in which no man is so rich as to be able to buy another's labour, no man so poor as to be bought[2]. Still, if "buying" mean "hiring," this is a long step towards levelling. He allows that labour may give a title to property, but it must be labour, not a mere marking out of the ground. This argument has been repeated by Paley[3]. Though Rousseau's historical account is far inferior to Locke's, he could have driven the latter into very awkward positions. Locke's argument seems only just as long as there is " common " to be reclaimed. What! are we " promiscuously born to all the same advantages of nature," only to find all nature's gifts engrossed ? Why is a tacit consent enough in this case, when the social compact requires " express promise and contract " ? " Men have agreed to a disproportionate and unequal possession of the earth." What men ? Do the promises of parents bind their children ? Locke says they do not. Let us make the consent a reality. Enough of fictions. Let the landowners shew that they have laboured, or that we have consented.

Meanwhile Hume produces another justification of property, its utility. But Hume allows that " wherever we depart from...equality we rob the poor of more satisfaction than we add to the rich[3]." The rule of equality is useful, and has been shewn by history to be not wholly impracticable ; but perfect equality we cannot have. " Render possessions ever so equal, men's different degrees of art, care, and industry will imme-

[1] *Soc. Cont,,* ii. xi. [2] *Mor, Phil.,* iii. iv.
[3] *Inquiry... Morals, lll.* i.

diately break that equality. Or if you check these virtues, you reduce society to the most extreme indigence." This is the line of defence behind which Paley and Bentham took their stand.

Then Hume asks that question which his opponents find it so hard to answer. What is property? Now if Locke is not to fall into pure Hobbism, he must find some criterion by which we may judge any scheme of property law. What ought to be a man's property? Shall we allow devise, bequest, inheritance? If so, let us put to Locke the question which Locke put to Filmer. Who is heir[1]? We know who is heir according to English law, but who is heir according to the law of nature deduced from the ideas of God, and of ourselves? Here let us quote Locke himself. "There being no law of nature, nor positive law of God, that determines which is the right heir[2]."...No law of nature on so important a point! Then is the law of nature our sole criterion of right and wrong? How are we to justify English property law, since the law of nature will not answer the very simplest question as to the extent of the natural rights of property? There is an escape; we may say with Locke that "the public good" *(i.e.* pleasure) "is the rule and measure of all law making;" then we are at one with Hume.

Paley followed Hume closely in his justification of property, but he brought into relief the weak side of the Utilitarian argument. The institution of property is, he thinks, "paradoxical and unnatural." The fable of the pigeons seems to lead to levelling principles. Inequality is admitted to be an evil, but it is a neces-

[1] *Civ. Gov.,* 1. 106. [2] *Civ. Gov., ll.* i.

sary evil; it flows from rules by which men are incited to industry. " If there be any great inequality unconnected with this origin it ought to be corrected[1]/'

Bentham agrees. There is a *prima facie* argument in favour of equality. On this subject he tries to be very precise. His theory as set forth in the *Principles of the Civil Code*[2], and more accurately in the *Pannomial Fragments*[3], is that if we go on adding to a man's wealth, to the sum of material objects of desire of which he has the use, each increment of wealth produces an increment of pleasure, but the pleasure never increases so rapidly as the wealth. It follows that the distribution of a given amount of wealth, which produces most pleasure, is an equal distribution. This may be looked upon as a cardinal doctrine of Utilitarianism, for Hume, Paley, Bentham, and Mill are agreed upon it. But none of these teachers recommend any very serious measures for obtaining this equality. Before we can estimate their reasons for narrowing the sphere of this doctrine we may see what attempts have been made to obtain an equation connecting wealth-produced happiness with wealth. Now we have two probably independent attempts to perform this feat. Bentham says, " It will even be matter of doubt whether ten thousand times the wealth will in general bring with it twice the happiness" Paley says that it ought to be assumed that ten persons possessing the means of healthy subsistence possess a greater amount of happiness than five people however wealthy[5]. This agreement is striking. The wealth-produced happiness of

[1] *Civ. Gov., lll.* 2. [2] *Works,* 1. 304. [3] iii. 228.
[4] 111. 229. [5] vi. xi.

the richest is never twice the wealth-produced happiness of a man who has the means of a healthy subsistence. How large an admission of levelling principles this is can easily be shown in a rough way. Let us take £100 per annum as a means of a healthy subsistence. There are in this country 8500 incomes of £5000 and upwards ; these, if cut up into incomes of £100, would produce more than twenty-five times as much happiness as they now do.

What has Paley got to say against this strong case ? According to him the principal advantages of such a property system as ours are that: (1) It increases the produce of the earth ; (2) It preserves the produce of the earth to maturity ; (3) It prevents contests ; (4) It improves the conveniency of living, by permitting a division of labour and by appropriating to the artist the benefit of his discovery. These may all be summed up in what Hume says in the passage quoted from him. To which Hume adds that equality of possessions weakens authority by leading to equality of power. Bentham's defence is by far the most powerful, he insists vigorously on the supreme importance of security. The evils which would follow from constant redistributions (alarm, danger, the extinction of industry) would throw the good of an equal distribution into the shade. " Equality ought not to be favoured except in cases where it will not injure security; where it does not disturb expectations to which the laws have given birth ; where it does not derange the actually existing distribution." Bentham's *Essay on the Levelling System* contains all these arguments repeated in their most telling form.

But what is remarkable is that we have not yet come across the Malthusian argument. I would not say that Bentham and Paley fail to resist the enormous prejudication which they have raised in favour of equality, but on their own principles it would have been difficult to reject a proposal made by Tom Paine.

Paine was the most popular of English demagogues, and justly so, for he came out of his controversy with Burke (who was hampered by the conventional theory) without serious loss. This being so, it surprises us to find that Paine was but little of a socialist. Indeed, socialism was not a product of 1789, but rather of 1830 and 1848. Paine was a leveller, not a socialist, and a comparatively moderate leveller. He would but establish a national fund out of which £15 should be paid to everyone on arriving at the age of twenty-one, and £10 per annum to every person over fifty years of age "to enable them to live without wretchedness, and go decently out of the world." He considers agrarian laws unjust, for the greater part of the value of land is due to labour; still there is some portion of the value due to nature, and on this the tax should be thrown[1]. Locke's premises lead to this, if we exclude title by consent.

What we may ask would Paine's scheme necessitate? Supposing our present population to remain constant, a tax of about 6 per cent, on all incomes over £100 would suffice. Now supposing this scheme was introduced with great caution, supposing that it was only to come into force after the lapse of a generation, I think

[1] *Agrarian Justice.*

Bentham and Paley would be put to it to find objections, if they chose to abide by their principle.

Of course such a tax would diminish wealth. But all that Bentham and Paley can say is that a man will not work for others as he works for himself. The rest of Paley's objections need not apply ; there need be no insecurity, no uncertainty, no contests. How much the motives to industry would be diminished by such a tax we can scarcely 'guess, but it would need a perfectly preposterous assumption to show that wealth would be so much diminished, that the great advantages of an equal distribution would be overbalanced. It is all very well to say that the rich would *consume* their wealth instead of *saving* it, and thus there would be no wages, demand for commodities not being demand for labour; but we must not let the phrases of economists drive us into absurdities. What way is there in which the rich can use by far the greater part of their wealth without paying wages, or inducing someone else to pay wages ? One and one only, they can waste their wealth without obtaining any enjoyment from it.

Against socialism, with its attendant uncertainty, Paley and Bentham have a very good defence, a defence which will be sufficient until some considerable change in human nature has taken place. But to considerable steps towards levelling, to taxing the rich for the relief of the poor, they cannot fairly object. As to Paley, one chapter in his work is the best apology for levelling ever made[1]. He holds that the improvement *(i.e.* increase) of population is "the object which ought, in all countries, to be aimed at in preference to every

[1] *Works,* vi. xi.

other political purpose whatsoever." He devotes a chapter to suggesting means to this end, he actually goes out of his way to revive the moribund fallacy of the balance of trade, because he thinks that the "accession of money" increases population, he would add to our species by adding to our specie. Paley's principles justified Pitt in saying, "Let us make relief in cases where there are a number of children a matter of right and honour, not of opprobrium[1]." Pitt framed a bill providing that people should be paid for bringing children into the world. The bill was withdrawn, thanks, it is said, to the criticism of it which Bentham sent to Pitt[2]. Bentham's editor, Dumont, gives to Bentham the credit of anticipating Malthus[3], but he is scarcely warranted in so doing; indeed, though Bentham did not think with Paley that legislative interferences are required in order to make the population increase sufficiently quickly, he never (as far as I know) used the Malthusian argument.

If we compare this chapter of Paley's with the ordinary talk of our own time, we find how completely new the most popular modern justification of property is. The subject of population is one on which Plato and Aristotle had speculated, but it was strangely neglected in England. Malthus really drew attention to a class of facts which had been ignored by all preceding English theorists. Nor did he assume his principles as convenient hypotheses; he had a stronger sense of the value of history than has been granted to most of our philosophers. He sought to prove from

[1] Quoted by Ricardo *{PoI. Ec.*, ch. v.).

[2] *Works*, 1., Preface, 70. viii. 440. [3] lll. 73.

history that the "positive checks" on population have been in constant operation. We have here only to inquire how much he added to the Utilitarian defence of a property law such as ours. It must be allowed that if the increase of population was due to causes over which we have no control, Paley and Bentham would lead us to some vigorous scheme of levelling. In Paley's case this is obvious, If to increase the population be the first and foremost duty of a statesman, Malthus might well ask Paley how he could spend his time in devising petty changes in our laws when Paine had recommended so much more efficient a route to the desired end. "Accept Paine's advice," he might say, "and you will have your heart's desire: the country will swarm with men and women."

Modern socialism has always seen in Malthus its most formidable enemy, and Malthus' first opponents found no way to answer him save by an audacious denial of the fact that population was increasing[1]. The fact is that there was a strong superstition which Malthus had to resist. Providence, it was thought, will take care that population does not increase too fast, Godwin held that "there is a principle in human society by which population is perpetually kept down to the level *of* the means of subsistence [2]". Yes, said Malthus, there is such a principle, the principle of starvation.

Malthus showed that to insure to every person the means of subsistence would cause a rapid increase of population. But this was not enough. It might be argued that every man would still have as good a

[1] *E.g.* Cobbett, *Pol. Regist.,* 10 April, 1823.
[2] *Pol Justice,* VIII iii.

chance of extracting a livelihood from nature as had his fathers. But here comes in Malthus' principle that population tends to increase faster than the means of subsistence, which means this, that as long as our means of coercing nature remain what they are, we can only extort an addition to our supply of food by a more than proportionate addition to our labour. Now here we have a really new argument against levelling, an argument which Malthus and Ricardo made too much of when they pleaded for the abolition of the poor laws, but an important addition to the armoury of Bentham and Paley. I do not however believe that even with this addition Bentham and Paley would be safe. It might be said that even allowing for an immense increase of population, a great decrease in the incitements to industry, and full force to the law of diminishing returns, the supposition that the richest man has never twice as much wealth-produced happiness as the poorest man, leaves an ample margin for levelling principles. It might further be urged that there are pleasures to which the law of diminishing returns does not apply, such are the pleasures of family society. Again, Godwin founds his plea for equality, that plea which occasioned the reply of "the Arch-Priest of Famine" (as Godwin's son-in-law called Malthus), not so much on the desirability of lessening the pains of physical want as on the desirability of getting rid of "the spirit of oppression, the spirit of servility, and the spirit of fraud", which are "the immediate growth of the present administration of property." On the other hand, Malthus, by showing how fast population might increase if a bounty was given, did show that redis-

tribution must be frequent, and thus added new force to Bentham's argument against insecurity.

It is doubtful whether Paley and Bentham could logically defend such a property law as ours without modifying what they say about the connection between wealth and happiness. I may not enter into verbal criticism, but neither philosopher sufficiently recognized the possibility of a man's wealth-produced happiness being a minus quantity. When Bentham says that ten thousand times the wealth does not bring twice the happiness, he seems to assume that the wealth-produced happiness of a man who has no wealth is zero ; but this is untrue, it is a very large negative quantity. Let us first attend merely to the happiness which results from the use of " material objects having a value in exchange," or "wealth-happiness." If we decrease a man's wealth below a certain point, his wealth-happiness becomes a minus quantity, he suffers the pain of want. Further, let us remark that Paley much underrates the connection between wealth and happiness in general; a certain minimum of wealth is necessary as a condition for any happiness. The pain of starvation excludes all or nearly all pleasures. From the consideration of the possibility of a man's wealth-happiness being a minus quantity, we may come to think that though ten men with ,£1000 a year are together far happier than one man with ,£10,000, yet one man with *£100* per annum is happier than ten men who have but £10a piece to last them through the year. But does not this add new force to the argument for equality ? Yes, if we consider only persons in *esse.* No, if we consider persons in *posse.* No, if our scheme will ultimately

increase the number of those whose wealth-happiness is negative. Suppose a Utilitarian had an annuity of ,£1000 and there were nine existing persons who had nothing, we should go even further than Paley in recommending an equal distribution ; it will save much suffering. But suppose a Utilitarian has an annuity of £1000 and no children, we should say that he ought perhaps to wish for nine children who might share his wealth, but not for 99, certainly not for 999. If however we do not admit the possibility of wealth-happiness being negative, if we hold by the letter of what Bentham and Paley have said, we must admit that 1000 persons with *£1* per annum a-piece are together more than fifty times as happy as ten persons with £100 per annum a-piece. And this, when we consider that some wealth is a necessary condition for almost every class of pleasures, seems absurd.

The Utilitarian can perhaps scarcely get to any precise theories on this subject, he can only point to the quarters from which the good and evil effects of measures promoting equality will come. The fact that there is doubt on such subjects as the connection between wealth and happiness, is a terribly strong argument against Bentham's scheme of a political arithmetic. But still we know that there is a general argument against inequality, an argument valid in the absence of other Utilitarian arguments, an argument admitted every time that our Court of Chancery says that equality is equity. This argument would be one of great force in any discussion of our present law of inheritance. On the other hand, we know whence the evils of a levelling scheme will flow.

Unsatisfactory principles no doubt to the believer in neat theories, but where, let us ask shall we look for better? Locke will not help us, for, though he can deduce a right to property from the law of nature, he cannot tell us whether that right includes the right of inheritance. Hutcheson will not help us, for he becomes Utilitarian. Our English moralists will not help us, for since the writers on the law of nature gave way before the Scotch psychologists, scarcely one anti-Utilitarian moralist has treated of politics. Even Dr Whewell will not help us, for he gives no criterion by which we may judge different schemes of property law, and Dr Whewell is one of the few English moralists who have attended to the morality of law.

One refuge remains. There is Kant, who to some extent formulated the doctrines of "natural jurisprudence." Here we have his account of what ought to be property. "Das aüssere Meine ist dasjenige ausser mir, an dessen mir beliebigem Gebrauch mich zu hindern, Lasion (Abbruch an meiner Freiheit die mit der Freiheit von Jedermann nach einem allgemeinem Gesetze zusammen bestehen kann) sein würde[1]." Now how could we use this in constructing a law of property? Kant admits testamentary power; but what testamentary power? It is surely evident that if the law of equal freedom allows of bequest at all, it allows of settlements in perpetuity.

Let us once more refer to Coleridge. "Now," he says, speaking of this very doctrine, "it is impossible to deduce the right of property from pure reason[2]." Then follows this note—"I mean, practically and with

[1] *RechtsIehre,* [2] *The Friend,* Essay iv.

the inequalities inseparable from the actual existence of property, abstractedly, the right of property is deducible from the free agency of man. If to act freely be a right, a sphere of agency is so too." I suppose this "practically" and "abstractedly" means that we can from the fact of free will deduce that there ought to be *some* proprietary rights, but that we must appeal to expediency to know *what* rights, for (as Coleridge has just told us) whatever is expedient he deems to be just.

Coleridge was a Utilitarian in politics because he was a Conservative. He escaped out of Kant's system just in time, for what would a supporter of " the realty" have said to Mr Spencer's use of the Kantian principle as destructive of a right to property in land ?

A distinction between property in land and property in other things has been common. It has been supposed that a justification good for the latter is not good for the former. This is due partly to the distinction between *mobilia* and *immobilia* which every code naturally makes, partly to the distinction between realty and personalty, the result of the conflict in this country between feudalism and commercialism, above all to the superstition that nature helps agriculture more than any other industry. This superstition is ancient, in modern times it formed the foundation of the physiocratic economy, it hampered Adam Smith, it crops up where one least expects it.

The physiocrats used this doctrine to account for the fact of rent. Thus Paine could say that rent is not due to labour or capital, but to nature; therefore the levelling tax should be a rent-charge. This was correct on Locke's principles, for had not Locke admitted that

a part of the produce of land is due to nature, and must not this part be the rent ? When Bastiat came to deal with Paine's successors, with all his cleverness he made one unfortunate admission. If Ricardo's theory be true, then property in land is unjust. Ricardo's theory most certainly is true, all Bastiat's ingenuity notwithstanding. Here is the difficulty of admitting that labour alone gives a title to property. Bastiat can only escape by playing upon the word "service."

Next we will take Mr Spencer's deductions from the law of equal liberty[1]. He says : " Given a race of beings having like claims to pursue the objects of their desires, given a world adapted to the gratification of those desires, a world into which such beings are similarly born, and it unavoidably follows that they have equal rights to the use of this world . . . . . It is manifest that no one or part of them may use the earth in such a way as to prevent others from similarly using it; seeing that to do this is to assume greater freedom than the rest, and consequently to break the law." This certainly seems a correct deduction from the law of equal freedom, and Kant must give up the right to landed property. But cannot we go further ? Let us change the argument. Given a race of beings having like claims to pursue the objects of their desires, given an apple adapted to the gratification of these desires, an apple near which such beings are similarly born, and it unavoidably follows that they have equal rights to that apple . . . . . It is manifest that no one or part of them may eat that apple in such a way as to prevent others from similarly eating it; seeing that to do this

[1] *Soc. Stat,* x. and xi.

is to assume greater freedom than the rest, and consequently to break the law.

Mr Spencer would have the society constitute itself the supreme landlord. He argues that the law of equal freedom is not broken in this case, for every man has an equal power of becoming tenant. Certainly every man would have an equal power of becoming tenant if every man could offer an equal rent, but what of this ? Every man has now an equal power of becoming a landlord, if every man can offer an equal price.

Then there comes this *reductio ad absurdum* of " landlordism." If one man may be the rightful owner of any part of the earth's surface, some few men might have a right to exclude all their fellows from the world. But is it not obvious that we can also say that if one man has an exclusive right to any one particle of matter, some few men may have a right to all matter.

But these arguments can scarcely be serious. If the law of equal freedom condemns land-ownerism it condemns coat-ownerism also. Touch not, taste not, handle not, make haste to leave this world lest you infringe the equal rights of others; this is the law of equal freedom.

But then there is an apparently solid argument. " We daily deny landlordism by our legislation." The railway and canal acts are appealed to as evidence of this. Now Mr Spencer holds a leasehold tenure to be just, a freehold tenure to be unjust. He appeals to popular opinion as supporting him. Here we can apply a really crucial test. If popular opinion as evidenced by Acts of Parliament makes any difference between wrongful and rightful tenures, these Acts will

treat the leaseholder in a different way from that in which they treat the freeholder. Do they do so? Certainly not: a company has just the same power of compelling a tenant for years at a competition rent to sell his interest, that it has of forcing a tenant in fee to sell his estate. If we deny "landlordism" we deny land-tenantism also. The reason why land is more often made the subject of compulsory sale than are other things is obvious, and has nothing to do with the law of equal freedom. In case of war our government might very likely force shipowners to sell their steamships; it would deny shipownerism, if ships were wanted for public purposes, just as it denies landlordism and land-tenantism when land is wanted for a railway.

But Coleridge also drew a distinction between property in land and property in other things. "It is declared by the spiritual history of our laws that the possession of a property not connected with especial duties, a property not fiduciary and official, but arbitrary and unconditional, was in the sight of our forefathers the brand of a Jew and an alien; not the distinction, nor the right, nor the honour, of an English baron or gentleman[1]." This is the Idea of our law of real property. Towards the Idea, "the line of evolution, however sinuous, has still tended ..... sometimes with, sometimes without, not seldom against, the intention of the individual actors, but always as if a power greater and better than the men themselves had intended it for them[2]." The Idea is not only the point towards which evolution has tended, but it is also an ideal, an object to be aimed at by us. Now whether property *in* land

[1] *Church and State*, p. 49. [2] p. 35

ought or ought not to be absolute and unconditional may be an open question; but if the spiritual history of our laws declares that a fiduciary and official property in land is the point to which evolution has tended, the spiritual history of our laws must have some little difficulty in accounting for facts. Indeed, it must state what is, temporally speaking, exactly the reverse of the truth. There has been through long centuries a tendency at work making the law of realty more and more like the law of personalty. True, we still say that no subject can be the supreme lord of land, but what is now the merest fiction was once a great reality, and that reality disappeared bit by bit. Little by little the power of alienation and the power of testamentary disposition were won. When the legislature would not move fast enough popular opinion permitted the judges to evade the very words of statutes by all manner of fictions, fines, recoveries, and so forth. Surely these powers of disposition are the signs of absolute as opposed to fiduciary possession. Take again the extremely gradual extinction of manorial rights. These were "connected with especial duties," but they have disappeared. Coleridge sometimes asserts that the idea of property in land is a new one. This also is untrue. It is an idea which has very slowly evolved itself through the course of our history. Nor could Coleridge say that it appeared during the reign of the false philosophy. No, it came in during the ages which he loved. The great statute which converted all tenures into free and common soccage was older than the days of Locke. From the Statute of Fines to the last Land Transfer Act there has been one

steady tendency in all legislation on the subject, a tendency to assimilate the law of real property to the law of personal property. It may be that this tendency has been from good to bad. It is open for Coleridge to say that this has been the case; but it should be admitted by all that if property in land is to be made less a matter of commerce than property in other things the tendency of centuries must be reversed.

Mill prophesies that it will certainly not be much longer tolerated that agriculture should be carried on (as Coleridge phrases it) on the same principles as trade[1]. This may be so, but this prophecy must be founded on other grounds than a history of our law, however "spiritual."

To consider the now common arguments for making a distinction between property in land and property in other things would be to transgress our limits by entering on post-Coleridgean controversy. But it may be remarked, that if we rigorously exclude the old physiocratic fallacy, and perceive that the law of equal freedom cannot make any distinction until it is supplemented by some doctrine as to the way in which restraint must be measured, the controversy is not one which can be decided by a bare appeal to first principles, but requires much economic and historical discussion.

[1] *Essay on Coleridge.*

THE LAW OF REAL PROPERTY[1].

IT may be hoped that the reform of our land laws will at some not distant day come within the sphere of practical politics. Already most Liberals acknowledge that there is, or maybe, a "Land Question," though they would freely admit that at present they are not prepared with an answer to, or even with a very precise statement of, that question. Nor is there necessarily anything unreasonable in this somewhat vague dissatisfaction. Many an invalid knows that he is unwell without being able to give a name to his ailment, and it certainly is not surprising that those whom lawyers call laymen should have no very definite opinions about real property law. With all their love for politics and public affairs, Englishmen are easily content with knowing nothing of the ordinary civil law under which they live. So long as it is not scandalously unjust they are satisfied, and for the rest will trust to Providence and the family solicitor. And if this be the case with the more modern and intelligible portions of the law, still truer is it of the inscrutable mysteries of real property. How could it be otherwise? How is the ordinary man to become acquainted with them? If he consult his "Blackstone" he straightway finds himself in the Middle Ages, or, what is far worse, in a theory of the Middle Ages, concocted by the lawyers

[1] *Westminster Review,* **1879.**

of the last century. He has to learn a new language, and to acquire wholly new habits of thinking about the most ordinary transactions. He is perplexed by ancient statutes, and troubled with "the learning of feuds." All is to him unreal and unreasonable, and in all probability he decides not to waste his time over matters which, after all, do not concern him very greatly. As to his own affairs, there is the family solicitor, while as to the affairs of other people, they are, by supposition, no affair of his.

Natural as all this is, it is none the less to be regretted. For we move in a vicious circle. The people cares not to understand its own laws, because these laws are obscure and antiquated ; the laws are obscure and antiquated because those who would be advantaged by their reform know nothing about them. And as our Constitution grows more democratic it becomes ever more important that our civil law should be widely known. Little will now be done by Parliament to which it is not urged from without, and in these days, when there are always many excellent and exciting electioneering cries, many questions about which it is easy to make a stir, no Minister could afford to devote Session after Session to measures, however indisputably useful, for which there was no popular demand. It concerns Liberals in particular to see that nothing is lost by those successive extensions of the suffrage which they have advocated. But something will assuredly be lost unless the electoral body can be persuaded to interest itself in our everyday civil law. Something will be lost if the spirit of law reform which was fairly awakened in Parliament some half

century ago be allowed to languish before one tithe of its appointed work is accomplished.

It is hard to believe that there can be any reform more necessary than a reform of our land laws, and yet it is a reform which might easily be accomplished were popular attention once fixed on the work. It is really to no one's interest that the law should remain what it is. Opposition, of course, there would be, for there are some whose honour demands that they should resist every change; but their honour would be easily satisfied, their resistance official and half-hearted. There have been times when a vigorous and virulent opposition to law reform was to be expected from lawyers. But lawyers have apparently grown wiser. It has become plain, from many proofs, that they have no real interest in maintaining a cumbersome and clumsy system. Here, for instance, is Mr Joshua Williams, the professor appointed to instruct law students in the hidden wisdom of real property law, the writer of books from which hundreds of lawyers have learnt all the real property law they know. He lectures on the Seisin of the Freehold. Now, when a very learned professor of the laws undertakes to lecture on so dark and mysterious a theme, we are wont to expect from him some of those bravura passages about ancestral wisdom, and the perfection of reason which Blackstone so brilliantly executed before crowded and admiring audiences. But Mr Williams disappoints us. In his first paragraph[1] he states his belief that some of the most remarkable of our laws are " absolutely worthless," while "others are worse than worthless;

[1] *The Seisin of the Freehold*, p. 1.

they are absurd and injurious "; and in his last paragraph[1] he modestly opines that he has made good this his first thesis. Now, when those who are set to teach the youth hold such language as this, there are but two courses open to us—to silence the professors, or to reform the laws.

But while it is impossible to defend the law as it at present stands, it is only too possible for reformers to differ among themselves as to what changes should be made. There are many who would look on no improvement of the law as final which did not do something towards securing a more equal distribution of landed property, towards lessening the power and influence of the land-owning aristocracy. There are others who would move in this direction with reluctance, or at least with much hesitation. Now it is to be feared lest a difference of opinion about the end of the journey may prevent our taking steps which all must allow tend in the right direction. For it seems to us that before any further advance can profitably be made, it is quite necessary that the law should be much simplified. Here is something on which we might agree at the present moment, and a measure which can in no way prejudice the cause of any further reforms. Unless this work be done we shall have more of that tinkering of antiquated law of which the disastrous results are daily seen,—fresh gins and pitfalls for the unwary. The new patch will be put upon the old garment with the result which we have been taught to expect.

But though the reforms at present most necessary are chiefly reforms tending to simplification; though

[1] *The Seisin of the Freehold*, p. 202.

they imply no alteration in the habits of English society, no interference with the manners and customs of landlords, farmers, and labourers ; though they might leave the agricultural system which Lord Hartington has lately attacked, and Lord Beaconsfield defended, much as it was before, it should be well understood that they must be real reforms, real changes, not mere additions to our law. Of mere additions to our law we have seen enough. We have now before us two Blue Books containing the results of an inquiry conducted by a Committee of the House of Commons as to the steps which ought to be taken "to simplify the Title to Land and facilitate the Transfer thereof, and to prevent Frauds on Purchasers and Mortgagees of Land[1]." The point to which the attention of the Committee was chiefly directed was the complete failure of two modern statutes, the one due to Lord Westbury, the other to Lord Cairns, intended to provide means for the registration of titles to land. On these two statutes, or at least on the latter of them, many reformers had pinned their hopes, but the witnesses examined, and the members of the Committee, however they might differ on other points, could not but agree that the failure has hitherto been complete. This is, indeed, so painfully obvious as to be beyond dispute. The Acts have been ignored by landlords and their advisers. Many different causes were assigned for this failure. The more hopeful considered that the scheme had not been sufficiently advertised; that solicitors had not been properly conciliated; that Lord Cairns' Act had

[1] ***Reports from the Select Committee on Land Titles and Transfer, 10th July, 1878, and 24th June, 1879.***

been prejudiced by the collapse of Lord Westbury's inferior and less practicable measure. The less hopeful referred to the great complexities of English titles, so different from the simple and registrable titles of Australia and New Zealand, to the fact that a land owner has no inducement to incur the expense of putting his land on the register, to the English love of secrecy, the English hatred of offices and officials. These differences of opinion spread from the witnesses to the members of the Committee, and produced two draft reports, the one submitted by Mr Osborne Morgan, and finally adopted, the other proceeding from Mr Shaw Lefevre. The chief issue between the two reports was the expediency of requiring the registration of *deeds*. Now the registration of deeds is a very different matter from the registration of title. The report puts the distinction clearly and well. The registration of title "aims at presenting the Intending purchaser or mortgagee with the net result of former dealings with the property," while the registration of deeds "places the dealings themselves before him, and leaves him to investigate them for himself." It was generally admitted that the registration of title aimed at by Lord Cairns' Act is the more desirable system, and that the Act itself is very cleverly constructed. The great question was whether, this Act being for the present a dead letter, we ought not at least, as a temporary protection against fraud, to compel the registration of deeds. It was allowed that such registration is an efficient protection against frauds of a particular kind, a kind which has lately been brought to the notice of the public by the ingenuity of Messrs

Dimsdale and Downes. These gentlemen, it was acknowledged, could hardly have succeeded in giving ten or twenty "first mortgages" on the same piece of land, had that land been situate in Middlesex or Yorkshire, in a county, that is, in which the registration of deeds is required. But desirable as it is to secure ourselves against a repetition of these scandalous frauds, it is thought by Mr Lefevre and those who followed him that this security would be bought at too dear a price were we to abandon our ideal, a registration of title, and adopt and consecrate an inferior though more immediately practicable system. The question is doubtless difficult, and we hesitate to decide between many high authorities and many sound arguments; but, on the whole, we think that the minority of the Committee were in the right. We shrink with Mr Lowe from that "mausoleum of parchment," a registry of deeds. Of two schemes, both of which will protect us against Mr Dimsdale, but only one of which will render the sale and mortgage of land a simpler and less costly undertaking than it now is, the choice seems easy, and we will not believe that the better plan is impracticable until efforts much more vigorous than any hitherto made have failed to secure its adoption. For the present compulsory registration of title is out of the question, and we may be heartily glad that it has not been tried. It would, indeed, be impossible to force all land owners to do what not one land owner in a thousand has chosen to do of his own accord. The suggestion has been made that it is so much for the benefit of society at large that a habit of registering should be formed, as to make it sound policy

for the State to undertake for some few years to register titles for a very small fee, or even gratuitously. This suggestion seems to us worthy of all attention. It may shock stern economists that public tax-raised money should be spent to confer a benefit on individuals already lucky enough to possess land; but it may well be doubted whether we could lay out money in a manner more advantageous to posterity than by inducing the present generation of land owners to set their titles in order, and have them publicly registered.

But all this by the way; whether the State should insist on the registration of titles as a matter of national concern; whether, even if it were willing to incur expense, it could in the present state of English law get the work done successfully, are questions which we may raise, but will not discuss. One fact, however, is obvious, namely, that among the chief obstacles to any efficient system of registration is the perverse complexity of real property law.

This was brought to the notice of the Committee by many most competent witnesses. Indeed, it was so constantly brought to their notice that they could not but recommend in their report certain changes in the law. Perhaps they felt that in proposing these changes they were trespassing beyond their proper sphere. To this we readily ascribe the timid and desultory nature of their proposals. They propose that a certain statute, called the Statute of Uses, should be repealed; that the land of a dead owner should pass, not straight to his heir, but to a " real representative " comparable to the personal representative who takes his goods and chattels; that the machinery of a mortgage should be

less clumsy than it at present is. Now all these may be changes in the right direction ; but if it was the Committee's business to consider them it was also their business to consider many other things also. Apparently they were content to catch at a few valuable hints thrown out by Mr Joshua Williams, Mr William Barber, and other witnesses, without asking themselves whether the particular absurdities which they condemn are not logical parts of a system the whole of which is equally worthy of condemnation. We should be glad to learn that the Committee (a more able and industrious it would be hard to find) had been reappointed with power to consider the whole of our land laws. We are convinced that such reappointment would result in proposals very different from those now made, proposals not limited to the trimming and pruning of essentially bad law, but extended to the rooting up of the cause of all those evils which are noticed in the present report and countless others no wit less grave.

For though we would begin with changes which might be called formal rather than material, these changes should be bold and thorough. The simplification of our land laws which is needed is nothing less than a total abolition of all that is distinctive in real property law. The distinction between real and personal property might be done away, without any disturbance of substantial rights or interests. There would be a saving of money, of time, of temper, of trouble; a saving of vexatious lawsuits and of those worst of quarrels—family quarrels; vast masses of antique and unintelligible law might be for ever forgotten ; but beyond this, there would be little change,

and certainly no change which the veriest Tory could call revolutionary.

It is really high time that the question should be asked, whether we gain anything whatever by keeping two systems of property law. Two systems we have, as many know to their cost, each with its own peculiar history, each with its own peculiar doctrines. Of course, it is plain enough that for certain purposes law must distinguish between the various subject matters of proprietary rights, and must place land in one class, moveable goods in another. It is chiefly with regard to the remedies for wrongs, breaches of contract, trespasses, and the like, that the distinction is important, and the distinction is well enough marked in English law, but marked, it should be noticed, by a line which does not coincide with that which divides real from personal property. And yet it is to this distinction that the words *real* and *personal* apparently point; for real property, so the phrase would lead us to think, there are real remedies, for personal property none but personal remedies. But these words are of late introduction, and were always inapt The old word *hereditaments*', things descending to the heir, is the real key to the situation. Our distinction between the two kinds of property is not to be explained by any jural necessity, it is the outcome of a long chapter of accidents. What is really at the bottom of the distinction is the fact that we have two systems of inheritance, or, if that phrase be incorrect, one law of descent and another law for the distribution of an intestate's goods and chattels. This is the one central, all-important fact from which the two systems diverge.

What, then, do we want with two systems of inheritance? We might, however, be thought visionary and unpractical were we at once to address ourselves to this abstract question. To any arguments drawn from the complexities which arise from this dualism, or from the comparative simplicity of foreign law, it might be replied that having a good, or at least tolerable, law of descent, we ought not rashly to abandon it for the sake of technical symmetry. For, of course, it is the law of descent, the law applicable to real property, that is threatened, no one being so enamoured of the heir-at-law as to desire that he should take, not only all the land, but also all the goods. Of the law of descent we are therefore obliged to speak, though it is certainly difficult to criticise it without insulting the intelligence of our readers. What need be said may be said in few words. The law makes a will for intestates which no sane testator would make for himself. However often this may have been said, it remains unanswered; it is un answerable. Its truth may be easily tested. There are hundreds of wills set forth in the law reports, and any one who will look at them, or who will even look at the *Illustrated London News*, may see that it is not the rule, but the rare exception, for any man to leave his land to his eldest son without making provision thereout for his widow and younger children. Besides, what class of persons is it that the law of inheritance should regard ? Surely those who are most likely to die intestate, the men of small means, not the owners of vast estates ; and in popular estimation a man of small means would be guilty of more than folly and

little less than crime were he to make the will which the law, in the fulness of its wisdom, makes for him. We are glad to hear Mr Williams speak his mind on this matter. He, we should imagine, had no prejudice against the law of real property, but "I confess," he says, "that, saving estates tail, the descent of which should, I think, be permitted to remain, I should be glad to see the whole law of inheritance swept away[1]."

The Essay by Mr Eyre Lloyd, with the title of which we head this Article, is instructive[2]. We cannot, indeed, praise the work very highly, but it serves to bring into strong relief the fact that the whole civilised world is against us. It was not always so; primogeniture has been known in many parts of Europe, the postponement of women in most, perhaps in all. But it is so now. Mr Lloyd arranges the countries of Christendom in alphabetical order, and as we pass from Austria to Wurtemburg the same phrases constantly meet our eyes; "all property, real and personal, is divided equally between the children," "without distinction of sex," "no distinction between males and females," and so forth, continually. And the exceptions are noteworthy. The only exceptions of any importance are Great Britain, Russia, and Servia. Have we not lately learned (if not, we cannot plead a lack of instructors) that of all countries Russia is the most barbarous and backward, save, perhaps, Servia? And yet it is to the despised Russia, and the contemptible Servia, not to France, Germany, or Italy,

[1] *Seisin,* p. 97, and *Evidence before the Committee, First Report,* **p. 27.**

[2] *Primogeniture as it exists in England,* by Eyre Lloyd, B.A., London, 1877.

that we must look for a law at all resembling our own. But let us not be downhearted. Mr Lloyd has concerned himself only with Christian countries; should he at some future time turn to the heathen he may obtain valuable and gratifying results.

But, better still, he should turn to the Dark Ages. To Herr Brunner the English law of inheritance is vastly interesting[1]. There has, it seems, been a notable dispute among German antiquaries, who have divided themselves into two Schools, *Gradualisten* and *Parentelisten,* over the question, What was the pure Teutonic law of inheritance before it was corrupted by Romanism and reason ? Some aid towards solving this nice problem may, Herr Brunner thinks, be found in the Anglo-Norman law; and so in praiseworthy fashion he has set himself to examine Glanvill, Bracton, and the old Norman customs. His short Tract is a valuable contribution to the history of English law, one of those contributions which we obtain but too seldom from English lawyers. But we must leave *Gradualisten* and *Parentelisten* to fight their own battles. We are, unfortunately, not at present in a position to examine our law from the archaeologist's standpoint Let us, however, notice, with pardonable pride, that a learned historian in search of the primitive finds it in law which is still in force among us. For should our readers desire to know what law it is that Herr Brunner reveals as a curiosity for admiring antiquaries, they have no need to trouble themselves with mediaeval Latin or Norman French ; let them but turn to Mr Williams's well-known text-book, and

[1] *Das Anglonormannische Erbfolgesystem,* Leipzig, 1869.

there, explained in the clearest English, they will find substantially the self-same law[1]. A few little changes have been made—for accidents will happen in the best regulated museums—bui, on the whole, this interesting specimen of antiquity has been most carefully preserved.

Englishmen, no doubt, are proud of this priceless curiosity, but apparently their pride is somewhat uncritical; they are hardly aware of the facts whence it derives its vast value in the eyes of connoisseurs. Such, at least, is the conclusion to which we are brought by a perusal of " Hansard," It seems to be thought that a vague reference to " feudalism" is a sufficient account of the origin of primogeniture. Perhaps familiarity with this law has blunted our power of discrimination. We are so accustomed to see all the ages jumbled together in our nineteenth century law that nothing surprises us, and any semblance of explanation which may be offered for existing institutions is accepted as satisfactory. " Feudalism " is a good word, and will cover a multitude of ignorances. To ask what was the real connection between feudalism and primogeniture would argue a reprehensible discontent with beliefs sanctioned by Blackstone and orthodoxy. Thus we miss the really noticeable points in the history of our law, and our attention must be drawn to them by learned foreigners, by whom they can be contemplated with the single eye of scientific interest. We are used to an unreasonable law of real property, and we find no difficulty in believing that

[1] *Principles of the LawofRealProperty*, by Joshua Williams, Q.C., twelfth edition, London, 1877.

what is unreasonable now was unreasonable always, "feudalism" of course, being a particular form of unreasonableness not to be rashly defined.

And so with the postponement of women, this also is sometimes called feudal, but with much injustice; it is better than feudal, it is primitive, it is grandly barbarous; nay, it is prehistoric. Indeed, the decline of the old law of inheritance had begun long before anything that could be called feudalism made its appearance. Already in the seventh century a king of the Visigoths ordained in the plainest terms that females should share equally with males, and supported his decree by sophistical reasoning about nature and justice. But there is no accounting for the caprices of foreign monarchs; and in this country no rationalizing Prince, Potentate, or Parliament has hitherto laid unholy hands on the sacred principle. Englishmen, we say, are not sufficiently aware of the high pedigree which may be claimed for their law. It may be (we do not say it is, for we would not excite hopes destined to be blighted, but it may be) that our law of inheritance has some connection with that pure and primitive record of barbarism, the Salic law, *ce texte si fameux, dont tant de gens out parle, et que si pen de gens ont lu*[1] We must not be too eager to adopt a conclusion so gratifying to our national vanity, but the fact remains, that the author of our *Leges Henrici Primi,* when he came to speak of the law of inheritance, thought fit to abandon his English authorities, and to transcribe, with slight modification, a passage from the Ripuarian law. This passage was itself but a slightly modified tran-

[1] Montesquieu, *L' Esprit des Lois,* liv. xviii, ch. xxii.

script of the world-famous words in the *Lex Sa/tea.* Why the English compiler did this we cannot say, nor can we shut our eyes to the fact that his work is bad and untrustworthy, but still there is some ground for hope, and national boastings have been based on worse evidence. But what a cause for congratulation is here! The *Lex Salica,* so high authorities tell us, was in its earliest form the production of a still heathen nation uncorrupted by Christianity or civilization. Really, when we think of the many destructive forces which at one time, of course long ago, threatened to deprive the male sex of its just prerogative, it seems little more than an accident, little less than a miracle, that our law of inheritance came safely through those revolutionary Dark Ages. There was the Church arrayed on the side of women, and of the meddlesome canon law all diligent readers of " Blackstone " know what to think. There was the civil law, including those improper Novels which even English judges are suspected of having perused in private. Nor are the names of individual revolutionists wholly forgotten. In the seventh century, and the neighbourhood of Paris, there lived a monk and conveyancer, one Marculf by name, the father of all those who publish collections of precedents. This bad man, not respecting ancestral wisdom, settled a form of conveyance from a father to his daughter, with intent to circumvent the salutary Salic law, which he scrupled not to call "diuturna sed impia consuetudo." *Diuturna,* indeed, what would he have said now ? We are afraid that he would have said *diuturnissinta. Impia* indeed, but let us remember, in his favour, that the law was

not in his days so old and mellow as it now is. And yet there are those even in this nineteenth century who, unconvinced by the annual eloquence of Her Majesty's law officers, and glorying in their invincible ignorance, still mutter to themselves the words of Marculf, "diuturna sed impia consuetudo," or, changing the phrase but not the meaning, adopt Mr Williams's plain English, "worse than worthless," "absurd and injurious."

But, in all seriousness, why should women be postponed? It must be out of respect for some one's memory. Rut whose? Is it Ethelbert or Cnut, is it Salagast, Bodogast and Widogast, or Choke, Croke, and Coke, is it Howel Dda or Dynwal Moel Mud? The Conservative party is a historical party, let it explain to the uninitiated the exact form which its ancestor-worship takes. And it really should be more consistent. It would, perhaps, be imprudent to re-enact the whole of the *Lex Salica,* because there are so many words in it which no one understands. A modern judge, not inexpert in the construction of obscure documents, might reasonably shrink from the title "De Chrene Cruda." And so with the Welsh Triads, and the Senchus Mor, and even with the Dooms of Hlothar and Eadric. But were we really in earnest something might, with the help of philologists, be done for the great principles of archaic law. Foreigners have stated as a fact, that it is still common in England for a man to sell his wife[1]; that they

[1] "Es ist bekannt, dass in England unter den gemeinen Volk der Gebrauch noch heut zu tag gilt, die Frau auf dem Markt zu bringen und zu verkaufen."—Grimm, *Deutsche Rechtsalterthumer,* p. 451.

mistake *Punch* for the Statute Book is plain, though pardonable. The statement is unfortunately not quite accurate, but it might be made so *ex post facto* by the next Metropolitan Markets Act, We are in difficulties with our bankruptcy law; might not a short and easy way with insolvent debtors be found in, let us say, the Twelve Tables ? Rut we really must have the blood feud ; no criminal code will be complete so long as this antique and excellent institution is neglected. As matters at present stand, our law of inheritance does look a little foolish, and from time to time the words of Marculf recur to our minds. But make our law all of one piece, and all will be well, the wisdom of our ancestors will be respected, and the price of woad will rise.

We would fain be serious, but we can only regard the arguments in favour of postponing women to men as some sort of fantasia or capriccio on the *Leges Barbarorum.* But the subject has a side which cannot be so airily treated. We again repeat that it is not our purpose to deal with the more obvious effects of our law of inheritance; about these readers of this *Review* have probably made up their minds. But it seems doubtful whether the full strength of the case for reform is widely known, and we turn to some of the less obvious effects of the law, believing that were these'well understood there could be but one opinion as to the necessity of a radical change. For absurdity can go no further than to represent the badness of this law as a sentimental grievance. It may seem a small thing to introduce a reasonable system of succession on intestacy, for few who have aught to leave allow our absurd law to distribute their property; but even

though the direct and immediate reform may be small, it must bring in its train certain other reforms which would effect a simplification—a time-saving, money-saving simplification throughout the whole body of the law.

But, in the first place, let it be noted that our canons of inheritance, besides being guilty of the two capital follies with which they are commonly charged —primogeniture and the postponement of women— are in other respects thoroughly bad. What shall we say of a law which ordains that if a man purchase land and die without issue, his most distant relative on his father's side shall inherit before his nearest maternal kinsman, before his mother herself? A "parentelic" system of descent may interest foreign professors, but its convenience and justice are not readily seen. Surely there is nowadays no presumption that a man's paternal kinsfolk are, or ought to be, nearer or dearer to him than his mother and his mother's kin. Our Statutes of Distribution, which, being but two centuries old, we may call modern, may not be very perfect; but at least they start from the sound cognatic and "gradualistic" principle, which is, as a matter of fact, the principle of the modern family.

In the second place, we can now well spare the local customs of descent—gavelkind, borough English, and those still more anomalous customs which lie dormant for centuries, and never awake save to do a mischief. The only reason for retaining the gavelkind custom has been, that it was one degree less ridiculous than the common law; it postpones females to males, but knows not primogeniture. The borough English rule, which gives all a man's land to his youngest son,

has also fulfilled its only purpose, that of preserving for modern historians a relic of an almost prehistoric family system. But the time has come when all these local rules should perish ; they are merely snares for laymen and traps for costs. However, all this is, or should be, obvious enough, and we pass to some remoter consequences which must follow from the adoption of one law of succession for all kinds of property.

Foremost among these we reckon the abolition of " equitable conversion," and all its attendant subtleties. The doctrine of conversion (let not our readers think that we here desert law for theology) arises in this way. A man owns land; by his will he directs trustees to sell that land, and to divide the proceeds between A and B. The trustees do not sell at once, and while they delay A dies; who is to take his share of the money, his real or his personal representatives? It would be unfair that the trustees' delay should benefit the heir at the expense of the next-of-kin, and the rule has been established that the trust to sell converts the land into money for the purpose of succession. And so with the converse case in which a testator directs money to be laid out in buying land for one who dies before the purchase is made. A person, it is said, may make land money, or money land. Hence an infinity of perplexing questions, hence a vast mass of law, much of it very equitable and very elegant, but all of it quite unnecessary. Many thousand law-suits has this transubstantiation, or rather consubstantiation (for land may be land for some purposes and money for others), cost the country ; and yet this doctrine is the unavoidable consequence of having two systems of

succession where one would suffice. Once get rid of the heir-at-law, and there will be no more need for conversion ; all property will be for ever personal property.

It should be remembered that English law is by no means unprepared to deal with personal property in land. In the first place, this device of conversion is often resorted to for the very purpose of placing land beyond the reach of our inheritance law, and rendering it divisible among the next-of-kin. In the second place, there are leaseholds, and leaseholds are personal property. It is certainly very ludicrous that when a man dies intestate the field that he holds in fee should go one way, the field that he holds for a thousand years another; but clearly all property in land might be made personal without our being driven to invent a wholly new system of land laws. Leaseholds may be regarded as providentially preserved for our guidance. If we must have a theory of tenure, let it be that all land is in the last resort held of the Crown for a million years[1]. Those who argue that to render land divisible among the next-of-kin would necessitate frequent actual subdivision, show their complete ignorance of English law and English habits. They may fairly be challenged to prove that a minute subdivision of long leaseholds is any commoner than a minute subdivision of freeholds.

When we reflect on the English impatience of taxation, it is surprising that we should allow ourselves to be heavily taxed by means of lawyers' bills for the maintenance of the "worse than worthless." What

[1] **Mr Lowe, we observe, ascribes this proposal to Mr Senior. {*Second Report,* Q. 2938.)**

an outcry would there be were the Chancellor of the Exchequer to propose a vote *of* money to be spent on a decent edition of "Bracton"—something better than that with which Sir Travers Twiss has favoured the world—and yet we are willing to pay for a cabinet of legal antiquities, if only we can have the annoyance of causeless litigation thrown in for nothing. We are willing to maintain even a "doctrine of conversion," a most expensive property, provided that we are suffered to keep our *diuturna sed impia consuetudo* of postponing females to males.

Another reform would follow. After a long struggle we have succeeded in establishing the principle that a dead land owner's debts should, if possible, be paid. But owing to our double property law, the principle is carried into effect by very imperfect machinery. Clearly the creditors should have some one person or body of persons to whom they could look as representing the dead man for all purposes, and bound to pay the dead man's debts so long as there are assets. As it is there is one man with the land, another with the goods. So convinced is Mr Williams of the necessity for some measure establishing a real "real representative," that he would secure this object even though the law of inheritance remained *in* other respects unaltered. Mr Williams has on this point convinced the Committee, but we hope for better things. Let all property be personal property, and this, as well as many other reforms, will follow as a matter of course. A will of realty will be proved as a will of personalty is proved, and a man's executor or administrator will represent him for all purposes whatsoever.

Take, again, the law concerning the effect of marriage on property. No one can pretend that it is in a satisfactory condition, and clearly the whole subject must one day be reconsidered. But an abolition of the distinction between real and personal property would go far towards making it more intelligible, and a better subject for further consideration. For, leaving out all question as to property settled, whether by statute or contract for the wife's separate use, and all consideration of the very capricious "equity to a settlement," we have this state of things—A man marries a woman who has both freeholds and leaseholds, his rights in the two are utterly different. During the marriage he cannot sell the freeholds without his wife's consent solemnly given ; he can sell the leaseholds against her will If he survive his wife he is absolutely entitled to the leaseholds ; he gets at most a life estate in the freeholds. For all this there is no reason, though there may be a historical explanation. It is true that the law of real property is rather more favourable to married women than the law of personal property, and the abolition of the distinction would afford a good opportunity for making our one system of property law better than either of the existing systems. But it surely is of some importance that the law of husband and wife should be intelligible to the people, and this it never will be until we have determined that two systems of property law are one system too many.

You cannot create an estate tail in personal property. This is a blessed truth and full of promise. Establish, therefore, that freeholds are only extremely

long leaseholds, and estates tail disappear. Here it may be thought that we pass from matters of mere law reform to questions of great social and political interest. But not so, for any lawyer will tell us that it is perfectly possible, and very common, so to settle leaseholds and other personal chattels that they shall go along with an entailed freehold estate. There is no need to investigate the mechanism employed by our modern Marculfs for this purpose; but the fact is, that, if it were impossible to create an estate tail, settlements of land might still be made, and would most certainly be made, which for most practical purposes, and in the ordinary course of events, would have the same effect as those which are now in use. The result would not be quite the same, but so far as all matters of real importance are concerned the result would, we believe, be the same. Not a great reform, then, some Liberals may be tempted to say ; but we cannot agree with them. Once effected, it would be easy, if thought advisable, to set narrower limits to the power a proprietor has of settling his property, whether land or goods ; but until some such simplification has been introduced, any attempt to shorten settlements will, in all probability, but darken the darkness of real property law. Let us first do that which all men who think about the matter must see to be good, then will come the time for deciding questions about which men may reasonably differ.

The position of a tenant in tail of full age is amusing. Something between a life tenant and an absolute owner, he can make himself an absolute owner by executing a deed and having it enrolled—

that is, by paying certain costs to his solicitor. Very instructive is all this to learned Germans, but to tenant in tail, and all who have to do with him, a nuisance. Besides, these estates tail form one of the worst stumbling-blocks in the way of an unlearned testator. By some phrase thrown out at random he may succeed in creating one of these anachronisms, or still more probably render a law-suit inevitable by leaving it doubtful whether he meant to give an estate tail or an estate in fee simple. All such doubts should once for all be answered; estates tail should vanish; one pitfall would be safely filled in, one "possible construction" of obscure wills be rendered for ever impossible.

Can anything be more absurd than what happens on the death of a mortgagee in fee? The only substantive right, the right to be repaid the money, passes to his personal representatives. But his heir takes something; he takes "a legal estate" in the land. Really he has no rights, he must deal with his precious possession as others bid him, he can make no penny thereout for himself. But the legal estate, the ghost of a departed right, goes wandering from heir to heir, and devisee to devisee, until it is hunted down, and safely exorcised, and "got in," not without costs. Otherwise there will be a law-suit and more costs. These legal estates, mere abstractions of nothingness, are a plague to vendors and purchasers, they are one of the chief hindrances to the registration of titles. To some extent, but to what extent our authorities tell us is not very clear, an improvement has been introduced by a recent Statute; but how? By grafting an anomaly on an absurdity, by timid tinkering and

caulking. There is but one way to meet the evil Render it impossible that the heir of a mortgagee, or the heir of any one else, should take anything whatever. For as with mortgagees, so with trustees. We are not pleading for elegance or technical refinement, but for real solid reforms, which would benefit the nation at large. Should any reader think that we overstate our case, we can only send him to the text-writers, but we send him with confidence as to the result. Let him reckon up the reported cases due to these outstanding legal estates, let him multiply their number by the average cost of a law-suit, let him consider how few are the cases reported out of those decided, let him consider how many are never pressed to a decision, let him think of these things and of the obvious remedy.

But throughout our law, look where we will, the distinction between the real and the personal is found a permanent cause of mischief It is an all-pervading distinction, similar to that which some metaphysicians make between the objective and the subjective. Indeed, were it still, as once it was, the fashion for our lawyers to adorn their works with scraps of second-hand and third-rate philosophy, there would doubtless not be wanting those who would convince us that the real is the objective and the personal the subjective. However, lawyers have been in some respects more fortunate than those with whom we have made bold to compare them; for between the two great opposites they have found what metaphysicians are still to seek, a *tertium quid,* the mixed fund. The part played by the mixed fund is well illustrated by an extract from

Mr Pollock's *Principles of Contract*, given below. First, however, let us notice that the law of England is good enough to encourage marriage, and with this object in view has established certain rules respecting the invalidity of a condition avoiding a gift on the marriage of the donee. Of course, however, it cannot deal with the two kinds of property by one set of rules, for it is, or must be deemed to be, a maxim of our law, that distinctions are to be multiplied. The extract is as follows :—

"Conditions in Restraint of Marriage:—

" I f *precedent,* are with trifling exceptions (if any) valid as to both real and personal estate.

" I f *subsequent,—*

"General restraint. Good, it seems, as to real estate. Had as to personal estate or mixed fund (or a fund arising only from the sale of realty, *semble*\ and this whether there is a gift over or not.

"Particular restraint. Good as to real estate; and good as to personal estate if there is a gift over, otherwise not[1]."

This is a very fair specimen of English law, and the reader will see that we have not been romancing. We have one rule for personalty, another for realty, and then arises the question which rule is applicable to the mixed fund. But why two rules? Either sound policy demands that a condition defeating a gift on the marriage of the donee should be void, or it does not, but it cannot possibly draw any distinction between land and goods. It is, of course, very interesting to know that the ecclesiastical and temporal courts could

[1] F. Pollock, *Principles of Contract,* ist ed., pp. 282, 283.

not agree about the validity of these conditions, but a history, however interesting, is not a reason. This is, we repeat, a fair specimen, and we have chosen it, not because it is more strikingly irrational than many others, but because Mr Pollock's statement is so concise, that it may easily be quoted. In truth, " it is curious to notice," as Mr Williams observes, "the strange differences that exist in our law, without any particular reason whatever, so far as one can see, between real estate and personal estate[1]." This remark serves as an introduction to an account of a very strange difference indeed, and one due to the unprincipled meddling of a modern Parliament. We say *unprincipled,* for an opportunity was offered for establishing on a particular point the same rule for real and personal property, but our legislators preferred to introduce a new complication for which we will defy any one to find "any particular reason," or, indeed, any reason particular or not particular. The matter is too elaborate to be here explained, but we refer our readers to Mr Williams's book on *Settlements.* If they do not agree with the learned author that "it is curious," their taste for legal curiosities must need cultivation.

Now, it seems to us plain that, even if both our two systems were reasonable and convenient, there would still be good cause for ridding ourselves of one of them. Much more, therefore, ought we to abolish so inconvenient and unreasonable a system as that of which we read in *The Seisin of the Freehold.* The general reader would hardly thank us for any observations on the abstruser doctrines of the law so

[1] *Settlements,* p. 159*

lucidly expounded, we had almost said exposed, by Mr Williams. And yet it is only by considering the minuter details of the law that we can appreciate its worthlessness at its true value. This is one of the worst impediments in the way of improvement. When told that the law is bad, and might easily be bettered, we are sceptical, we desire, and rightly desire, a proof, and when the proof is offered, we say, and truly say, that it is dull. For who shall interest us in contingent remainders, or the Statute of Uses, while Chinese metaphysics remain unexplored? If we want barbarism at its best, we can turn to the *Lex Salica.* If we want scholasticism at its best, we prefer Thomas Aquinas to Lord Coke, Were it a matter of wrong or wicked lewdness reason would that we should lend an ear (the reports of the police and divorce courts are found by some to have a certain human interest), but as to words and names and our law, our ordinary civil law, let lawyers look to it, for we will be no judge of such matters. And yet the subtle learning of contingent remainders is suffered to interfere with actual life. It is mere innocent ingenuity amusing itself with frivolous distinctions. On it may depend the rights of the widow, the orphan, the purchaser who has paid for land and bought a law-suit. And it is all unnecessary. There can be no contingent remainders of leaseholds. Make freeholds personal property, and one mass of obscure and difficult doctrines may be for ever forgotten. Who would lose by such a reform? No one. Must we hint that this is the very reason why no one cares to alter the law? Who would gain? Every one who, whether as vendor or purchaser,

donor or donee, had anything to do with freehold land.

Then there is that marvellous monument of legislative futility, the Statute of Uses, the statute through which not mere coaches and four, but whole judicial processions with javelin-men and trumpeters have passed and re-passed in triumph. It has been said of this ambitious statute that its sole effect has been to "add three words to a conveyance." This may pass as a contemptuous epigram, but it is far from the whole truth. It has caused innumerable unnecessary law-suits. This is not an epigram but a fact. It is not a mere Statute of Uselessness but a Statute of Abuses. And it will be readily understood that if there is a flaw or a stupidity in our property law, the whole body of the civil law is the worse for it, for property law must be the very core of the Corpus Juris. Thus, it is not only those who make and profit by elaborate settlements of land who suffer by our misplaced antiquarianism. Whenever title to freeholds comes in question, directly or indirectly, the power of this statute is felt, and the real merits of the case but too often disappear beneath the accumulated rubbish of ages. It might have been supposed that one part at least of our law would be plain, the law relating to the Parliamentary franchise. But it never will be plain so long as it depends on real property law essentially nonsensical. It is a "fancy franchise," more fanciful than any conceived by our most fantastic Minister, when the right to vote is given or denied by the fact that a certain deed took effect not under the common law but under this statute. It is a

powerful sarcasm on our boasted liberalism that the cases which of recent years have turned on the most absurdly frivolous distinctions have been cases on the right to vote under the Reform Act.

Space may fail us but matter does not, for in truth it is only when we turn to "questions of construction" that the badriess of our dual system is seen at its best. To take but one instance, centuries have not sufficed to convince the people of England that the word "heir" is quite inapplicable to personal property; they cannot or will not believe that we have two distinct schemes of succession. The consequence is that in their innocence testators make use of inappropriate phrases, and then follows the inevitable administration suit, the family quarrel, the costs. We do not hesitate to say that ten per cent, of the "questions of construction " which are raised are due to our having, and having long had, two bodies of law where one would suffice. Doubtless, the simplification of our property law would work but slowly and gradually on the minds of testators, but it would work surely, and some day an educated Englishman may be trusted to make a simple will for himself.

Perhaps there is not sufficient work for our Courts, that wrongs being unknown, and all contracts kept, we are obliged to invent problems for our judges. Can there be any other explanation than this for the care with which we preserve a system or want of system ingeniously framed to lead testators astray ? And yet we are constantly told of large arrears of cases waiting to be tried, we constantly hear demands for more and more judges. We are not so very successful in sup-

pressing fraud and breach of faith that we can afford to encourage by artificial means that worst kind of litigation, litigation between parties all equally innocent, equally unfortunate. The promoter of bubble companies, the swindling director, the fraudulent bankrupt, are. allowed a respite, which may be ruinous to those whom they have cheated, while the Courts are deciding what shall be done with the property of a man whose sole crime is that he has shown a not unnatural ignorance of the distinction between real and personal estate.

Now, were it seriously contended by the friends of the heir-at-law that his existence is necessary for the maintenance of our present social order, that he is a prop of the State, or the Church, or of anything else, we might have to consider whether the system of law of which he is the centre might not be made more tolerable by amendment But no such contention is raised. On the contrary, the advocates of primogeniture are fond of laying stress on the fact that few land owners die intestate. Is it not a little one?—this is their favourite plea. No, we reply, the abuse is not a little one. It is for the sake of the heir-at-law that we disorder the whole of our jurisprudence. In order to postpone women to men, in order to make a will which no one wants made, we render our law unknowable by any save experts. If after all our efforts we fail in attaining our worthless object, if daughters and younger sons are not disinherited, this is but an additional argument for reform. We undergo all the evils of having two systems of property law, and have nothing to show for it. You cannot prove that a law

is good by showing that all sensible men contrive to evade it.

It is quite unnecessary for us to say harsh words of our ancestors. There is no need to seek a scapegoat among the feudalists, the canonists, the civilians. We have no quarrel with the Parliament which passed the Statute *De donis* or with that which passed the Statute of Uses. For all our legislators and judges from Ethelbert to Eldon we profess profound respect. It is we who are guilty of our own law, for as Hobbes rightly says, "The legislator is he not by whose authority the laws were first made, but by whose authority they now continue to be laws." It is therefore our present law-givers, and we who have elected them, that are to blame, if the right to land, and the right to vote, may still depend upon nonsense which it would be unjust to the schoolmen to call scholastic, nonsense which can only be explained by long stories about the quarrels between Courts which we have abolished. If these quarrels ended in an illogical compromise, this may have been our ancestors' wisdom, but that the terms of this compromise are still retained as law for all time is no better than our own folly.

To any reader trained in the historical school now fashionable our arguments may savour of a narrow and frigid Utilitarianism long since abandoned by all enlightened persons. The law of real property is, we shall be told, an historical institution—the product of social evolution, of national life—and as such it must be criticised ; nor must it be rashly condemned if it fail to conform to our notions of practical con-

venience. Now, it is but too probable that we are sadly deficient in the historic sense which it is the pride of this generation to have discovered in itself. It is not unlikely that we are behind an age whose chief ambition is to be behind itself. We must even confess to a belief that the law reformers of fifty years ago were often on the right track, though it is but too plain that they were ignorant persons who knew nothing of the primitive Aryan, and believed that all the Middle Ages were contemporaries. Were it necessary we should not fear to maintain the heresy that no practical convenience, however small, is to be sacrificed on the altar of historic continuity. But in the present case there is no need for the assertion of this very old-fashioned doctrine. Were it expedient, we might easily show that for centuries past there has been one steady tendency running through the whole movement of our property law; a tendency towards the assimilation of real to personal property. Indeed, we know not where to date the beginning of this tendency, for, as far as our records reach, we see it at work. We have been gradually, very gradually, moving towards the idea of absolute property in land. The theory of feudal tenure marks a particular stage in the movement ; but the movement had begun long before the feudal theory was conceived, and has continued long after that theory has been capable of producing any consequences save confusion and inconvenience. What is now desirable is that we should bring the work which has been so long in hand to its logical conclusion. We know that there are those who would hesitate to sanction the doctrine that there may be

and is absolute property in land. They have a certain affection for the old theory of tenure, not because they are Conservatives, but because they are Radicals; because in their eyes that theory serves to indicate, however imperfectly, the principle that property in land ought not to be placed on the same footing as property in other things. How far their economical reasonings justify this distinction we may not here inquire; but let them ask themselves whether they can seriously hope to make use of the theory of tenure in aid of their schemes. To us it seems that they do but prejudice their cause by seeking an alliance with worn out and discredited principles. If there be any special reason for taxing landlords more heavily than other people, if there be just cause for appropriating to the State " the unearned increment" of rent, all this is compatible with a simple system of property law, unencumbered by theories of tenure. We do not believe that any sense of the claims of the community on the land is kept alive by the doctrine still to be found in our law books, that of land no subject can be the absolute owner. Every one knows that this doctrine, however indispensable as an explanation for some of the subtleties of real property law, is, in fact, untrue. " The first thing the student has to do is to get rid of the idea of absolute ownership[1]." So says Mr Williams; but we may add, with equal truth, that the second thing he has to do is to learn how, by slow degrees, the statement that there is no absolute ownership of land has been deprived of most of its important consequences. The question, therefore, for those who

[1] ***Real Property,*** **p. 17,**

would limit the rights of property in land is, whether they would rather work in the dark or in the light; whether they would rather deal with a modern and reasonable system, capable of further improvement, or with a mass of old theories—once, perhaps, an organized whole, but long since fallen into decay.

For our own part, we can imagine no sounder advice than that given by Mr Williams:—"For the future, perhaps, the wisest course to be followed would be to aim as far as possible at a uniformity of system in the laws of both kinds of property; and, for this purpose, rather to take the laws of personal estate as the model to which the laws of real estate should be made to conform, than, on the one hand, to preserve untouched all the ancient rules, because they once were useful, or, on the other, to be annually plucking off, by parliamentary enactments, the fruit which such rules must, until eradicated, necessarily produce[1]." Thus has Mr Williams preached through twelve editions of his book, but we grow no wiser; and now we have Mr Morgan's Committee marking out for us the annual crop of weeds for the year 1880: a statute to be repealed, a real administrator appointed, verbiage curtailed, but no attack on the root of all evil—the heir-at-law. Perhaps when Mr Williams has published twelve more editions we may be converted to his bold and sensible policy, and regret that we have spent so much well-meant labour in trying to patch up a hopelessly rotten system. When that time comes we shall think of Mr Williams not only as of a very learned lawyer, but also as of a law reformer who knew what

[1] ***Real Property,* p. 468.**

he was about: a law reformer of the good old school, which knew that a reform to be effectual must be logical and thorough.

Such, briefly stated, is the case for reform. We have chosen to take what may seem to some a narrow and a low view of the subject, but our object has been to lay stress on the practical inconveniences of our present law. We are quite willing to adopt Mr Matthew Arnold's argument, that to our law of inheritance is in part due that very unequal distribution of wealth of which he complains, and we are decidedly of opinion that "materialize," "vulgarize," and "brutalize" are brave words and not inapt We are quite willing to leave open the question whether our law does not give to settlors too vast a power of tying up property. We would gladly see land a merchantable commodity. But we have purposely avoided all great social and political questions, and even all questions which are likely to be warmly contested. We have taken our stand on low ground, the saving of quarrels and costs, but our position is, we verily believe, impregnable.

There was a time, some fifty years ago, when it might have been plausibly said that to meddle with so old a structure as our land laws was dangerous. For centuries they had been almost untouched by statute, and there was some reason for thinking that to improve them was beyond the power of mortal man. But there were reformers in those days. The work that they did was done skilfully and well; and yet it was a daring work. Old abuses fell like leaves in autumn. Fines were not saved by their antiquity,

nor recoveries by their absurdity, nor real actions b their costliness. The writ of entry sur disseisin in th quibus perished along with writs of aiel, besaie tresaiel, and cosinage. Our sense of historical con tinuity was not keen enough to save "the casus ejector," or "the common vouchee." A decent ablivioi was provided for John Doe and Richard Roe. Thi law of inheritance itself did not altogether escape the touch of the innovator. The deluge did not follow The House of Lords exists. The Church flourishes Had these measures failed, had they even produces great though temporary inconvenience, were we in consolable for the loss of the solemn mummery o fictitious actions, we might hesitate to make anothe perilous experiment. But these measures were splendidly successful. There probably has never been a statute which has won higher praise for its technics perfection, and that too from critics not wont to praison highly, than the Act which abolished fines an< recoveries. It did its work with little friction. I was skilful and it was bold. Are we to believe that similar skill and boldness are not now at the command of law reformers ? This surely is not the case. The work might be done, and done well, were there ; demand for it. But such a demand must nowaday: be a popular demand. We trust it may soon be made It did not seem unreasonable to hope that a Con servative Ministry might have given us this reform for it is a Conservative reform, one, that is, which ha; no tendency to benefit one class at the expense o others. But now, it seems, we must wait for the Liberals; may they soon come and deliver us from this heir-at-law. The war against him and his works

let it be well understood, must be a war of extermination. There should be no compromise, for this simple reason, that any compromise must leave us with two systems of property law instead of one. The details of the campaign it may be impossible to foresee, but of*the general plan there should be no doubt; it must leave us with one system of property law, and one only. This is what a civilized jurisprudence requires, and here, as always, scientific jurisprudence is on the side of convenience and common sense. What is inconvenient in fact is anomalous in law. A system of law logical but inconvenient may perhaps be imagined, but it cannot be realised ; it must fall into confusion so soon as it is applied in practice. First one exception is admitted, then another, then chaos. The converse is true; make law convenient and you make it scientific. Contemplate, therefore, this reform from what point of view you will, from that of the jurist, from that of the farmer, from that of the landowner, from that of the plain man of sense, it is seen a necessary indispensable reform.

This heir-at-law must know that the time of his departure is at hand. His doom was long ago pronounced. It was foreseen by the dramatist who determined that the epilogue to *The Heir-at-Law* should be spoken by Dr Pangloss, L L . D . and A.S.S. It was foreseen even more clearly by Bentham, when he said in the pages of this *Review* that the heir-at-law must be "abandoned to the Society of Antiquaries[1]." This is his doom, "abandoned to the Society of

[1] **" Commentary on Mr Humphrey's Real Property Code,"** ***Westminster Review,*** **No. xii. Reprinted in Bentham's** ***Works,*** **Vol. v., p. 387. See p. 405, comment on the word " heirs."**

Antiquaries" ; yes, with all his rights, privileges, and appurtenances. Or if our antiquaries will not have him as a gift, if there is in England no Pangloss who will receive him with an apt quotation, we will hand him over to the tender mercies of *Gradualisten* and *Parentelisten,* who shall write monographs upon him until the end of time.

THE LAWS OF WALES.—THE KINDRED AND THE BLOOD FEUD[1].

THE Ancient Laws and Institutes of Wales, of which Mr Aneurin Owen now many years ago published an edition and an English translation for the Record Commissioners[2] have hardly hitherto received, even in the Principality, the attention which is their due. Englishmen having at one time somewhat too greedily devoured Welsh myths are now wont to mistrust any information contained in a Welsh document, and thus an indiscriminating credulity has given birth to an indiscriminating scepticism. There seems really very little ground for doubt that the bulk of Mr Owen's three codes, Venedotian, Dimetian, and Gwentian, was at one time law in Wales, or at least was thought to be law. This qualification we add because it is very apparent that a large part of these masses of rules is neither law made by any "sovereign one or many" (to use Austin's phrase), nor yet "judge-made" law, nor yet again a mere record of popular customs. It is lawyer-made law, glossators' law, text-writers' law. That the kernel of the mass is a real old code compiled by Howel the Good about the year 928 is more than

[1] *Law Magazine and Review,* August, 1881.

[2] *Ancient Laws and Institutes of Wales,* 1841. I use the octavo edition, which I believe agrees in all points with the folio.

probable[1]. But our documents do not profess to give us the code, the whole code, and nothing but the code. By comparing the several versions which Mr Owen assigns to Gwynedd (North Wales), Dyfed (South West Wales), and Gwent (Monmouth), we soon come to the conclusion that they have been made at different times, in different parts of the country, and that the makers thereof have held themselves free to gloss, to rearrange, and to introduce new matter. The relation of these versions to the real ancient code is probably much the same as that of the compilations which bear the names of Edward the Confessor, William the Conqueror, and Henry the First, to the codes and statutes of Cnut and his West-Saxon predecessors. Between the Norman Conquest and the reign of Henry the Second, there lies a time in which it must have seemed likely that the future of the law of England was committed to glossators and text-writers. This period was brought to a close by Henry's vigorous legislation. But in Wales there was no one to issue assises or constitutions. Much as the later Welsh lawyers must have added to their ancient code, they hardly ever refer to any subsequent legislation. Only fitfully, now and again, were the Welsh people united under one chieftain, and then for the purpose of war, while even in each separate kingdom or principality the king or prince can have had but small legislative power. The care of the laws belonged not to kings or princes, but to lawyers. It was for them to explain, and in explaining to develope

[1] **Haddan and Stubbs, *Councils and Ecclesiastical Documents*, vol. 1., p. 211.**

the ancient law. In this there is nothing strange. The really strange thing is that during the period of English history which ends with the Conquest, we hear so very little of "law-men," so very much of real legislation[1]. For this we have to thank the energetic line of West-Saxon Kings and very possibly the influence of the Frank Empire. In Wales, where no great family succeeded in gaining a permanent, unquestioned, irresistible supremacy, there arose a special class of men learned in the laws, a class quite comparable to that of the German and Scandinavian "law-men," and the Irish "Brehons," and it is not unworthy of note that the one great Welsh law-giving King, Howel the Good, whose code was universally regarded as the very core of Welsh law, was himself a tributary of the English AEthelstan.

From what has been said it will be easily understood that the materials provided by the Ancient Laws and Institutes of Wales should only be used with the greatest caution. They are of very uncertain date; even the dates of the MSS. (and they are numerous) from whence they are taken have not yet been assigned with much accuracy. Again, though in the main they are far more consistent than we might expect, it is sometimes very difficult, or perhaps impossible to harmonise them even when they touch on matters of considerable importance. Clearly the first qualification which should be required of any one who would

[1] **Curiously enough one of the few passages in the Anglo-Saxon authorities which mentions " law-men " is a provision for the administration of justice between Englishmen and Welshmen, the " ordinance respecting the Dunsetas."**

deal with these materials thoroughly and scientifically must be a very competent knowledge of the Welsh language, its dialects and its history, and the second must be a large acquaintance with other old systems of law, for it is at once apparent that this mass of Welsh rules has many and strong resemblances to other masses of ancient law, and in such other masses a sound criticism would find many of its best weapons. But even to one who boasts no such equipment, and who is wholly dependent on Mr Owen's English version, there are certain things fairly clear and very interesting in these documents, and such an one now submits to his readers a brief account of what seems to him a very noticeable part of the system described in the Welsh laws[1].

A fact which at once strikes us is that very great importance is attached to nationality. The pure-blooded Welshman has many privileges which he does not share with any foreigner, or with any one who is tainted by foreign blood. We constantly read of aliens and foreigners, and seemingly a considerable part of the population was, or was deemed to be, of alien descent. But with scarce an exception the alien is a villein ; not indeed a slave or bondsman, for below these alien villeins there is a yet lower class of real slaves, whom the Welsh lawyers constantly compare to the beasts that perish and lie unavenged ; but still the alien is unfree, is a villein, and the very word *villein* has made its way into Wales. In all respects

[1] **I cite the three Codes as Ven., Dim., and Gwent., respectively by Book, Chapter, and Section, and the remaining tracts as Bk. iv., v., etc., here again giving Chapter and Section.**

he is on a lower level than the pure-blooded Welshman. How strict are the notions entertained concerning purity of blood may be seen from the provisions which permit the alien, whose ancestors have for several generations been settled in Wales, to become a true Welshman. According indeed to one authority, but one which seems open to suspicion or worse, no less than nine generations are requisite to purge out the stain of foreign blood, and thus a period of nearly three centuries may elapse before a true Welshman is born of a foreign stock[1]. This is probably exaggeration, but more trustworthy authorities agree that long settlement in Wales is necessary, the number of generations requisite being apparently three[2].

On hardly any point is there so striking a difference between the Welsh laws and the earliest English laws that have come down to us. In England, to all appearance, law very rapidly became territorial, and he was a West-Saxon who lived in Wessex. It may well be that for some time after the Teutonic invasion, Jutes, Angles and Saxons thought of their laws as the laws of their race, not of their territory. In Ine's code the Welshman, even when no slave, is clearly not on a level with the West-Saxon[3]. He has a smaller *wer,* probably an altogether inferior status. But Ine's code belongs to the seventh century, and there must have been many Welshmen in his dominions who had be-

[1] Bk. xiii. 2, §.66, 67. This thirteenth book seems to me the least trustworthy of all the authorities, and such I understand is the opinion of better judges.

[2] **Bk. v. 2, § 123, 126, 144.**

[8] Ine 23, 24, 32, 33, 46. (I cite the Anglo-Saxon Laws from the second edition of Schmid's *Gesetze.)*

come his subjects not by birth but by conquest. No such distinction appears in our next code, that of Alfred, and from that time onwards the laws hardly mention the Wealh[1], though a large portion of the population of the south-western counties must have been of British descent, and must have spoken a Celtic tongue. So again after the Danish invasions, "the Danes' law" seems to have rapidly become territorial, and indeed the phrase became the name of a territory[2]. Nowhere do we hear anything of the strange system of "personal law," as it is called, or of tribal or national law as we might better call it, which prevailed on the Continent and which allowed the Frank to carry about with him his Salic or Ripuarian law into Saxony or into Lombardy or wherever he might go. Probably what distinguished England from the Continent was this: that on the mainland there was one system of law utterly different from the customs of any of the German tribes, the Roman law. The Church was deeply interested in its preservation, and the clergy secured from their conquerors and converts the privilege of retaining their old law. This made a nucleus, round which an elaborate system of "personal law" arose, each man keeping wherever he

[1] AEthelstan, vi. 6. Athelred, II. 6.

[2] It still, I imagine, gives its name to the Hundred of *Dacorum* in the County of Hertford. This means the Danes' hundred, for our ancestors thought it classical to call the Danes, *Daci.* This hundred perhaps got its name as being the only district south-west of the Watling Street, which was under the Danes' law. That law we are told extended to the Watling Street *and eight miles further.* This would nearly include the hundred in question. *{Leges Edwardi Confessoris** 30 (27).)

might be the law to which he was born. In England, Roman institutions perished, and the British Church gained no hold over the invaders. But be the explanation what it may, the Danes' law rapidly became the law, not of men of Scandinavian descent, but of Eastern and Northern England. Even the Norman Conquest, deeply as it affected the history of our law, placed no new nation alongside of the English. The privileges which belonged to Normans as Normans were very few. At last we find the Common Law of England so utterly careless concerning purity of blood that it holds every man an Englishman if born in the English king's dominions, an alien if born elsewhere. Very different is this from the Welsh law with its excessive care for pure Welsh nationality.

To refer this difference to an ultimate difference in national character would be rather easy than satisfying. Before so doing we should remember that the English conquest of Western Britain must have done much to make the Welsh law the law of a race not of a territory, and to keep alive the memory of pure Cymric descent The Welsh had an outstanding claim to the whole of Britain, and to no narrower territory could their law attach itself. In the struggle against English invasion they became an exclusive people.

The same causes which made for the preservation of a national as opposed to a territorial ideal of the state, must have aided the retention in Wales, down to the very last days of Welsh law, of an organisation of society for legal purposes by kindreds and families. No one will now be surprised to find traces of a time when the kindred or clan and not the individual was

the true unit of the legal system. But in Wales, so long as Welsh lawyers continued to write about Welsh law, that time had not wholly passed away. The kindred or clan was, to use a phrase but little too technical, a corporation having rights and duties in its corporate capacity, not indeed a corporation created by law, but one which the law must recognise. The constitution of these kindreds and their corporate rights and duties are a matter well deserving of observation, and we may be pardoned for speaking of them at some length.

The kindred *(cenedl)* must have normally been a body of considerable size, for fifty of its full grown male members were often required to act in common, and in some cases even three hundred. It is a body of kinsmen tracing their descent from a common ancestor, and there are some signs of a theory that all these kinsmen are distant from the common ancestor by at least three generations. A family of aliens is not a kindred until at least a certain number (some say nine) generations have passed away. One curious passage suggests that, according to the current notion, this is the way in which all kindreds have been formed[1]. After aliens have remained in the country for the due time a Welshman is born, and he becomes the head of the kindred, and he is not in law called the son of his father being rather his father's father in the law[2].

The relationship between the members of a kindred was normally a real blood relationship, but we read of nine methods "by which strangers can become relations[3]." Each of these consists of some great service

[1] Bk. v. 2, § 144. [2] Bk. xiii. 2, § 66, 67. [3] Bk. x. 2.

done to a kindred, espousing its cause in a blood feud, or the like, and the benefactor thereby becomes a member of the clan which he has benefited. There are other passages which show that similar legal fictions were not unknown. The lord who takes by escheat becomes the son of the dead man[1], and as already said a man may be his own father's father. But normally the bond of union was blood relationship, and that agnatic. The bond of kindred was closely connected with the possession of land, and though there is some slight conflict between our various authorities, it seems perfectly plain that according to the oldest law, and the law which prevailed in Gwynedd down to the time of Edward the First, no woman could *in any case* inherit land[2]. In three quite exceptional cases she could transmit to her sons a right to inherit her father's land along with her brothers. It is constantly assumed that it is the duty of a woman's kinsmen to give her in marriage where her sons may obtain a paternal inheritance. If they fail in this duty her sons will inherit through their mother. If a Welshwoman be given in marriage to an alien, if she be given as a hostage into a foreign land and there marry, if she suffer rape by an alien, her sons will inherit with their maternal uncles and be members of their mother's kin[3]. These (with

[1] *E.g.)* Ven. II 6, § 28.

[2] The Bishop and Chapter of St Asaph, stating their grievances against Liywelyn (A.D. 1276), say, "Mulieribus et si alii heredes deficiant, jus successionis hereditarie immo denegat Set hoc consuetudo patrie est." This admission seems conclusive. See also the Statute of Rhuddlan, and Ven. 11. 15, § 1.

Ven. 11. 15, § 1-4. The same rules with slight variations occur in many other passages.

one other to be hereafter mentioned) are the exceptional cases, and in all others it is through males and only through males that relationship is traced.

A man therefore belongs not to many kindreds, but to one kindred, namely, that to which his father belongs. But it is a very noticeable fact that marriage did not in Wales, any more than in England, take a woman out of her own kindred and transfer her to that of the husband. Here we can only notice this fact, hoping to return thereto at a more convenient season. However, plain it is that in Wales, as in England, the wife remained a member of her own kindred[1]. But though, as already said, a child normally belongs to his father's kin, there are exceptions to this rule. Owing to the somewhat loose notions of marriage and legitimacy which prevailed in Wales, it was not always easy to determine who a child's father was. Apparently the son even of a common prostitute[2] is not a child without a father. If the mother can affiliate him he becomes a member of his father's clan. If the attempt to affiliate him be unsuccessful (and no more than one attempt is ever allowed), he becomes a member, and seemingly a perfectly legitimate member of his mother's clan. For him, as for the most lawfully begotten of children, a *wergild* (or *galanas)* is payable, and there being no father's kindred a greater share than usual is paid to the maternal relatives[3]. If the man on whom a child is fathered be living, he may free himself by solemn oath[4]. If he be dead then the matter rests with his

[1] Legg. Henr. Primi 70, § 12, and Schmid, Anhang vi. § 7.
[2] "A woman of bush and brake," Gwent. 11. 39, § 40.
[3] Ven. II 3it § 7, 8. [4] *ibid.,* § 4-

kindred. Here we see the clan and its chieftain in full activity and get a glimpse of the organisation. The chief with six of the clan may go to the church and there by oath repudiate the child, and seven other members must swear that the oath is pure. If there be no chief, the men of Gwynedd require the oaths of twenty-one kinsmen, while in Powys and Dyfed there must be fifty swearers. Provision, however, is made to prevent the denial being given by those whose interest conflicts with their duty. Those with whom the child would be entitled to share the paternal inheritance are disqualified to repudiate him. Until solemnly repudiated the child is "a son by sufferance,' and the clan must pay if he commits manslaughter, but have no claim if he be slain, having as it were the burden but not the benefit of being related to him[1]. A solemn and impressive form of adoption is provided. The chief and six of the best men may acknowledge the child. The chief takes the child's hands within his own and kisses it, then places its hands within those of the oldest of the other men, who kisses it, "and so from hand to hand until the last man." If there be no chief, the ceremony is performed by twenty-one (according to others, fifty) of the clan's best men[2].

Over the clan there presides a chieftain *(pencenedl).* Concerning the title by which he holds his power, the more trustworthy sources give us but little and that negative information. It is not a hereditary title. "A son is not to be chief of kindred after the father

[1] **Bk. v. i, § 7. Bk. v. 2, § 82.**

[2] **Ven. 11. 31. Dim. 11. 8, § 30. Gwent. 11. 39, § 40. Bk. x. 7,** § 4. Bk. XIII. 2, § 120.

in succession, for chief of kindredship is during life[1]." From this we may infer that though not deemed hereditary, such it was tending to become; and this is probable, for from the same source we learn that the nobility of the chief extended to the members of his family, their *galanas,* or as the English would have said *wer,* being greater than that of the mere non-noble free man[2]. Less trustworthy authorities are richer in information. "A chief of kindred is to be the oldest efficient man in the kindred to the ninth descent[3]." How far this requirement was actually fulfilled in practice we cannot say, nor is it impossible that age was reckoned in some artificial manner which represented the members of an older line as themselves older than members of younger branches, for by such means a transition may have been made to that hereditary transmission of the office against which the law expressly provides.

The chiefs position is one of honour and privilege. In the Welsh laws, as in other ancient systems, every man has his price, the price which must be paid for him in case he be slain. In Wales this price is called *galanas,* and like the *wergild* of the Teutonic nations, it fixes a man's station in society[4]. Now the *galanas* of the chief is according to the Venedotian Code, "nine score and nine kine once augmented[5]," Con-

[1] Gwent. 11. 40, § 10. [2] Gwent. ll. 5, § 11. Dim. 11. 17, § 23.

[3] Bk. xiii. 2, § 88.

[4] The same word *galnes* or *galnys* occurs in the old Scotch *Regiam Majestatem.* {*Acts of Parliament of Scotland,* pp. 273, 276, 300.) Seemingly it means *murder, slaughter.*

[6] Ven. iii. 1, § 27.

cerning the phrase "once augmented" we can only here say that it seems to mean that the sum named is to be increased by one-third of itself. The chiefs value therefore is 252 kine. He is thus ranked on a level with the highest of the king's servants or officers of state, the steward, the chancellor, and the chief huntsman. The value of the mere Welsh free man according to the same system is 63 kine[1]. In the other codes the difference between the chief and the free man is still greater, the life of the one being apparently nine times as valuable as that of the other[2]. In short, no one is more honourable than the chief of a clan, save only the king, queen, heir apparent to the throne, and the chief of the royal household, for even the king has his price in Wales, as in England and in Scotland.

Many other payments are regulated by the amount of a man's *galanas,* for instance, his *saraad* or honour price, the sum he receives if insult be done him, the *ebediew,* relief or heriot payable on his death, the *amobyr* or fine for leave to marry his daughter, and the *cowyll* or morning-gift and *agxveddi* or dower to be provided by her husband. Thus his *galanas* fixes a man's general status, just as in England many legal consequences depend on the amount of a man's *wer.* Judging by this standard, the chiefs position is honourable and exalted. He enjoys other privileges and immunities. He receives *galanas* for the death of a kinsman, but does not pay[3]. He is entitled to twenty-

[1] **Ven. iii. 1, § 31.**

*** Dim. 11. 17, § 21, 27. Gwent. 11. 5, § 9, 15.**

[3] **Gwent. 11. 39, § 14.**

four pence from every youth admitted to the kindred, and to twenty-four pence from every kinsman who places a woman under his protection[1]. To slay him is among the gravest crimes[2]. In all matters which concern the clan he takes the lead, and if in "counselling" a kinsman he has recourse to a blow, that blow may not be redressed[3].

Thus much we have on good authority. The Triads of Dynwal, to which we refer with very much less confidence, ascribe to the chieftain vast political and constitutional importance. For instance, it is by a chief of kindred that an assembly may be convoked for the deposition of an unjust king[4]. These Triads bring out very strongly the theory, doubtless the old traditional theory, that the Welsh nation is constituted, not of individuals, but of kindreds each under its own chief. But they are poetic and vague, and probably in their present form of little value as evidence of fact, though of much value as evidence of ideals and aspirations. They leave the impression that the kindred for many purposes, both civil and constitutional, acts as a body, being in some sort represented by its chief. Also the chief has large though rather indefinite powers in the internal government of the kindred and the direction of its affairs. "Every one of the kindred is to be a man and a kin to him, and his word is paramount to the word of every one of the kindred[5]." "Three things, if possessed by a man, make him fit to be a chief of kindred; that he should speak on behalf of his kin and be listened to;

[1] **Ven. n. 19, § 1, 2.**

[2] **Dim. IL 8, § 8.**

[3] Dim. IL 8, § 20.

[4] Bk. XIII 2, § 62.

[6] ***ibid.*, § 165.**

that he should fight on behalf of his kin and be feared; and that he should be security on behalf of his kin and be accepted[1]" "It is the duty of every man of the kindred to listen to him, and for him to listen to his man[2]." We are told more definitely that he is entitled to maintenance from the ploughs of the kindred[3]. He also has the privilege of imprisonment, whatever that may mean[4]. He is assisted by a council of seven elders, also by a "representative" of the kindred, and by one who bears the ominous title of "the avenger[5]." The avenger punishes evil doers and leads the kindred to battle. This must imply important duties, for it is as a corporation capable of making private war that the kindred retains its chief importance in Welsh law. The "representative" must we are told be a learned man. It is for him to act as the chiefs deputy, and we must regard him as the kindred's peace-maker, negotiator, and man of business. To the existence of the council of seven elders, the avenger, and the representative there is testimony in the "codes," but hardly anything is there said of their qualifications, rights, or duties[6].

Though there is some evidence that the kindred as a corporate body is still capable of possessing property, it is chiefly in the sphere of criminal law, or what we should consider the sphere of criminal law, that it finds scope for its corporate activity. The whole subject of Welsh criminal law is well deserving of examination, but here it is only necessary to premise a brief explanation, and one which will hardly surprise those who are

[1] Bk. xiii. 2, § 163. [2] *ibid.*, § 88. [3] *ibid.*, § 131.
[4] *ibid., § 133.* [5] ibid, § 88, 162.
[6] Gwent. 11. 39, § 38, 55. Dim, 11. 8, § 8.

acquainted with other ancient systems of law. The Welsh laws in some cases inflict real punishments. Most frequently these are fines or mulcts payable to the king or lord, but mutilation and death are occasionally though rarely denounced. There is a real penal or criminal law. But this does not extend to what we are wont to think the gravest of all crimes. It does not extend to homicide. Neither manslaughter nor what we call murder was, strictly speaking, a crime at all. It was a legal justification for a blood feud, which feud might be composed by the payment of the slain man's worth or *galanas,* a payment of just the same nature as the werg*ild* of our own old laws. Criminal or penal law, the law which does not extort reparation but punishes, seems to have followed the same course of development in Wales as in England. It is seriously doubtful whether at any time before the Norman conquest homicide, unless it was accompanied by some foul and diabolic dealing which made it *morth,* was punished in this country by anything beyond a pecuniary mulct, while it is certain that the punishment of death had long been freely applied in cases of theft and even of petty theft[1]. There is some discrepancy between the various Welsh authorities as to the limits within which the blood feud is permissible. According to one version of the Venedotian code the slain man's kindred may only revenge his death on the person of the slayer[2]. Apparently, therefore, in North Wales

[1] As to what constituted *Morth,* see Schmid, *Gesetze,* Glossar.

[2] " No one is to be killed on account of another but a murderer... For if the kindred disown the murderer, there is no claim upon them." Ven. in. 1, note, § 19. Compare Laws of Edmund.

that step towards the abolition of the feud had been taken which in England was taken by King Edmund, In this case we are able to test the value of the Welsh authorities by appeal to a very trustworthy source, Edward the First issued a commission to examine witnesses from North Wales touching their laws[1], and one of these gave evidence of just such a limitation of the blood feud as marks the Venedotian code and ascribed it to David ap Llywelyn, apparently the prince of that name who died in 1246[2]. In the other codes there is certainly no such limitation. An act of homicide if not duly paid for within the appointed time is still a signal for private war of kindred against kindred. That the revenge was not originally restricted to the person of the slayer should be clearly understood, for only thus can we understand the composition for homicide whether it be called *wergild* or *galanas.* The slayer's kindred must pay the money, not because they are bound to help a kinsman out of a difficulty, but

[1] **Printed by Wotton in an Appendix to *Leges Wallicae.***

[2] **The passage is curious :—" Ithel ab Philippi juratus dicit idem in omnibus cum Kenewrek prejurato, adjiciens quod Princeps potest pro voluntate sua leges corrigere et in melius reformare, exemplificando de David ab Lewel. avo Principis nunc, qui delevit per se et consilium suum le Glanas per totam Northwalliam. Videbatur sibi et consilio suo quod culpa suos debeat tenere auctores delinquentes, et non alios, qui nichil deliquerint, quod aliter fieri consuebat colligendo Glanas, etc." *{Wotton,* p. 524). Apparently Edward's commissioners did not understand this, for some one has written in the margin of the Roll, "Inquirendum quid sit Lex Glanas. Examinandum de emend. Legis." We, however, have no difficulty in catching the drift of the remark. According to Ithel, David freed the kin from the feud because he thought it unjust that the innocent should suffer for the guilty, "quod fieri consuebat."**

because they themselves and every of them are liable to the revenge of the slain man's clan. With the money, *wergild* or *galanas*, they purchase not their relatives' peace, but their own. On the payment of the *galanas* within due time, what may fairly be called a treaty of peace is concluded. Three hundred men of the offended kindred swear that the slayer is forgiven, and everlasting concord and perpetual amnesty are established[1].

Now first we must notice that though a man properly belongs to one kindred only, namely, that of his father, he is by no means a stranger to his mother's clan. If he slay or be slain, not only his paternal but also his maternal kin are involved in the feud. Seemingly it is thought that his mother's kin have only one-third share in him. They pay or receive a smaller part of the *galanas*, the greater part being paid or received by the father's kinsfolk. It is well worthy of note, that of this rule which is firmly established in Wales, we have evidence from England also[2]. Thus there are four kindreds involved in each feud, and apparently the maternal kin on the one side is at war with the maternal on the other, the paternal with the paternal. At least, paternal kin pay to paternal, maternal to maternal; and paternal swear peace to paternal, maternal to maternal.

When we pass to more minute rules, we find that these were evidently the subject of many differences of opinion. We are told what "some say" and "others hold," and one Welsh lawyer frankly confesses that

[1] **Ven. iii. 1, § 16.**

[2] Legg. Henr. Prim. 75, § 8, 9, 10. Supported by Alfred, 27.

"the sharing of *galanas"* is one of "the three complexities of the law[1]." However, even on this dangerous ground, we may take a few steps.

In the first place we must distinguish from the *galanas* another payment, namely, the *saraad.* Whenever a person is subjected to any injury or disgrace, *saraad* is done to him, and must be paid for. Just as every man has a certain price which must be paid if he be slain, so he has a certain *saraad* or, as we may term it, "honour price," which must be paid if he be insulted[2]. The latter price varies with the former. Thus, if a man's *galanas* be three score and three kine, his *saraad* is three kine and three score pence, the one being determined by the other. Similar instances of prices for minor injuries, dependent on the amount of the injured person's *wergild* are to be found in the old English laws. Now, if a man be slain, *saraad* is done him, and must be paid for. But *saraad* and *galanas* spring from different notions. The *galanas* is payable (as in the English *wer)* for very much less than *murder.* It is payable seemingly for every voluntary homicide; it is payable even in cases where a modern coroner's jury would be inclined to refer death to misadventure, or to the Act of God. *Saraad,* on the other hand, is payable only for injury wilfully inflicted. The difference is brought out thus: If an idiot slay a man, the idiot's kindred must pay *galanas,* but they need not pay *saraad"*[3] and such also is the case where the slayer

[1] **Bk. x. 7, § 27.**

[2] ***Saraad* seemingly means disgrace. I borrow the phrase " honour price " from the translation of the Irish laws.**

[3] **Bk. iv. 1, § 2, 4.**

is an infant[1]. To occasion *saraad* there must be bad will; but nothing of the sort is necessary to give rise to *galanas.* But ordinarily, where there is homicide, both payments must be made. Now *saraad* is paid both by and to a narrower class of relations than that which pays and receives *galanas.* One-third is paid to the slain man's widow if he leaves one and the rest is divided among his near relations. Authorities differ as to how near the relations must be who claim the *saraad.* One names only father, mother, brothers and sisters[2] (whom we may call *the household)* ; another names brothers, first cousins and second cousins[3] (whom, for reasons which cannot be here given, we may call *the inheriting family),* while others, perhaps describing the practice of a later date, after deducting the widow's third mix the rest of the *saraad* with the *galanas*[4]. So again the *saraad* is paid by a narrower circle of relations than those who pay *galanas.* Generally, indeed, the books speak as if the offender pays the whole *saraad,* but it seems that at least in case of his insolvency his kinsmen to the distance of second cousins are liable[8].

Now here again is a curious likeness to old English law. The payment of the bulk of the *wergild* was preceded in England by the payment of a sum to the nearest relatives of the slain. This was the *heals fang* ; in the Latin versions "*apprehensio colli"* the taking of the neck. *"Heals-fang* belongs to the children,

[1] Bk. vi. 1, § 17.

[2] Dim. 11.1, § 14, 16. (In the last of these passages *saraad* in the English version seems a mistake for *galanas.)*

[8] Ven. in. i, § 19. [4] *ibid.,* note, § 22.

[5] Gwent. 11. 8, § 10. Ven. iii. 1, § 19.

brothers, and paternal uncles; that money belongs to no kinsman, except to those within the joint (*binnan cneowe)*[1]." Our older commentators supposed that *heals-fang* had something to do with the pillory. But Dr Schmid has ingeniously suggested that it is connected with a mode of representing the degrees of relationship by reference to the various limbs of the human body which was well known among the Germans[2]. It is the portion taken by those who "stand in the neck," those who are within the joint *(binnan cneowe);* more distant relations "elbow cousins," " nail cousins," and the like have no share. However, there are many differences between the *heals-fang* and the *saraad,* and we by no means intend to suggest that the resemblance between Welsh and English law is due to any survival of British customs in England, or to any influence of English upon Welsh law.

The *saraad* being paid, it remains to pay the *galanas,* which is of considerably greater amount and importance. Some light on its distribution is thrown by the strange number which the Welsh took as the unit of *galanas.* When these laws were written, the use of money, at least as a means of reckoning, had become common ; but the *galanas,* an old traditional payment, is always expressed in terms of cattle. The unit of *galanas,* if we may so speak, the worth of a mere free man, is "three score and three kine," more noble persons being valued at " six score and six," or

[1] Schmid, Anhang VII. (In the Record edition this is printed at the end of the laws of Edward and Guthrum.)

[2] Schmid, Glossar. *Heals-fang.* Grimm, *Deutsche Rechts Alterthilmer,* pp. 468-470.

"nine score and nine." Now the number 63 is not only the product of two very sacred numbers, 7 and 9, but it is also the sum of the geometrical series 1 + 2 + 4 to six places. Six persons or classes of persons can pay 63 cows, the first person or class paying one cow, the second twice as much, the third twice as much again, and so forth. Apparently it was this property of the number which gave it a place in the *galanas* system.

So far as we can see the burden of paying *galanas* was borne thus[1]:—Divide the whole sum by three; one of the three parts falls on the slayer and his nearest relations, whom we will call his household. Of this the slayer himself pays one-third, his father and mother one-third, his brothers and sisters one-third, the father paying twice as much as the mother, and a brother twice as much as a sister. The remaining two-thirds of the whole sum are again divided by three, two-thirds falling on the paternal, one-third on the maternal kindred. Of each kindred, six classes of relations pay, the first class paying twice as much as the second, and so on. It will be seen that if the total sum be sixty-three, the class which pays least must provide the third of a cow; while if the full *galanas* be "nine score and nine," the class which pays least is liable for just one cow.

The mode of computing the degrees of relationship

[1] The passages most in point are, Ven. in. i, and the version in the notes to that chapter, Dim. II I, Gwent. ii. 8, Bk. iv. 3, Bk. x, 3. The account in the text is compiled from these, and is not exactly borne out by any one of them. The discrepancies, however, seem due rather to imperfections of statement than to any difference of principle.

seems to be "parentelic," that is to say, my father and all his issue constitute a class or *parentela,* but these, since they take the household's third, are not one of the six. The first of the six consists of my grandfather and his issue, other than my father and his issue ; the second consists of my great-grandfather and his issue, other than my grandfather and his issue. Thus a sixth cousin is in the last class which pays or receives *galanas.* A mode of reckoning somewhat similar to this was apparently prevalent in England also[1], and indeed is still involved in our law of inheritance, which exhausts my father's issue before it passes to the next *parentela*[2].

The right to receive *galanas* is governed by much the same rules. There are, however, differences. In the first place, the lord at the time of which these laws speak takes one-third of the whole for his trouble in exacting payment. Then, again, the slain man of course receives nothing, and, consequently, the household's share is somewhat differently distributed. But the most curious point is that a woman pays but does not receive *galanas.* The notion seems to be that she pays as representing her infant, or yet unborn children ; for a woman who is past child-bearing, or will swear that she will never have children, is exempt, and if she have children of full age she is absolved by their payment[3].

[1] Schmid, Glossar., *Cneow.*

[2] But there are many difficulties about the Welsh reckoning which I cannot pretend to have solved. Vent. II. i, § 12. Dim. II I, § 17-29. Gwent. IL 8, § 1-7. Bk. iv. 3. It is, however, much more intelligible than the Irish.

[8] Ven. III. 1, § 21-23. Ven. II I, § 64.

In cases where she pays she is only liable for one-half of a man's share[1].

Apparently each class of relatives is liable to pay or entitled to receive the whole sum allotted to it, however few or many be the members of the class. Beyond the relatives bound to pay *galanas* stand yet remoter kinsmen who, if the sum cannot be otherwise raised, are bound to contribute a "spear penny," and can only escape by swearing that they" are of no kin to the slayer[2]. But all these rules are probably only rules apportioning the burden as between various members of the kindred. If the whole sum be not paid then there is war between the kindreds, even though certain members of the offending clan have been ready with their contribution—such at least must have been the old rule, though, doubtless, it was mitigated in course of time.

We have already noticed the resemblance to English law in the distribution of the burden and benefit of the composition between paternal and maternal kin in the proportion of two to one. A division of the *wer* into three parts, one of which is paid by the household, one by the father's and one by the mother's kin, is found in the *Lex Salica,"* There is, however, little to be gathered from the so-called *Leges Barbarorum* concerning the mode of distributing the *wer,* and not much more to be gathered from the Anglo-Saxon authorities. Owing to the power in one case of the Frank Empire, in the other of the West-

[1] Ven. 11. 1, § 64. Dim. ll. i , § 16. [2] Ven. III. i , § 13.

[8] *Lex Sa/.—De* composit. homicid. (Hessel's and Kern's ed., 388-396).

Saxon house, the old w*er-gild* system rapidly gave way before a system of punishment, and it is to the extreme north of Europe that we must look for any body of rules so complicated as the Welsh. The Scandinavian lawmen seem to have delighted as did the Welsh in elaborating the scheme, and anyone who will turn to Wilda's *Strafrecht der Germanen* will find a parallel for nearly every Welsh rule in some authority Icelandic, Norwegian, Swedish or Danish[1]. For instance, in the East Gothlanders' law, as in the English, as in the Welsh, the paternal kindred pay twice as much as the maternal, while (and this is very remarkable) the West Gothlanders' law has the rule that six classes of relations pay, each paying twice as much as the one which is one degree more distant[2].

It is plain that since every manslaughter involved four kindreds in the feud, some nice questions might arise from the mutual interference of family obligations. A man might be called on to support his mother's kin in a feud against his father's kin. Such a case is actually provided for, and in the strangest fashion. If a man slay another of his own kindred he has to pay to the kindred the *galanas* of the slain, and in this case he alone is liable, for the kindred cannot pay to itself[:I]. He also forfeits his patrimony, and doubtless the law

[1] W. E. Wilda, *Strafrecht der Germanen,* p. 372 f. It seems to me that many, if not most of the writer's conclusions concerning the early stages in the development of criminal law, though derived entirely from Teutonic sources, hold good also as to Welsh law. It is much to be regretted that of early Scotch law we have but the merest fragments, and at present it is hardly safe for any but an Irish scholar to speak of Irish law.

[8] Wilda, p. 379. [:i] Gwent. 11. 37, § 2.

affords him but little protection against the justice more or less irregular of a domestic forum ; but lawfully he may not be slain " since the living kin is not killed for the sake of the dead kin[1]." Now if a man in avenging the death of a maternal relation kill one of his own kindred and thereby forfeit his patrimony, he is to be allowed an inheritance from his maternal grandfather'. Perhaps there is no more striking example of the queer mixture of barbarism and logic which characterises these Welsh laws. One of the few exceptional cases in which a woman can transmit inheritance to her son is where that son is a murderer.

Even long after the English had finally mastered Wales, and when there could no longer be any talk of the blood feud as a legal mode of redress, the payment and receipt of*galanas* continued. In the same way in England, long after Edmund's legislation and long after the Norman conquest, we hear of men paying and receiving the *wer-gild.* Among the Welsh authorities there is a book of precedents for pleaders, seemingly of as late date as the reign of Edward the Fourth. This contains " a plaint of *galanas"* " This is the plaint of John, son of Madog, &c, on account of there being two parts on behalf of the father, and the third on behalf of the mother of John, son of David, to whom came Maredudd, son of Phylip, and caused death to that said John." It then states with good and sufficient pleader's verbiage how Maredudd dealt with the said John, making "an unjust and public attack through wrath and anger, and animosity, and surrep-

[1] Gwent. 11. 39, § 54.
Dim. 11. 8, § 21. Gwent. II. 39, § 1. Bk. IX. 30, § 1.

tion, and disrespect, to the lord, and to the dominion, and to the kindred." It demands the payment of three marks, the worth of a free privileged *uchehvr* (gentleman). It is addressed to "the governors," for "the law has not apportioned to the lord a share in the worth of anyone, but by causing the inquiring party [the plaintiff] to obtain the whole[1]."

One more testimony to the endurance of the blood feud shall be given, and this from an unimpeachable source, namely, the English Statute Book. First we must notice that if a man be charged with slaying another and wish to deny the accusation, he can do so. The Welsh law, like other old systems, recognizes compurgation as the usual mode of trial, or rather of defence, in criminal cases. The number of compurgators required is very large, far larger than any of which we hear in England or on the Continent. In the case of homicide, the number of men who help the accused in "making his law" is no less than three hundred, and they must be men of his kindred. "The oaths of three hundred men of a kindred are required to deny murder, blood, and wound, and the killing of a person," and therefore, the law adds, the same number of oaths is required when *galanas* is paid and peace thereupon sworn. Now a Statute of the year 1413 (1 Henry V., c. 5), refers to the then late rebellion in Wales and complains that the Welshmen are still taking revenge for the deaths of their kinsmen against the king's faithful lieges, and some of such lieges they keep in prison until they have paid ransom, or until they have purged themselves of the death of the said rebels so slain

[1] **Bk,** XII. **II.**

as aforesaid, "par un assach[1] selonc la custume de Galles, cest a dire par le serement de ccc hommes." The fact is that the Welshmen had been acting according to their notions of law and requiring three hundred compurgators. This is not the only instance in which our Statute Book bears out the testimony of the Welsh laws, but here, at least for a time, we must take leave of the Kindred and the Blood Feud.

[1] *Asacfu* An oath, a troth. Pughe's *Welsh Dictionary.*

THE CRIMINAL LIABILITY OF THE HUNDRED[1].

THE practice of making a district answerable for crimes committed by its inhabitants, or of making a group of men answerable for crimes committed by a member of the group was at one time thought to be of vast antiquity. The institution which the Norman lawyers called frank-pledge, and which has lately, perhaps for the last time, found mention in our statute book, was regarded as much older than the Norman Conquest, and indeed as one of those institutions which might safely be ascribed to King Alfred or to primitive man according to the taste of the ascriber. Recent investigations however have thrown doubt, or more than doubt, on its claims to so long a pedigree. Professor Stubbs speaks of it thus[2]:—

"This institution, of which there is no definite trace before the Norman Conquest, is based on a principle akin to that of the law which directs every landless man to have a lord who shall answer for his appearance in the courts of law. That measure, which was enacted by Athelstan[3], was enlarged by a law of Edgar[4], who required that every man should have a

[1] *Law Magazine and Review,* 1881-2. [2] *Const Hist.*, § 41.
[3] Athelstan, II. 2. [4] Edgar, III. 6; iv. 3.

surety who should be bound to produce him in case of litigation, and answer for him if he were not forthcoming. A law of Canute[1] re-enacts this direction, in close juxta-position with another police order ; namely, that every man shall be in a hundred and in a tithing; where the reference is probably to the obligation of the hundred and the tithing to pursue and do justice on the thief. The laws of Edward the Confessor, a compilation of supposed Anglo-Saxon customs issued in the twelfth century, contain a clause on which the later practice of frank-pledge is founded, but which seems to originate in the confusion of these two clauses of the law of Canute/'

Having given the substance of this well-known clause, well-known because it is the foundation of all that was written touching frank-pledge from Bracton's day onwards, Professor Stubbs thus sums up the evidence:—" There is no trace of any similar institution on the Continent, or even in England, earlier than the middle of the twelfth century, although, as has been said, it would not be strange to the legislation of the Conqueror." Not strange to the legislation of the Conqueror because not unlike the law ascribed to him fining the hundred in which a Frenchman was found murdered.

It would be rash to dispute, nor have I any intention of disputing the sentence thus pronounced, a sentence which bears the authority not only of the great historian from whose book it has been cited, but the authority of almost all those who in these days have been at pains to search out the origin of the

[1] Canute, n. 20.

curious institution in question. But there is evidence, and that of a very remarkable kind, in favour of the supposition that even before the Conquest the practice of fining a district for the offences of its inhabitants obtained at least in one part of England, and so far as I am aware that evidence has never yet received the notice that it deserves. It does not explain the frank-pledge in its later shape, the shape which it bears in Bracton's treatise, but unless it be the outcome of some mistake, it does show that the common responsibility of a group of men for the crimes committed by one of their number was an idea familiar in England before William of Normandy landed upon our shore.

In the first place we must refer to Doomsday Book. As is well known there are scattered about in this great rent roll some brief notices of English criminal law. We are told what are the *forisfacturce* which the king enjoys in this and that county, in other words, what according to local custom are the pleas of the crown, criminal justice being from the royal point of view a source of income. We know from Canute's code[1] that the number of these pleas which were considered as inalienable rights of the crown was very limited; but still there were certain crimes, which (save where some more than ordinary franchise had been granted) brought profit to the king himself. Among these was breach of the king's special peace or protection *(grith* or *mund),* not a mere breach of the general peace *[frith)* which existed at all times and in all places, but a breach of the peculiar peace which surrounded the kings person and dwelling, or had

[1] Canute, 11. 12-15.

been granted by his letters of safe-conduct, or in some other manner specially proclaimed. Now the brief notices in Doomsday of these *placita cor once* are for the more part so thoroughly in harmony with all that we know of the native English law, that they seem trustworthy evidence of that law even when other authority fails us. But concerning breach of the king's special peace they tell us what is very remarkable, and it may be well to repeat their substance at some length.

Berkshire[1].—Ifany one kills a man who has the king's peace, he forfeits to the king his body and all his substance,

Oxfordshire[1]. — If any one breaks the peace given by the king's hand or seal, by slaying the man to whom the peace is given, his life and members are at the king's mercy.

Worcestershire[3].—In this county if any one knowingly breaks the peace which the king gives with his hand, he is deemed outlaw ; but the peace of the king when given by the sheriff, if any one breaks this, he pays 100 shillings.

Hereford[4].—The king has in his demesne three forfeitures, breach of the peace, hamsocn (house-breaking), and forsteal (ambush); whoever commits one of these crimes pays 100 shillings to the king, whosesoever man he may be.

[1] 1. 56 *b.* It is much to be regretted that concerning a large and important part of England (Sussex, Surrey, Hants, etc.), no information is given us.

[2] **1. 154 I).** [3] **1. 172.** [4] **1. 179.**

from some old English documents which have not come down to us. That the Latin version is a translation made from the French, seems to me, after a minute examination of the two texts, indubitable, while I believe it to be the opinion of philologists that the French version, though undoubtedly it has suffered at the hands of copyists, can in substance hardly be of later date than the twelfth century[1]. Be that as it may, we are there- told that if in the Mercian law any one breaks the king's peace, the fine is 100 shillings, but in the Daneslaw the fine is £144. We are not told who pays this fine, we are only told its amount. That amount is simply enormous if the fine be set on the individual peace breaker, and wholly out of proportion to the general criminal tariff set forth in this very document. It would be easy to change pounds into shillings, but how can we do this with Doomsday before our eyes ? The agreement with the great survey is exact, for £144 is just what will be paid if 18 hundreds pay *£8* apiece.

Turn we next to the code bearing the Confessor's name, which professedly states the report of those jurors from whom William demanded a summary of the English laws[3]. This is the work which Professor Stubbs in the passage above cited describes as "a

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[2] C. 12. [3] Leges Edwardi Confessoris.

compilation of supposed Anglo-Saxon customs issued in the twelfth century," and the issue of which there is some reason for attributing to Glanvill. It is, at least in its present form, a queer untrustworthy patchwork, but good evidence of what the twelfth century thought about the eleventh. Now this contains much to our purpose. In the first place the writer enumerates the various solemn peaces[1]. The peace of the king is manifold. There is the peace given by his hand, the peace of his coronation days, the peace of the great church feasts, the peace of the king's highways. Then as to the punishment of him who breaks the king's peace. " Qui scienter fregerit earn, x. et viii. hundreda in Danelaga, et corpus suum in misericordia regis.[1]' This enigmatical sentence would not of itself give us much information. But the writer after an interval returns to this matter[2], again enumerates the great peaces and says that they all have one and the same sanction. " Verbi gratia, in Danelaga per xviii. hundreda, qui numerus complet septies xx. Hbras et iiii.; forisfacturam enim hundredi Dani et Norwicenses (al. Norguenses)[3] vocabant viii. libras." His meaning is becoming clear. In the Daneslaw the fine of a hundred is £8, and this multiplied by 18, since in some way 18 hundreds are involved, gives £144. He then explains how out of each £& the king has £5, the earl of the county *£2 10s.*, the tithing-man (decanus) the remainder.

[1] C. 12. [2] C 27 (25).

[3] Stubbs, Preface to *Havederis Chronicle* (Rolls Series), vol. IL, p. xlvii. The writer, who has theories of nationality, means men of Norway, not men of Norwich.

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[3] Stubbs, Preface to *Hoveden's Chronicle* (Rolls Series), vol. n., p. xlvii. The writer, who has theories of nationality, means men of Norway, not men of Norwich.

The mention of the tithing-man (decanus), who in one version is raised to a deanery[1], sets the writer off on the subject of frank-pledge. But again he returns to his hundreds-. Yorkshire[3], Lincolnshire, Nottinghamshire, Leicestershire, Northamptonshire and to the Watling Street and eight miles beyond the Watling Street, are, he says, "sub lege Anglorum," but doubtless he means "sub lege Danorum," and what others call a hundred these counties call a wapentake[4]. Then follows an etymological excursus, and then[5] "Erat eciam lex Danorum, Northfolc, Suthfolc, Cantebrugescire, que habebat in emendationem forisfacturae ubi supradicti comitatus habebant xviii. hundreda, isti x. et dimidium. Et hoc affinitate Saxonum, quia tunc temporis major emendacio forisfactune Saxonum erat quater xx. lib. et ini." This seems to mean that while in York, Lincoln, etc., 18 hundreds at *£8* make up £144, in Norfolk, Suffolk, and Cambridge, 10½ hundreds make up £84. This difference between the two parts of the Daneslaw is in some way due to the neighbourhood of the three last named counties to the

[1] *Decanus episcopi*: the whole document seems full of the interpolations of would-be expositors.

[2] C. 30 (27). [3] A better reading than Warwickshire.

[4] I think that every one who has said anything of this passage has pointed out that "Anglorum" should be "Danorum," and this is made still plainer by the MS. spoken of by Stubbs, Preface to Hoveden *(loe. cit.)*, where the following clause runs "and what the English *(Angli* for *alii)* call a hundred, these counties call a wapentake." In the *Law Magazine and Review* (No. CCXLL p. 348), I have suggested that the eight miles beyond Watling Street was meant to include the hundred "Dacorum" in Hertfordshire.

[5] C. *33 (30).*

"Saxones" among whom the greater *forisfactura* is

Before going further it will be well to notice that the *Leges Henrici Primi,* another twelfth century compilation, though they over and over again make mention of breach of the king's special peace and its punishment, have nothing whatever to say about those enormously heavy fines. The crime is either one for which no pecuniary composition will be accepted, or is paid for by a fine of 100 shillings. This, taken along with our other evidence, may dispose us to believe that the practice of fining the district did not obtain throughout England, and in this context it is worthy of remark that the writer of the treatise which has gotten the name *Leges Henrici* ascribed some kind of super-eminence to the laws of Wessex[1]. It will have been observed that all our evidence concerning these large fines comes only from the Danized part of England. The exception to this, if exception it be, is the vague and obscure reference in the *Leges Edivardi* to the " Saxones " who lived near Norfolk and Suffolk,

Now from what has been already said we seem entitled to draw this inference, namely, that the makers of the Doomsday survey believed that it then was, and that the lawyers of the next century believed that it then was, or at least had been, the law of some part of England, that when the king's hand-given peace was broken, a fine should be imposed upon a large district, consisting of 18, *12,* or perhaps 10½ hundreds, each

[1] He more than once says that Wessex is " caput regni et regum " (70, § 1 ; 87, § 5), a phrase which is applied to London in one version of the Confessor's Laws,

hundred paying £8. What was the origin of this law? That it was enacted by the Conqueror at some time between the conquest and the survey seems incredible. That surely was not the time when a difference between Mercia and the Daneslaw arose, when the custom of Cambridge became other than the custom of Nottingham. Two suppositions are open to us, either that these rules were older than the Conquest, or that they never existed save in the minds of Norman lawyers who mistook a payment of hundreds of coins for a payment by territorial districts called hundreds.

There is, so far as I know, but one passage in any of the old English laws directly bearing on the subject It is necessary therefore to consider "the laws which King Ethelred and his Witan have decreed at Wantage, as frith-bot[1]." It has generally been considered that despite the fact that the ordinance in question was seemingly made at Wantage in Berkshire, it was nevertheless intended in some special manner for the Danized part of England. In favour of this conclusion are the mention of "the five burghs" (which can hardly be other than the five Danish towns, Derby, Nottingham, Leicester, Stamford, and Lincoln), and the computation of all sums of money Danish fashion in half-marks and ores, instead of English fashion in shillings. Now taking Thorpe's translation, what we are told is this :—The king's grith (his special peace) is to stand as it formerly stood. The grith which he gives with his own hand is to be *bot-tess,* that is to say, a breach thereof is a crime not to be atoned for by any money payment. For the

[1] **Ethelred, 111,**

grith which the ealdorman and the king's reeve give in the assembly of the five burghs, *hot* may be made *with twelve hundred* (bete man thset mid xii. hund.). For the grith which is given in a burgh assembly, *dot* may be made *with six hundred.* For that which is given in a wapentake, *dot* may be made *with a hundred.* For that which is given in an alehouse, *dot* may be made, for a dead man with 6 half-marks, for a live man with *12* ores.

Now doubtless the natural interpretation, and as I suppose the only interpretation that the Anglo-Saxon text will bear, is that the twelve hundred, six hundred, and hundred here spoken of are coins. It is a little strange that the quality of these coins should not be mentioned, for such an omission is, to say the least, very rare in the Anglo-Saxon laws, but in this very document there is a passage[1] in which a person is directed to deposit "a hundred," the kind of the coins not being stated, and I believe that reckoning by hundreds without naming coins was a common Scandinavian, though not an English practice. Still no one can consider this Wantage ordinance side by side with the customs reported in Doomsday and the *Leges Edwardi* without believing that there is some connection between them. They are almost exactly *in pari materia.* It is true that according to Ethelred's law there seems to be no fine when the peace broken is that given by the king's own hand, while it is just in this case that according to the later authorities the 18 hundreds are fined. On the other hand, it is far from impossible that between the date of the Wantage

[1] C. 7.

assembly and the Norman Conquest the severity of the law had been mitigated, and this bot-less crime had become one for which in some cases a composition might be taken[1]. Besides, if we are right in our construction of the customs in Doomsday Book and in the twelfth century compilations, the heavy fines there spoken of have nothing to do with the fate of the criminal. They are not paid by him but by his neighbours. It may be, therefore, that under Ethelred's law (which expressly declares itself to be merely declaratory), as there was a hundred fine, a six hundred fine, a twelve hundred fine, so also there was an eighteen hundred fine.

While therefore admitting that the hundreds mentioned in the Wantage ordinance are hundreds of coins, one is still tempted to believe that more is implied in the law than is expressed. The fine for breaking the peace given in a wapentake is a hundred, and what is the wapentake but a hundred or the assembly of a hundred? May it not be that in naming the amount of the fine, we also name the district upon which it is imposed? This ordinance relates, apparently, to the king's own peace proclaimed in and comprising a local assembly. When the ealdorman and king's reeve have proclaimed the king's peace in the assembly of the five burghs, an assembly representing a large district, if that peace be broken the whole district is fined. So with the wapentake, the assembly of a single hundred, if the king's peace proclaimed therein be

[1] Under Ethelred and Canute a reaction seems to have set in against the severe penal laws of their predecessors: Ethelred, v. 3; vi. 10; Canute, ll. *2*.

broken, the whole hundred is fined ; so even with the alehouse, probably the meeting places of township or tithing, for which in later days the vestry was substituted. It may, indeed, be difficult to imagine on what occasions the king's peace would be proclaimed in so humble an assembly, still there may have been occasions when the king's reeve had to transact business with the township.

Some such explanation as this is made the more probable when we attempt to determine what were the coins of which the "hundred" or several "hundreds' consisted. A breach of the peace proclaimed in the alehouse, or assembly of the tithing, is paid for by 12 ores. If, however, a man has been slain, the fine is doubled, and becomes 6 half-marks. Now if the fine for a wapentake's peace be a hundred ores this will fall in with the theory that the wapentake consists of ten tithings, for it is by no means improbable that the hundred here mentioned is the so-called "long hundred " of 120[1]. At any rate, there is no other coin so probable as the ore. The wapentake's peace is thus reckoned at " one hundred " ores, the peace of a burgh assembly at " six hundred" ores, the peace of the assembly of the five burghs at " twelve hundred " ores. For peace given by the king's own hand no composition is provided ; but, as already said, the supposition that for the breach of this also a fine is required from the district is not excluded by the declaration that the

[1] " **If, as is generally believed,** the **Anglo-Saxon** hundred was the **long** one of six-score, the tithing ought to have contained twelve, and Fleta speaks of the frank-pledges as *dozeins"*—(Stubbs, *Const. Hist.*, § 41, note, p. 86.)

crime is (for the criminal) *bot-less.* Might we suppose that this fine was 18 " hundreds," that is 18 x 120 ores, we should neatly arrive at our sum of £144, for though the better opinion seems to be that the Danish ore was usually deemed equal to but fifteen pence, yet there is direct authority in Ethelred's laws for reckoning it at sixteen pence[1]. This result is arrived at by a perilous series of suppositions, nor is any stress laid upon the exact correspondence of figures. It is, however, necessary to notice that the largest fine mentioned in the Wantage ordinance is, if the hundreds be hundreds of ores (and that they must be so seems clear from the relation of the fine in the case of the wapentake to the fine in the case of the alehouse), a fine not merely great but enormous. At the very least twelve hundred ores are £75 and they may be £96. I believe that no other law contained in the Anglo-Saxon collection or in the Norman compilations exacts a fine to the king amounting to one-tenth part of this sum. The heaviest of such fines or mulcts is I believe *£5,* and the difference between *£5* and *£75* is (the word must be repeated) enormous. What has just been said should be qualified by the statement that the murder fine was 46 marks, but the murder fine was a fine laid on a district not on an individual, and even this did not amount to one-half of *£75.* Now considering the comparatively small fines which were exacted even in the very worst cases, the conclusion seems inevitable that if the twelve hundred of Ethelred's law mean twelve hundred ores, the fine is imposed not on the criminal but on the district, and that district

[1] Schmid, *Gesetze,* Glossar, v. *Geld-Rechnung.*

a large one. If they be not ores what are they? Twelve ores (sometimes 24) are demanded when the peace given in an alehouse is broken, and from this we clearly have an ascending scale, one hundred, six hundred, twelve hundred

Probably therefore the Doomsday surveyors were not in the wrong when they said that in the Danized counties a breach of the king's peace was paid for by a number of hundreds, each paying *£8.* Mistakes about numbers they may have made, but there was some substantial truth at the bottom of their statements. It may seem very strange to us that so large a territory as 12 or 18 hundreds should be fined for a crime, but the *Leges Hetirici* speak of the impleading of a whole county, or of several hundreds[1]. There is, too, a series of entries in the Pipe Roll of the 31st of Henry I[2] which seems to tell *of* a very large fine "pro pace fracta" imposed on a part of Cambridgeshire. The fine is paid in part by the great landowners, in part by the sheriff on behalf of the men of this, that, and the other township, and though we cannot say with certainty that all these entries were occasioned by one and the same crime, still they follow each other in immediate succession.

The importance of the evidence to which attention has been asked is not small, and I hope that it may come into the hands of explorers more competent than myself. Its importance is not small, because even if this fine for breach of the king's peace stood quite by itself it would be a very noticeable fact in the history

[1] Leg. Hen. Prim. 48, § 2 "Si totus comitatus, vel vii. hundreta super aliquibus implacitentur." [2] p. 45.

of our criminal law. But it does not stand by itself, for if once established, it might be brought into connection with those two most remarkable institutions, the frank-pledge and the murder fine. As regards the former, it certainly throws no light on the much debated relation of the territorial tithing to the personal frank-pledge, or group of ten or a dozen sureties, but it may suggest that the tithing which was fined if the peace proclaimed in its alehouse was broken, may have been a responsible unit in the police system for other purposes also. As to the murder fine it may suggest that neither of the two rival stories about its origin contains the whole truth, neither the story now generally accepted that William introduced it as a protection for his French followers, nor the story which Blackstone took from Bracton and Bracton from the *Leges Edwardi* that the English Witan introduced it at Canute's request as a protection for his Danes. If in the Daneslaw it was the practice to fine a hundred or several hundreds for breach of the king's peace, it may also have been the practice to fine the hundred within whose bounds was found the body of a murdered foreigner, a foreigner to whom the king was "a protector and a kinsman[1]." Lastly, it may suggest that the twelfth century writers who spoke of England as divided between three laws, Danish, Mercian, West-Saxon, had more reason for insisting on this theory than they get credit for with most of their readers, and that there really were very great and very important diversities of local custom of which they tell us nothing expressly.

[1] Ethelred, vin. 33; Canute, 11. 40 ; Leg. Hen. Prim. 75, § 6, 7.

MR HERBERT SPENCER'S THEORY OF SOCIETY[1].

1. THE IDEAL STATE.

WHEN in 1879 Mr Herbert Spencer published his *Data of Ethics* in advance of the second and third volumes of his *Principles of Sociology,* he gave as reasons for thus departing from his philosophic programme his fear lest he should not be able to reach in its proper order the last part of the task which he had marked out for himself, and his unwillingness to leave altogether unfulfilled the purpose which ever since 1842, when he wrote his letters on *The Proper Sphere of Government,* had been his " ultimate purpose lying behind all proximate purposes,'[3] that, namely, of " finding for the principles of right and wrong in conduct at large a scientific basis"." All his many readers are glad in thinking that hitherto this fear has proved groundless, and now that *Ceremonial Institutions* and *Political Institutions* have been investigated, we may hope for the completion of that work on Morality of which the *Data of Ethics* forms but the introductory part. It may seem, therefore, that the present is not a well-chosen moment in which to criticise Mr Spencer's

[1] *Mind,* 1883. [2] *Data of Ethics,* Preface.

ethical principles and method as apparent in his already published works, but it may possibly add to the interest with which we shall read any book or books that he may have in store for us if in the meantime we consider what he has led us to expect.

Not the least interesting fact about Mr Spencer's conception of Ethics is that its chief outlines have remained unaltered for at least thirty years. While he has been maturing an idea of evolution of which but faint glimpses were granted to us in 1851, two cardinal doctrines have been undisturbed from first to last, or rather after every expedition into the material, moral or social world he has returned to his original theme with new faith, new proofs and illustrations. Scientific Ethics must still begin with a study of the relations which will exist between men in that ideal state of society to which we are tending. A law of equal liberty is still the main law, perhaps the only knowable law of those relations. Mr Spencer has indeed cautioned us[1] that *Social Statics* "must not be taken as a literal expression of his present views," and has given us certain more definite warnings concerning the qualifications with which it should be read, warnings to which it is hoped that due regard will be paid in what here follows ; still Mr Spencer " adheres to the leading principles set forth" in his early work, has found new arguments for them in his *Data of Ethics*, and has applied and defended them in many another book and essay. It would seem, therefore, to be our own fault if we fail to understand the general nature of

[1] *Social Statics*, Preface to American edition of 1864, adopted in Preface to stereotyped edition of 1868.

that undertaking which lies before him in the last part of his task.

Out of the many passages in which Mr Spencer has stated his general doctrine of ethical method, the following may be chosen as one of the most concise :—

"One who has followed the general argument thus far, will not deny that an ideal social being* may be conceived as so constituted that his spontaneous activities are congruous with the conditions imposed by the social environment formed by other such beings. In many places, and in various ways, I have argued that conformably with the laws of evolution in general, and conformably with the laws of organisation in particular, there has been, and is, in progress an adaptation of humanity to the social state, changing it in the direction of such an ideal congruity. And the corollary before drawn and here repeated, is that the ultimate man is one in whom this process has gone so far as to produce a correspondence between all the promptings of his nature and all the requirements of his life as carried on in society. If so, it is a necessary implication that there exists an ideal code of conduct formulating the behaviour of the completely adapted man in the completely evolved society. Such a code is that here called Absolute Ethics as distinguished from Relative Ethics—a code the injunctions of which are alone to be considered as absolutely right in contrast with those that are relatively right or least wrong ; and which, as a system of ideal conduct, is to serve as a standard for our guidance in solving, as well as we can, the problems of real conduct[1]."

[1] *Data of Ethics*', § 105.

Absolute Ethics stands to Relative Ethics, or Moral Therapeutics, in somewhat the same relation as that in which Physiology stands to Pathology[1]. We must have a science of social and moral health, before we can have a science or an art which shall deal with social and moral disease. And moral health implies social health; the perfect man cannot exist in an imperfect society, nor the fully evolved man in a partially evolved society. To make any progress in ethical science we must conceive a " perfect," " normal," "ideal," "fully evolved" society. In the comparison thus instituted between Relative Ethics and Pathology, one who has had no "preparation in Biology" may fancy he detects some confusion between immaturity and disease, but it will be better for him not to meddle or make with these comparisons. In the *Social Statics* the doctrine seems clear enough that, in so far as an existing society differs from society as it will ultimately be constituted, it is diseased[2]. Whether Mr Spencer would hold such language now may be doubted, but the theory that Absolute Ethics is a Physiology to which Relative Ethics is the corresponding Pathology is restated and defended in the *Data.*

Now Mr Spencer differs from some other promoters of ideal commonwealths in this, namely, in believing that the natural and normal course of human progress tends towards the realisation of his ideal. Not that he thinks all movement progress, for he points out that there has been in some instances positive retrogression. There are backwaters in the stream of history, not to speak of stagnant pools. There is social dissolution

[1] *Social Statics,* c. 1, § 3 ; *Data,* § 105. [2] Ch. 1, § 3.

as well as social evolution. Still social evolution is in some sense normal. There are always forces which are making for it, though they may be thwarted and neutralised. Indeed, it seems to be his present opinion that the ideal state contemplated by Absolute Ethics can never be quite attained, though we shall approach indefinitely or perhaps infinitely near to it, always provided that cosmic processes do not outrun the evolution of humanity, "reduce the substance of the earth to a gaseous state[1]" and end all things in the complete equilibration of universal and, it may be, eternal death'. I know of no formal proof that the ideal state contemplated by Absolute Ethics is necessarily beyond our attainment, but in *First Principles* this seems to be either assumed or implicitly proved both as to the balance between mankind and its environment and as to the balance between society and the individual. The former "can never indeed be absolutely reached," and the process which adapts individual to society and society to individual must go on until the balance between the antagonistic forces approaches "indefinitely near perfection[3]." Perhaps there is something in the doctrine of rhythm as conceived by Mr Spencer which forbids our hoping for more than this. At one time he took a more cheerful view, for we were told in *Social Statics* that all imperfection must disappear, that "the ultimate development of the ideal man is logically certain—as certain as any conclusion in which we place the most implicit faith; for instance, that all men will die." This Mr Spencer formally proved as follows:—"All im-

[1] *First Principles*, § 181. [2] *ibid.*, § 182. [3i] *ibid.*, § 175.

perfection is unfitness to the conditions of existence. This unfitness must consist either in having a faculty or faculties in excess ; or in having a faculty or faculties deficient; or in both. A faculty in excess is one which the conditions of existence do not afford full exercise to; and a faculty that is deficient is one from which the conditions of existence demand more than it can perform. But it is an essential principle of life that a faculty to which circumstances do not allow full exercise diminishes; and that a faculty on which circumstances make excessive demands increases. And so long as this excess and this deficiency continue, there must continue decrease on the one hand and growth on the other. Finally, all excess and all deficiency must disappear; that is, all unfitness must disappear ; that is, all imperfection must disappear[1]." Where Mr Spencer now finds the error in this plausible reasoning is not so plain as might be wished,—but certainly he is not now convinced by it.

In the *Data of Ethics* we are told that " however near to completeness the adaptation of human nature to the conditions of existence at large, physical and social, may become, it can never reach completeness[3]." And here what seem to be very serious limitations are set to the process of adaptation, so serious that the passage may perhaps betray some momentary "lack of faith in such further evolution of humanity as shall harmonise its nature with its conditions[3]". We learn that "in the private relations of men, opportunities for self-sacrifice prompted by sympathy, must ever in some degree, though eventually in a small degree, be

[1] *Social Statics,* c. 2, § 4. - *Data,* § 96. [3] *ibid..,* § 67.

afforded by accidents, diseases and misfortunes in general....Flood, fire and wreck must to the last yield at intervals opportunities for heroic acts[1]." Now poor unscientific Virgil painting his golden age got rid of the possibility of wreck by "cmnis feret omnia tellus," a suggestion which betrays a want of "preparation in Biology." Mr Spencer, though he certainly does not regard the enterprises of industrialism as "priscse vestigia fraudis," should, one would imagine, be ready to say that the fully evolved sailor, with body and mind perfectly adapted to all the rhythms of season and wind and wave, will think any talk of wreck no better than a pedantic allusion to the classics. But so long as we are subject to accidents, diseases and misfortunes in general, we have hardly come even "indefinitely near" the perfect state which allows no "scope for further mental culture and moral progress."

Were we here speculating as to the future of the human race it would become us to consider what are Mr Spencer's reasons for setting to progress bounds which it shall not pass, and also to ask whether, if mankind is always to fall so very far short of adaptation to its environment as to continue permanently subject to flood, fire and wreck, accidents, diseases and misfortunes in general, there must not to the very last be at times a very wide divergence between the desires and aims of the individual and those of his neighbours. So long as we have not discovered all truth discoverable by man, so long as there is scope for further mental culture, there may well be danger lest some new discovery or invention should throw the social

[1] *Data*, § 96.

machine out of gear and introduce discordant notes into the pre-established harmony.

But here we are dealing with the ideal of Absolute Ethics, the fully-adapted man, the fully-evolved society. Nor have we plausible pretext for grumbling if Mr Spencer will not allow us to be quite perfect. All tends towards the best in this only possible evolution. The life of man will be sociable, rich, nice, human, long, and not only long but broad. There will be the greatest totality of life, quantum of life being estimated " by multiplying its length into its breadth[1]." Industrialism will have supplanted militancy, the religion of enmity will be reconciled with the religion of amity, and egoism will lie down with altruism. Without further question, therefore, whether we are embarking under a Christopher Columbus who will make for a real concrete America hereafter to be peopled by an ingenious and thriving race, or under a Raphael Hythlodaye who steers for Utopia, we will suppose this ideal state made real and see what may be said of it.

In the first place, we must notice that in this state there will not be any right or wrong in our sense of the words; certainly no wrong in any sense at all, and with us right seems to imply possibility of wrong. The four sanctions of morality will have become useless, and their existence will perhaps be pronounced essentially unthinkable. No religious sanction, for no fear of the supernatural; no legal sanction, for no command of earthly superiors; no social sanction, for society will never be displeased; no internal sanction, for no war in our members, no lusting of the flesh against

[1] *Data*, §§ 4, 8.

the spirit, or the spirit against the flesh. If such words as *right, duty, ought* survive at all, they will survive as pretty archaisms of uncertain meaning. May not even the same be said of *liberty*; what meaning can it have when no one is ever tempted to interfere with his neighbour's desires? *Law* goes too, at least *law* in one of its meanings. When we say of these fully-evolved men that they will obey the law of equal liberty or any other law, we can only mean that they will obey in the sense in which matter is sometimes said to obey the law of gravity. In short, our ideal code is a code "formulating," not regulating, "the behaviour of the completely-adapted man in the completely-evolved society."

This, as I think, is Mr Spencer's view of the ideal state. In the most interesting chapter of his *Data*, he has sought to show that not only the external sanctions of morality, theological, legal, social, but also the internal or specifically moral sanction are the accompaniments of imperfect evolution[1]. As we become better and better adapted to our environment, self-coercion, like every other form of coercion, tends to disappear. We are brought to the "conclusion, which will be to most very startling, that the sense of duty or moral obligation is transitory, and will diminish as fast as moralisation increases." "Evidently, then," we are told, "with complete adaptation to the social state, that element in the moral consciousness which is expressed by the word obligation, will disappear[2]." This is just what we should expect: the notion of obligation or duty disappears. But here as well as

[1] *Data*, c. 7. [2] *ibid.*, § 46.

elsewhere Mr Spencer cannot be brought to say, perhaps would deny, that the ideal will ever be quite perfectly realised. " In their proper times and places and proportions, the moral sentiments will guide men just as spontaneously and adequately as now do the sensations. And though, joined with their regulating influence when this is called for, will exist latent ideas of the evils which nonconformity would bring, these will occupy the mind no more than do ideas of the evils of starvation at the time when a healthy appetite is being satisfied by a meal[1]."•.."With complete evolution, then, the sense of obligation, not ordinarily present in consciousness, will be awakened only on those extraordinary occasions that prompt breach of the laws otherwise spontaneously conformed to[2]" This, however, though for some reason or other it will be the last stage of human progress, is clearly not the ideal state, for further adaptation is conceivable. " Ideal congruity " is not yet realised. The ideal man must be adapted to " extraordinary occasions," as well as to ordinary occasions. The perfect man will never be prompted to break the law. The moral sentiments will lose their " regulating influence" over competing motives, and the "ideas of the evils which nonconformity would bring" having become latent must finally vanish. Whether absolute perfection be practically possible or no, whether or no there will always be some slight tremors and oscillations about the point of equilibrium, it must be with the perfectly-adapted man and the perfectly-adapted society that Absolute Ethics must deal. Obviously to accept as ideal any-

[1] *Data,* § 46. [2] *ibid,,* § 47.

thing short of absolute perfection would be to vitiate the whole procedure. "No conclusions can lay claim to absolute truth, but such as depend upon truths that are themselves absolute. Before there can be exactness in an inference, there must be exactness in the antecedent propositions. A geometrician requires that the straight lines with which he deals shall be veritably straight; and that his circles and ellipses and parabolas shall agree with precise definitions—shall perfectly and invariably answer to specified equations. If you put to him a question in which these conditions are not complied with, he tells you that it cannot be answered. So likewise is it with the philosophical moralist. He treats solely of the *straight* man. He determines the properties of the straight man; describes how the straight man comports himself; shows in what relationship he stands to other straight men; shows how a community of straight men is constituted. Any deviation from strict rectitude he is obliged wholly to ignore. It cannot be admitted into his premisses without vitiating all his conclusions. A problem in which a *crooked* man forms one of the elements is insoluble by him[1]." The geometrician is not to be put off with slightly crooked lines because they are the straightest that can be made, nor can the moralist accept as straight a man who is on "extraordinary occasions" prompted to break the moral law.

This should be well understood, for Mr Spencer not unfrequently sets before us a less remote ideal, a state through which we shall pass on the way to an ultimate goal, but not itself by any means the goal.

[1] *Social Statics*, c. i, § 3, cited and defended in *Data*, § 105.

There will be a time—we might call it the Silver Age—when society will still coerce the individual but only for a few purposes. There will still be laws in the lawyer's sense of the word, the individual will still be compelled to submit his will to the wills of others. But the sphere of political coercion will be much smaller than it at present is. To enforce the law of equal liberty, to protect life, limb, reputation, and property, to compel the performance of contracts, will still be the function of the state. Within this narrow sphere the coercive force will for a time be more active than it is at present. When Mr Huxley labelled Mr Spencer's political theory as "Administrative Nihilism[1]" the latter replied that what he desired was "Specialised Administration," and he has said that the phrase *laissez faire* does not fairly represent his opinions[2]. The state should give over meddling with many or most of those matters which are now thought proper subjects for coercive regulation and should concentrate its efforts on the provision of justice swift, cheap, foreknowable in accordance with the law of equal liberty. Political coercion should be specialised. Bentham himself has not spoken more strongly than Mr Spencer of the ills which flow from our law's delay, and Mr Spencer thinks that the remedy lies in concentrating upon the administration of justice those coercive governmental forces which are now dissipated in a thousand and one channels. But beyond this provisional paradise there lies the veritable land of promise. Perhaps the individual's "right to ignore the state" of which we read in *Social Statics*[3] will never

[1] ***Critiques and Addresses*, 1.** [2] ***Essays*, Third Series, v.** [3] **C. 19.**

be admitted as a right in our sense of the word, for the existence of a right seems to imply some probability or at least possibility of infringement, but the day will come when coercive co-operation will give way to voluntary co-operation, and no society will attempt to retain a member who wishes to be quit of it. Whether any particular type of voluntary society will be called a state, or a body politic, or the like, would seem to be a question barely about the future history of language, but membership of every social body will be terminable at the will of the member, whose will, however, cannot but be consonant with the will of each of his fellows.

It is necessary to state this clearly, for in his *Data of Ethics* Mr Spencer sometimes uses words which, if I have caught his meaning, might mislead an unwary reader. Thus a department of Ethics is marked off which "considering exclusively the effects of conduct on others, treats of the right regulation of it with a view to such effects[1]/' This division of Ethics comprises the field of Justice. We then read as follows :—" This division of Ethics, considered under its absolute form, has to define the equitable relations among perfect individuals who limit one another's spheres of action by co-existing, and who achieve their ends by co-operation. It has to do much more than this. Beyond justice between man and man, justice between each man and the aggregate of men has to be dealt with by it. The relations between the individual and the state, considered as representing all individuals, have to be deduced—an important and a relatively-difficult

[1] *Data,* § 109.

matter. What is the ethical warrant for governmental authority? To what ends may it be legitimately exercised? How far may it rightly be carried? Up to what point is the citizen bound to recognise the collective decisions of other citizens, and beyond what point may he properly refuse to obey them[1]?"

This passage certainly starts in the key of Absolute Ethics; we are "among perfect individuals"; but seemingly at the mention of the state it passes into some Relative mode. If we are still dealing with perfect individuals, and the questions which we are asked are "relatively-difficult," the other questions of Ethics must indeed be superlatively easy. What is the ethical warrant for governmental authority? None; for no perfect individual will coerce his equally perfect neighbour. As to obedience and disobedience, the only doubt is which of these two words is the more inappropriate when we speak of the relations between fully-evolved men. Of course, therefore, these questions are questions of Relative Ethics; one of the factors they involve is the infliction of pain, and of this Absolute Ethics has nothing to say. "The law of absolute right can take no cognisance of pain, save the cognisance implied by negation[2]".

Again, in the "prospects" which Mr Spencer takes at the end of each section of his *Sociology,* he seems to contemplate as the final condition of humanity a condition which neither he nor others would call absolutely perfect. Thus he raises the question—What is to be the ultimate political *rdgime*[3]?" He thinks that it will

[1] ***Data,* § 109.** [2] ***ibid.)* § 101.**
[3] ***Political Institutions,* § 577.**

not be the same in all communities, and then speculates as to the future of the British Constitution, and ends by saying that "neither these nor any other speculations concerning ultimate political forms can, however, be regarded as anything more than tentative." In the immediately preceding sentence he says that "municipal and kindred governments may be expected to exercise legislative and administrative powers subject to no greater control by the central government than is needful for the concord of the whole community." The age of ultimate political forms during which mayors and aldermen (in their ultimate form) exercise legislative powers under the control of the central government is not, I take it, the final epoch of equilibrium in which there will be no "scope for further mental culture and moral progress"; it is at best a penultimate age. So again, when "somewhat more definitely and with somewhat greater positiveness," Mr Spencer infers the political functions which will be carried on by those ultimate political structures, and predicts that citizens whose natures have through many generations of voluntary co-operation and accompanying regard for one another's claims, been moulded into the appropriate form, will entirely agree to maintain such political institutions as may continue needful, and then mentions among such institutions "the agency for adjudicating in complex cases where the equitable course is not manifest, and for such legislative and administrative purposes as may prove needful for effecting an equitable division of all natural advantages[1]"—when Mr Spencer speaks thus, he has not before him the ideal of Absolute

[1] ***Political Institutions,* § 579.**

Ethics, but some preparatory millenium during which adjudication and legislation will still be necessary. Adjudication implies conflict. So legislation also implies an imperfect adaptation of man to circumstances; for even if it be said that all the citizens will of their own free-will and without fear of punishment obey every law when made, the dilemma must yet be met: either the laws will bid them do only such things as they would have done if no laws had been made, or the laws will in some instances bid them do other things; in the former case the laws are futile; in the latter either the laws are pernicious, or the citizens are not yet perfect In the ultimate state there will be no place for command, place only for counsel or advice, for arguments which will convince the reason, not coerce the will of the citizen; and in this sense must be understood the saying that, "however great the degree of evolution reached by an industrial society, it cannot abolish the distinction between the superior and the inferior—the regulators and the regulated[1]." The final form of regulation is advice.

No one will blame Mr Spencer for failing in his *Political Institutions* to describe that ideal state which is the subject-matter of Absolute Ethics. But even when in the *Data* he is dealing expressly with Absolute Ethics he sometimes writes as though he had not firmly grasped this ideal state. As is well known, he classifies the duties of one individual towards other individuals thus: he first distinguishes Justice from Beneficence, and then divides Beneficence into Positive and Negative. This may be a sound classification in

[1] *Political Institutions*, § 578.

Moral Therapeutics, and conceivably, though in a somewhat non-natural sense, it may be applied to the conduct of the fully-evolved man in the fully-evolved society. Duty in our sense of the word there will be none, for every man will always do his duty. Still, conceivably we may be able to classify the social actions of fully-evolved men as just, positively beneficent, negatively beneficent. But then on one of the last pages of the *Data of Ethics* we are told that "under ideal circumstances" Negative Beneficence " has but a nominal existence." The reason given is as follows :—" In the conduct of the ideal man among ideal men, that self-regulation which has for its motive to avoid giving pain practically disappears. No one having feelings which prompt acts that disagreeably affect others, there can exist no code of restraints referring to this division of conduct[1]." Here Mr Spencer seems to be gliding into the opinion that Absolute Ethics is a code of restraints for ideal men in the ideal society. Let us be fair, then, and treat Justice in the same way as we treat Negative Beneficence. Under ideal conditions Justice also must have " but a nominal existence," whatever that may mean, for surely among ideal men the regulation, whether imposed on the individual by society or on a man by himself, which has for its object to prevent unjust action " practically," not to say theoretically, "disappears." No one is to have feelings which prompt acts that disagreeably affect others, and therefore surely there can exist no code of restraints which will coerce the ideal man into

[1] *Political Institutions*', § no.

justice. We must not play fast and loose with the conditions of our ideal state.

Mr Spencer, however, is not going to let Justice escape with a nominal existence, for is there not the law of equal liberty, and is not this law a law of Absolute Ethics? Very well, but that law is not an ideal code of restraints which are enforced by any forum, external or internal, against the ideal man, the promptings of whose nature are in perfect harmony with his environment It can only be a formula which states in general terms what will be the conduct, or some part of the conduct of ideal men towards each other. What shape, then, does this formula take?

Now I understand Mr Spencer to be still of opinion that the maxim of Justice is as follows:—Every man has the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man[1]. The maxim has a negative side:—No man may claim to exercise any liberty which is incompatible with the exercise of the like liberty by every other man. This maxim is perfectly intelligible when applied, as it is in *Social Statics*, to the actions of us imperfect men, though to the mode in which Mr Spencer applies it some objections might perhaps be taken. So applied it is a test whereby we may judge of the rightfulness of any law or other interference with the liberty of the individual. Every individual is to enjoy equal freedom. If I may be allowed the phrase, the *objective* freedom of one is to be the same as that of any other. A law does not sin against this supreme rule merely because it is felt as more oppressive by one than by another.

[1] *Social Statics*, c 4, § 3; c. 6, § 1.

To respectable members of society a law against theft is no curtailment of *subjective* freedom, but there are disreputable members who do feel it to be a restraint on their liberty. The law, however, in this case allows to the vagabond the same sphere of objective freedom that it allows to the man who would never dream of taking his neighbour's goods. Such at least seems to be Mr Spencer's view, for he thinks that the maxim of equal liberty allows or even demands the existence of proprietary rights.

But now this maxim is to be transfigured into a formula expressing the conduct of ideal men. How can this be done? Mr Spencer is not of the number of those who believe that in the Golden Age all men will be equal, in the sense that they will all be able to do and think and feel the same things. Quite the contrary: society becomes ever more heterogeneous, and in the ultimate form of society the limit of heterogeneity is reached. There will be more difference between the powers bodily and mental of the ultimate philosopher and the ultimate coal-heaver than there is between the powers of their present half-evolved antitypes. Men will neither do the same things nor be able to do the same things; the division of labour and the accompanying specialisation of abilities will have touched their utmost bounds. Not in this direction may we look for equality. But may it not be that though the activities of men will not be equal, yet they will enjoy equal spheres of action? Such language is perfectly intelligible when used of such men and such societies as at present exist; for when we say that a man is at liberty to do many things that he does

not want to do, for instance, that every man is free to construct a system of philosophy, or to speak his mind, or to buy whatever is offered for sale, we have before our minds the fact that there are many things which a man may wish to do, and which but for legal or social coercion he would do, but which he is restrained from doing by restraint which he feels as restraint. He is restrained because he is not in complete harmony with the environing society; there is not yet a "complete equilibrium between man's desires and the conduct necessitated by surrounding conditions." But when it has become impossible for any man to have any wish that society will not gladly see him fulfil, can it in any sense whatever be said of him that he is free to do anything save what he actually does? Such an assertion seems to me simply impossible. If ideal men were to be equal in all their faculties and capacities, then it would be possible to say that every one of them would have an equal sphere of action, but as they are to be unequal and yet are not to be prevented either by social pressure or by moral self-coercion from doing anything that they wish to do, their spheres of action, if that phrase be at all appropriate, will be unequal There can be no "freedom of speech" where no one is ever tempted to say anything that will give pain to his neighbour. There can be no "freedom of contract" where no one dreams of entering into any agreements save those which the whole society will admit to be advantageous to it and to every member of it. The inference that I draw from this is that Mr Spencer's ideal code, "formulating the behaviour of the completely-adapted man in the completely-evolved society,"

should have nothing to say about equal liberty, but meanwhile we must be on our guard, and when we ask for "a straight man" see that we get him.

Of course it may be true that, in a society such as our own, to enforce the law of equal liberty is the best means of hastening the advent of the happy time when man will be fully evolved and " true self-love and social be the same." Still, this is a matter which requires to be proved, and cannot be proved by the meaningless assertion that this law will be enforced in, or hold good of, a society fully evolved. For instance, if we be discussing freedom of speech, it is quite possible to maintain that perfect adaptation may most readily be produced rather by a rigorous suppression of all speech which can possibly give pain than by granting a wide liberty to those who have unfavourable opinions of their neighbours. This assertion may be very untrue ; still it cannot be met by saying that in the ideal state there will be unbounded liberty of speech, any more than it can be met by any other phrase that has no meaning.

Whether Mr Spencer still adheres to the " first principle " of *Social Statics*—the law of equal liberty—as an accurate and sufficient formula of Justice, is perhaps not quite certain, and since my own opinion is that from that formula it is impossible without a liberal use of quasi-legal fictions to deduce any code of conduct whatever, I would gladly believe in its abandonment. Still, it is quite plain that the Golden Age is to be the reign of Justice. Saturn returns to us and brings back the freedom of contract which our politicians have banished to his planet. Also, it is still

plain to Mr Spencer that Justice is (in some sense or other) Equality. For this identification he argues in his last work as in his first. Therefore I may be allowed to point out that the objection here taken to the law of equal liberty as a description of the relations which will exist between fully-evolved men applies also to any theory which finds equality in those relations. Society will be more heterogeneous than it is at present. There will be greater inequality between the faculties and capacities of different men than there is at present Every faculty, every capacity will be fully exercised and satisfied. Therefore men will not have equal spheres of action; for if every faculty be fully exercised its sphere of action will be completely filled by its action.

I can well understand, though not altogether agree with, Mr Spencer when in *Social Statics* he writes thus:—"This sphere of existence into which we are thrown not affording room for the unrestrained activity of all, and yet all possessing in virtue of their constitutions similar claims to such unrestrained activity, there is no course but to apportion out the unavoidable restraint equally. Wherefore we arrive at the general proposition, that every man may claim the fullest liberty to exercise his faculties compatible with the possession of the like liberty by every other man[1]," This is a piece of Relative Ethics, of Moral Pathology. The sphere of existence does not afford room for the unrestrained activity of all, because we are not yet fully adapted to our environment. But I cannot understand Mr Spencer when in the *Data* he writes

[1] ***Social Statics,* c. 4, § 3.**

thus :—" This division of Ethics " [the division which deals with Justice] "considered under its absolute form has to define the equitable relations among perfect individuals who limit one another's spheres of action by co-existing, and who achieve their ends by co-operation[1]," Of course the word *equitable* as here used does not imply that the relations among perfect individuals could possibly be other than they ought to be, that they could possibly be inequitable or iniquitous. But Mr Spencer certainly does mean that in some form or another equality ("equity or equalness[2]") is to be found in them. But how? Again, when it is said that these perfect individuals " limit one another's spheres of action by co-existing," these words must be used in a queer sense. There will be no coercion, no restraint, no pain inflicted by one on another, no " fear of the visible ruler, the invisible ruler, or of society at large," finally no self-coercion, for " that element of the moral consciousness which is expressed by the word obligation" will have disappeared. In short, a mans sphere of action will be limited only by his own spontaneous wishes and his physical constitution. There can be no talk of [4i] the sphere of existence into which we are *thrown* not affording room for the unrestrained activity of all"; for it is just the essence of the sphere of existence into which we shall have *grown* that it does give every one room to fulfil his every desire.

Immediately before the passage just quoted, which speaks of the department of Ethics concerned with Justice as having to define the equitable relations

[1] § 109. [2] *Data,* § 60.

among perfect individuals, we may read the following:—"Though having to recognise differences among individuals due to age, sex or other cause, we cannot regard the members of a society as absolutely equal, and therefore cannot deal with problems growing out of their relations with that precision which absolute equality might make possible; yet, considering them as approximately equal in virtue of their common human nature, and dealing with questions of equity on this supposition, we may reach conclusions of a sufficiently-definite kind[1]," I have quoted this passage because I may have spoken too hastily in saying that Mr Spencer is not of the number of those who believe that in the Golden Age all men will be equal. If, however, the words just cited describe the problems with which Absolute Ethics must deal, then he does seem to think for the moment that completely-adapted men in the completely-evolved society will be so much alike in their powers and wishes that Absolute Ethics may ignore the differences between them and yet obtain "conclusions of a sufficiently-definite kind." Sufficiently definite doubtless, but also one would think sufficiently untrue. Surely in this procedure our strictly scientific Ethics would be substituting the perfectly homogeneous for the superlatively heterogeneous, the least stable for the most stable, the crooked for the straight I do not think that this is really Mr Spencer's meaning; rather he is thinking not of what men will do but of what they will not be restrained from doing by legal or social pressure. But I can only repeat that such pressure, these men being

[1] ***Data*, § 109.**

completely-adapted men in a completely-evolved society, is out of the question.

Similar difficulties are occasioned by what is said concerning Positive Beneficence[1]. We have already seen that the ultimate state of man will still afford opportunities for self-sacrifice though these opportunities will be rare. Flood, fire and wreck, accidents, diseases and misfortunes in general, are to be ours to the last, and will give us now and then a chance for an heroic act. This may be the ultimate state, but seemingly it should not, cannot be the ideal state. The geometrician would not put up with a straight line which on " extra-ordinary occasions " fell into crookedness. Self-sacrifice implies crookedness somewhere. Either he who offers the sacrifice ought to feel it no sacrifice, or he for whose sake it is made ought not to need the sacrifice. It is, as I think, Mr Spencer's opinion that Absolute Ethics has no place for self-abnegation. This could hardly be otherwise. It will be so even in the relation of parent to child. The ideal parent will not be called on to give up any pleasure for the sake of the ideal child. In doing for the child all that the child wishes the parent will find pleasure. Whether the day will ever come when the promptings of an inherited ex-perience will teach the weaned child to leave your cockatrice alone, may perchance be doubted, but failing this adaptation of children to their environment, the adaptation of parents to children will probably insure as literal a fulfilment of prophecy as a judicious inter-preter should desire. But though self-sacrifice can have in Absolute Ethics no place at all, Mr Spencer

[1] *Data,)* §§ 96, no.

apparently thinks that there may be a place for Positive Beneficence, He says :—" Of positive beneficence under its absolute form nothing more specific can be said than that it must become co-extensive with whatever sphere remains for it; aiding to complete the life of each as a recipient of services and to exalt the life of each as a renderer of services. As with a developed humanity the desire for it by every one will so increase, and the sphere for exercise of it so decrease, as to involve an altruistic competition, analogous to the existing egoistic competition, it may be that Absolute Ethics will eventually include what we before called a higher equity, prescribing the mutual limitations of altruistic activities[1]." This last sentence has its difficulties, for an ideal code formulating the relations of perfect men begins to grow more perfect before our very eyes. It is perhaps to include eventually what it does not include now. Once more we must ask, whether perfect men will need, will be able to conceive, a code prescribing what they are to do, and placing them under an obligation to do it. And even this scheme of the higher equity which Absolute Ethics *may* eventually formulate is not apparently the ultimate state; it is not even the penultimate. For a time there may be an all too brisk competition among wealthy pleasure-hunters for the few remaining chances of an exquisite altruistic gratification, and the higher equity may be needed to prevent philanthropic jobbers from engrossing the occasions of beneficence or forming a "ring" to "corner" all those that are in misery and distress. But as adaptation goes on, the acceptance of

[1] *Data*, § no.

a benefit will become very rare, and "altruistic competition, first reaching a compromise under which each restrains himself from taking an undue share of altruistic satisfactions, eventually rises to a conciliation under which each takes care that others shall have their opportunities for altruistic satisfaction[1]." Eventually perhaps Absolute Ethics will formulate first the compromise and then the conciliation, and yet it would seem as if men would not be quite perfect, for this "taking care" implies some self-restraint, some sense of obligation. What then does Absolute Ethics say now about Positive Beneficence? The perfect man will by the same course of conduct secure both his own greatest happiness and the greatest happiness of all. "The moral conduct will be the natural conduct[2]," or rather morality will be a thing of the past. But we have excluded Negative Beneficence from our ideal code on the ground that "no one having any feelings which prompt acts that disagreeably affect others, there can exist no code of restraints referring to this division of conduct." Is there then to be even eventually and in the ideal state a code of restraints referring to the division of conduct called Positive Beneficence? If so, are men yet perfect in this ideal state? Seemingly beyond the higher equity there lies the compromise, and beyond the compromise the conciliation, and beyond the conciliation of each man with competing philanthropists must lie the conciliation of each man with himself. "That element in the moral consciousness which is expressed by the word obligation, will

[1] *Data,* § 97. [2] *ibid.)* § 47.

disappear," and the natural conduct will be—well it will be the natural conduct.

Possibly to a perception of this consequence we must attribute Mr Spencer's apparent reluctance to admit that the ideal of perfect adaptation can ever be reached. We must not have our "straight man" all too straight, or there will be no place for any theory of Justice or Equality. The seer must keep his telescope just a little dusty, in order that the outlook may not be too blank for intelligible description. The sinless innocence of the jelly-fish or the angel is not a good material whereof to fashion the citizens of an instructive model commonwealth, without some admixture of sinful human nature, and " latent ideas " of nonconformity. Whether this has weighed with Mr Spencer, or whether there is something in the doctrine of rhythmic motion that prevents our accepting really perfect social equilibrium even as an ideal, it is not for me to guess, but I think it clear that Mr Spencer should deal with Positive Beneficence and with Justice or Equality as he has already dealt with Negative Beneficence, and say that under ideal circumstances they can have only a nominal existence, which is, humanly speaking, no existence at all.

IL THE LAW OF EQUAL LIBERTY.

In the last number of *Mind* I ventured to question whether the law of equal liberty which Mr Spencer now some thirty years ago set forth in his *Social Statics* can in any guise or form find place in that " ideal code of conduct formulating the behaviour o

the completely-adapted man in the completely-evolved society[1]," to determine the contents of which is the task of Absolute Ethics. It remains to consider this law as a rule prescribing the behaviour of men who are not yet perfect, for "when, formulating normal conduct in an ideal society, we have reached a science of absolute ethics, we have simultaneously reached a science which, when used to interpret the phenomena of real societies in their transitional states, full of the miseries due to non-adaptation (which we may call pathological states), enables us to form approximately true conclusions respecting the natures of the abnormalities, and the causes which tend most in the direction of the normal[2]." Now in *Social Statics* the law in question, the " First Principle," was thus stated—*"Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man*."* Mr Spencer did not regard this as a complete statement of the whole duty of imperfect man. A man is bound to obey this law and in obeying it he is just; but he ought also to be positively beneficent, negatively beneficent and prudent. The field of positive beneficence grows ever narrower; still in some cases a man ought to sacrifice himself in doing good to others. He ought again to be negatively beneficent, for " various ways exist in which the faculties may be exercised to the aggrieving of other persons without the law of equal freedom being overstepped. A man may behave unamiably, may use harsh language, or annoy by disgusting habits; and whoso thus offends the normal feelings

[1] ***Data*, § 105.** [2] ***ibid.***
[3] ***Social Statics*, c. 6, § 1.**

of his fellows, manifestly diminishes happiness[1]/' This he ought not to do, for in the last resort happiness is the chief good. Again there are the self-regarding virtues; one ought to be sober and so forth. But these "supplementary restrictions/' imposed by negative beneficence and by prudence, "are of quite inferior authority to the original law. Instead of being, like it, capable of strictly scientific development, they (under existing circumstances) can be unfolded only into superior forms of expediency/'

These "supplementary limitations involve the term *happiness,* and as happiness is for the present capable only of a generic and not of a specific definition, they do not admit of scientific development. Though abstractedly correct limitations, and limitations which the ideal man will strictly observe, they cannot be reduced to concrete forms until the ideal man exists[2]."... "Indeed we may almost say that the first law is the sole law; for we find that of the several conditions to greatest happiness it is the only one at present capable of a systematic development; and we further find that conformity to it ensures ultimate conformity to the others[3]."

Almost supreme in ethics, it is absolutely supreme in politics. In other words, though the exercise I make of the liberty which this law allows me is not morally indifferent, still it cannot be right for any man, prince, potentate or parliament to restrict my freedom within any narrower bounds. Whether we be sovereigns, or whether we be subjects, we must leave every man free to do all that he wills provided that he infringes not the equal liberty of any other man.

Mr Spencer apparently still holds by this law. It is true that in the *Data of Ethics* he nowhere states it in such plain terms as those cited above. However he

[1] *Social Statics,* c. 4, § 4. [2] *ibid.,* § 5. [3] *ibid.,* § 6.

tells us that the maintenance of equitable relations between men (and "equitable" means "equal") is "the condition to the attainment of greatest happiness in all societies ; however much the greatest happiness attainable may differ in nature, or amount, or both," and that "this pre-requisite to social equilibrium," "this universal requirement," was what he had in view when he chose for his first work the title *Social Statics*[1]. He has also, at least as lately as 1868, told us that he " adheres to the leading principles set forth" in that book, though not " prepared to abide by all the detailed applications of them," and further that "the deductions included in Part I L " (the Part which contains that deduction of proprietary rights which forms the main subject of this paper) " may be taken as representing in great measure those which the author would still draw ; but had he now to express them he would express some of them differently'-." We have reason therefore for believing that Mr Spencer adheres to the " First Principle" (which must be among the leading principles) of *Social Statics,* and that he is still ready to deduce from it proprietary rights in somewhat the same fashion in which he set about that task in his earliest work. Nor is this all, for in his very last work, the *Political Institutions,* he recurs to the distinction which he took in 1850 between property in land and property in other things, with the result of finding a new justification for one of the most marked peculiarities of the treatment which property received

[1] *Data,* § 61.

[2] Preface to American edition of 1864, and Preface to English edition of 1868.

in *Social Statics*. It seems therefore fair to infer that the doctrine here to be criticised is in the main Mr Spencer's present doctrine; but in any case the fact that it once was his is a sufficient claim to respectful attention, though, should the law of equal liberty disappear from any Deuteronomy that may yet be forthcoming, this would certainly remove a difficulty from the way of some who would much rather agree than disagree with Mr Spencer.

Now some of the applications which in *Social Statics* were made of this first principle were, so far as I am aware, quite new, and certainly they were very striking. But the principle itself was not new, for it had been stated and adopted by no less a person than Kant. It seems to me probable, if such a guess may be allowed, that in 1850 Mr Spencer was not aware of this, for on the several occasions on which he has argued that his law is a precise expression of that idea of Justice or Equity which is more or less clearly apprehended by others, he has cited authorities very much less to the point than Kant's political or juristic writings. The dogma of equal liberty is not at all an unnatural outcome of a theory of Natural Law, or (as, to prevent all ambiguity, we may say) of Natural Right. From of old it stood written that all men are by nature free, and that all men are by nature equal, and when it had at length become plain that men clamouring for natural liberty and natural equality were not to be put off with stories about an original contract, to say that all men ought to be equally free must have seemed an obvious mode of reconciling the possibly conflicting claims of these two ideals of Natural Right.

It may well be, therefore, that some exponent of *Jus Naturce,* some natural lawyer, had already hit on Mr Spencers first principle before it was stated by Kant, At any rate, however, it was stated by Kant, and that very plainly. Already in an essay published in 1793 we find this passage :—

" Ein Jeder darf seine Gluckseligkeit auf dem Wege suchen welcher ihm selbst gut diinkt, wenn er nur der Freiheit Anderer, einem ahnlichen Zwecke nachzustreben, die mit der Freiheit von Jedermann nach einem moglichen allgemeinen Gesetze zusammen bestehen kann (d. i. diesem Rechte des Andern), nicht Abbruch thut[1]."

Kant contrasts this principle of freedom with the utilitarian doctrine that a ruler should directly aim at making his subjects happy, and this latter, much in Mr Spencer's manner, he pronounces despotic. Then in the *Rechtslekre* this rule of equal liberty stands forth as the general principle of all law (Recht).

"Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkiihr des Einen mit der Willkuhr des Anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann."

"Eine jede Handlung ist *recht,* die oder nach deren Maxime die Freiheit der Willkuhr eines Jeden mit Jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann[2]."...

" Das angeborne Recht ist nur ein einziges. Freiheit (Unabhangigkeit von eines Anderen nothigender Willkuhr) sofern sie mit jedes Anderen Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann, ist dieses einzige, urspriingliche, jedem Menschen kraft seiner Menschheit zustehende Recht[3]."

Had the *Rechtslekre* fallen into Mr Spencer's hands ere he wrote *Social Statics,* he might have had the satisfaction of appealing to a high philosophical authority

[1] "Ueber den Gemeinspruch: Das mag in Theorie richtig sein," etc. (Kant's *Werke,* ed. Hartenstein, vol. vi., pp. 322-3).

[2] Ed. *cit,* vol. vii., p. 27. [3] *ibid.)* p. 34.

in support of his first principle, but had he watched Kant's struggles to get out of this formula a coherent system of Natural Right, his satisfaction would probably have been alloyed with some misgivings as to the hopefulness of an undertaking which cost his great predecessor many a curious contortion. Coleridge knew well this Jaw of equal liberty. In *The Friend*[1] he says that all the different systems of political justice, all the theories of the rightful origin of government are reducible in the end to three classes, correspondent to the three different points of view in which the human being itself may be contemplated. That being may be regarded as an animal, and we fall into Hobbism; or as endowed with understanding, and utilitarianism follows; or as rational, and we must have politics of the pure reason, or "metapolitics." Coleridge professing himself an advocate of the second system (he was utilitarian in politics though not in ethics), gives a sketch of the metapolitical system, and in doing so expressly identifies it with the French revolutionary philosophy ; but as it seems to me, the theory which he states in order to refute is really an eclectic mosaic of theories part English, part French, part German. But whether or no this sketch fairly represents the opinions which had been held by any one theorist, Coleridge in the following passage not indistinctly foreshadows the main doctrine of *Social Statics.*

" Justice, austere, unrelenting justice is everywhere holden up as the one thing needful; and the only duty of the citizen, in fulfilling

[1] *The Friend,* First Section :—" On the Principles of Political Knowledge" (ed. 1863, vol. 1., pp. 179 ff.).

which he obeys all the laws, is not to encroach on another's sphere of action. The greatest possible happiness of a people is not, according to this system, the object of a governor; but to preserve the freedom of all, by coercing within the requisite bounds the freedom of each. Whatever a government does more than this, comes of evil: and its best employment is the repeal of laws and regulations, not the establishment of them. Each man is the best judge of his own happiness, and to himself must it therefore be entrusted. Remove all the interferences of positive statutes, all monopoly, all bounties, all prohibitions, and all encouragements of importation and exportation, of particular growth and particular manufactures; let the revenues of the state be taken at once from the produce of the soil; and all things will find their level, all irregularities will correct each other, and an indestructible cycle of harmonious motions take place in the moral equally as in the natural world. The business of the governor is to watch incessantly, that the state shall remain composed of individuals, acting as individuals, by which alone the freedom of all can be secured[1]."

Now Coleridge, certainly not biased against the claims of pure reason, rejected the law of equal liberty because, as he thought, it must condemn property. "It is impossible," he says, "to deduce the right of property from pure reason[2]." To this he appends a characteristic foot-note, "I mean practically and with the inequalities inseparable from the actual existence of property. Abstractedly, the right to property is deducible from the free agency of man. If to act freely be a right, a sphere of action must be so too." We may doubt whether a kind of property, the *esse* of which is *abstrahiy* can be of much value to its owner, but probably Coleridge has his eye on Kant and means that between proprietary rights and the law of equal liberty there is no formal, though there is of necessity

[1] First Section, Essay 4 (vol. 1., pp. 219, 220). [2] *ibid.*, p. 222.

a practical contradiction. Kant, as it seems to me, had evaded rather than solved the problem by introducing alongside of his "Allgemeines Princip des Rechts," a "Rechtliches Postulat der praktischen Vernunft." Every external object of desire must, he argues, be capable of appropriation. In order that it may be used, it must be appropriated, and it would be absurd to say that anything useful cannot rightfully be used. The easy reply is that doubtless this is so, that a political theory which condemns to eternal uselessness things that are useful condemns itself as worse than useless; but this does not prove that an admission of this postulate of practical reason is not an infringement of the inborn right of every man to have equal liberty with each of his neighbours. Kant, as I understand him, thought it enough to say that there is no formal contradiction between his postulate and his principle. Certainly there is none, for neither formal logic nor any principles which Kant could discover *a priori* can prove that we are not living in a world wherein it is possible for each of us to satisfy his every wish and yet leave unappropriated as many objects of desire as his fellows can possibly want. Such will perhaps be our condition when we are fully-adapted men in a fully-evolved society, but we happen to know substantially, if not formally, that such is not our present condition and that were it our condition the idea of property, of exclusive right, would be absurd. Who, asks Coleridge, ever thought of property in heaven, property among angels and glorified spirits, beings of pure reason? And why, asks Hume[1], raise

[1] *Inquiry concerning the Principles of Morals,* sec. 3, pt. 1.

landmarks between my neighbour's field and mine when my heart has made no division between our interests, but shares all his joys and sorrows with the same force and vivacity as if originally my own? Property means that the world being what it is and men being what they are, every man cannot have all that he wants.

The real problem which has to be faced by any scheme of Natural Jurisprudence which rejects arguments based on mere expediency, is just the old problem which Locke set before him, though the terms in which it has to be stated may be new. God made all men free and equal and gave the earth to them in common; it is required to find a justification for exclusive proprietary rights. It is required to find a justification; the conclusion to which the theorist must come is a foregone conclusion, for, as Locke pointed out in memorable words, proprietary rights there must be if the human race is to exist. Carry our socialism never so far, we must end with appropriation, and appropriation by individuals. When did the acorns become the property of the natural man—"when he digested? or when he eat? or when he boiled? or when he brought them home? or when he picked them up[1]?" At latest they must be his when they are fairly in his stomach. Mr Spencer knew well how to use this argument against "M. Proudhonand his party,"and of course there is a plain absurdity in saying that no appropriation can be just. It does not follow, however, that the law of equal liberty is not committed to this absurdity and merely refrains from declaring that

[1] ***Of Civil Government,* § 28.**

property is theft because the use of a word like *thefty* which commonly imports some blame, might seem to imply that property is at least possibly rightful.

We may now consider how Mr Spencer, in 1850, sought to avoid this ugly and impotent conclusion. Most certainly he meant to avoid it; every man would so mean, but he more than others, for his practical teaching in politics requires that proprietary rights shall be built on a foundation so sure that they can resist the attacks of any occasional exceptional expediency. He begins, as I venture to think, very logically by making large, but not too large, concessions to the anarchist.

"Given a race of beings having like claims to pursue the objects of their desires—given a world adapted to the gratification of those desires—a world into which such beings are similarly born, and it unavoidably follows that they have equal rights to the use of this world. For if each of them has freedom to do all that he wills, provided he infringes not the equal freedom of any other, then each of them is free to use the earth for the satisfaction of his wants, provided he allows all others the same liberty. And, conversely, it is manifest that no one, or part of them, may use the earth in such a way as to prevent the rest from similarly using it; seeing that to do this is to assume greater freedom than the rest and consequently to break the law. Equity, therefore, does not permit property in land[1]."

This we must allow to be very sound argument, very much more logical than anything in the *Rechtslehre.* By *world,* however, Mr Spencer must mean the material universe, and when the *world* of the first sentence becomes the *earth* of the second, and the

[1] *Sodal Statics,* c. 9, § 1.

land of the fourth, we think that he is but drawing by way of example a particular conclusion from general premises. So with *property*, this word in our ears connotes some large and permanent right, for we are not accustomed to say that the man in the street is proprietor of the spot upon which he is standing. What "Equity" really does not permit is the exclusive possession by one man of any particle of matter which any other men wish to possess, or the exclusive, though but temporary, occupation of any part of space that any other men wish to occupy. There follows a *reductio ad absurdum* of any contrary opinion. "If *one* portion of the earth's surface may justly become the possession of an individual, and may be held by him for his sole use and benefit, as a thing to which he has an exclusive right, then *other* portions of the earth's surface may be so held, and eventually the *whole* of the earth's surface may be so held." This truth of course holds good of other things besides the earth's surface. If one atom may be owned, all atoms may be owned. "Observe now the dilemma to which this leads. Supposing the entire habitable globe to be so enclosed, it follows that if the landowners have a valid right to its surface, all who are not landowners, have no right at all to its surface. Hence such can exist on the earth by sufferance only. They are all trespassers[1]." Worse is behind if theft be worse than trespass, for should we concede property in one molecule inexorable logic may eventually drive us to concede property in all molecules, and our dilemma will then be theft or suicide.

It is true that Mr Spencer, for some reason or

[1] *Social Statics*, c. 9, § 2.

another, spends most of his indignation on property in land. This however does not prevent him from dealing out, in a later passage, impartial though less rhetorical condemnation against such property in movables as now exists. In the meantime he disposes briefly of the existing titles of landowners. It can never be pretended that they are legitimate. [4i] Should any one think so, let him look in the chronicles. Violence, fraud, the prerogative of force, the claims of superior cunning—these are the sources to which those titles may be traced. The original deeds were written with the sword, rather than with the pen: not lawyers, but soldiers, were the conveyancers: blows were the current coin given in payment; and for seals, blood was used in preference to wax. Could valid claims be thus constituted? Hardly." A title originally bad cannot be made good by transfer. Sale or bequest cannot generate a right. Nor can lapse of time validate the invalid. Clearly the law of equal liberty cannot recognise any particular term of years as sufficient to turn trespass into ownership. Then we are told that "not only have present land-tenures an indefensible origin, but it is impossible to discover any mode in which land *can* become private property." The pleas of title by first occupation, by improvement, by, in Locke's phrase, "mixing one's labour" with the land, are dispelled in a spirited dialogue between a "cosmopolite" and a backwoodsman who has made unto himself a clearing. "The world is God's bequest to mankind," says the former, all men are joint heirs to it; you amongst the number. And because you have taken up your residence on a certain part of it, and

have subdued, cultivated, beautified that part—improved it as you say, you are not therefore warranted in appropriating it as entirely private property[1]."

This is equally true of all things other than land. We may subdue, cultivate, beautify, work up into this form or that form, but matter we cannot make, and it belongs to mankind. "The world is God's bequest to mankind; all men are joint heirs to it"; and if no one has a right to take a bit of it, cultivate it, and call it his own, still less can he have a right to carry a bit bodily away in his hands, his pocket, or his stomach and thus consummate a constructive theft by actual asportation. For this conclusion we must wait until the next chapter: but we get it in good time.

"The reasoning used in the last chapter to prove that no amount of labour, bestowed by an individual upon a part of the earth's surface, can nullify the title of society to that part, might be similarly employed to show that no one can, by the mere act of appropriating to himself any wild unclaimed animal or fruit, supersede the joint claims of other men to it. It may be quite true that the labour a man expends in catching or gathering, gives him a better right to the thing caught or gathered, than any one other man; but the question at issue is, whether by labour so expended he has made his right to the thing caught or gathered, greater than the rights of all other men put together[2]."

Besides, his right can only be admitted if after the appropriation there is, in Locke's words, "enough and as good left in common for others." "A condition like this gives birth. to such a host of queries, doubts, and limitations, as practically to neutralise the general proposition entirely/' and out of this inquisition "it

[1] *Social Statics,* c. 9, § 4. [2] *ibid.,* c. 10, § 1.

seems impossible to liberate the alleged right without such mutilations as to render it in an ethical point of view entirely valueless."

" Abstractedly," then, as Coleridge said, there may be a right of property, but practically this is entirely valueless. Property might be rightful in certain conceivable or inconceivable circumstances (circumstances, by the way, that would render the notion of property absurd), but these circumstances are not ours. The landowner and the owner of movables are in the same position, and (though Mr Spencer does not emphasise this conclusion) all existing titles to property of every kind are bad. Indeed in almost all, if not all, cases no title can be made to a movable that does not involve an admission that there may be property in land. Whence the title to an apple, a shilling, a coat ? Exchange or gift has not generated it; time has not consecrated it. It is null.

The outlook now seems hopeless, and we are beginning to think that Mr Spencer's " cosmopolite " was really a chaopolite in disguise. But the law of equal liberty having sufficiently proved its power as an engine of impartial destruction, the time for reconstruction has come, and Mr Spencer has ready for us a scheme which shall give to proprietary rights a legitimate foundation ; in theory a very simple scheme, whatever may be the practical difficulties which will impede its accomplishment. He did not recommend what is called "the nationalisation of the land"; that would have helped him but a little way, if any way, towards establishing an equitable system of property. Englishmen can have no better title to England than

has Lord A to his deer-forest. We must not exclude Germans or Frenchmen, or the Chinese or the Chinooks from sharing in the rents and profits of our fertile island. The surface of the earth is to be owned by "the public," "the great corporate body—Society," "the community," "mankind at large," and is to be let out upon leases at the best rent. This done, "all men would be equally landlords; all men would be alike free to become tenants." Under this system of land-tenure all difficulties about property in movables disappear "and the right of property obtains a legitimate foundation[1]."

Does it? This is a serious question; for, however far distant may be the time when mankind at large will "resume" the ownership of the soil, even a theoretical deliverance from our apparently incurable immorality would be of some value. Now suppose that the resumption has taken place. All men are equally landlords, but are all men equally free to become tenants? All men, it is true, are "equally free to bid" for a farm, just as all men are even now equally free to bid for whatever lands or goods are in the market. If all that the law of equal liberty requires in the matter of land-tenure is that every man shall be equally free to bid for land that law is perfectly fulfilled in this country at this moment. But existing titles, it may be said, are bad, and men can not at present purchase an "equitable" title. The answer is that this truly unfortunate state of things will not be improved by the resumption. Mr A will outbid his fellows for a site in the best quarter, for the best farm,

[1] *Social Statics*^ c. 10, § 2.

the best moor. What will enable him to do so will be his superior wealth, and his wealth will be then as now illgotten. In whatever it may consist, coin or cotton or what not, it will consist of matter subtracted from the common stock of mankind. Sale or bequest can not turn wrong into right, lapse of time will not legalise what was once unlawful, and the long and short of it is that A or his predecessors in title must have robbed mankind and he is to be left in possession of the stolen goods and even suffered to acquire by means thereof a lease of public land. Our original sin of wrongful appropriation is not thus to be purged away.

An equal division of all wealth, which Mr Spencer would strenuously resist, seems at first sight a more hopeful project Once let there be an equitable distribution of all desirable things, then, it might be thought, we could leave the future to the law of equal liberty. But to a similar proposal (restricted however to an equal division of land) Mr Spencer has given a very noteworthy answer. After urging the difficulty of making a really fair allotment, he asks :—

> " Is it proposed that each man, woman, and child, shall have a section ? If so, what becomes of all who are to be born next year ? And what will be the fate of those whose fathers sell their estates and squander the proceeds. These portionless ones must constitute a class already described as having no right to a resting-place on earth —as living by the sufferance of their fellow-men—as being practically serfs. And the existence of such a class is wholly at variance with the law of equal freedom V

The same, be it observed, will happen after as before the " resumption" of the land. Portionless

[1] *Social Statics,* c. 9, § 5.

ones will be born with no more chance of holding land for years than they now have of owning land absolutely. But it is more important to notice that here Mr Spencer throws away the last hope of squaring property with the law of equal liberty. Were it not for the claims of children yet unborn we might harden our hearts and say that this law is not retrospective. Let us sanction existing titles, or let us make some fresh distribution of wealth that seems better than the present, then pass a sponge over the past and abide by our law for the future. But "until it can be proved that God has given one charter of privileges to one generation, and another to the next," or to adopt other terms, until it can be proved that men hereafter to be born are not *men* within the meaning of our law, we shall find no answer to Mr Spencer's question, what is to become of all who are to be born next year? They will come into an appropriated world, appropriated without their consent. Redistribution of wealth on the birth of every child is what our law requires. To find Mr Spencer sanctioning the claims of those "whose fathers sell their estates and squander the proceeds" may surprise us. His usual doctrine is that the sons of the industrially unfit shall not be heirs with the sons of the fit. If the fathers eat sour grapes we must not hinder the salutary process of evolution which sets the children's teeth on edge. Very possibly this argument about portionless ones may have escaped him unadvisedly in the course of controversy with an imaginary opponent, but it is a sound argument, one sanctioned by the law of equal freedom. If we are to tell the child of penniless parents that he is just as free as

the rest of us to acquire property by contract or gift we must make exactly the same remark to Mr Spencer when he denounces "landlordism."

In short, if we are going to be really serious about our law of equal liberty, and think it capable of a "strictly scientific development,'[1] we must prepare some scheme which will equalise the advantages of all children hereafter to be born. Any such scheme would be ridiculous enough and, what is more, would be condemned by Mr Spencer as worse than ridiculous. There remains but one other course; we may adopt the good old device of a constructive contract to which most of Mr Spencer's predecessors in the attempt to square property with natural liberty and equality have found themselves sooner or later reduced. But much experience has warned us that if once we take to constructive contracts, we may indeed by the exercise of a little metaphysico-legal legerdemain construct whatever pleases us, but it is easiest and simplest to reconstruct pure Hobbism and then our Law of Nature becomes *Quodprincipiplacuit.*

We have seen that according to *Social Statics* the title which any one can now have to movable goods is "in an ethical point of view entirely valueless." Perhaps on this point Mr Spencer has changed his mind. In *Political Institutions* he insists on the distinction between property in land and property in other things. The one is still "established by force," but the other is now "established by contract." This is presented to us not as guesswork or declamation, but as the sober result of scientific sociology. That this theory is groundless might, in my opinion, be shown even from

the evidence which Mr Spencer brings for its support, but a discussion of history would here be quite out of place. We are concerned with what has been only in so far as it determines what ought to be, and all Mr Spencer's historical generalisations shall therefore be taken as true. We must ask then what inferences he draws from the history of property as to the relations which will exist between men in the ultimate stage of human progress and therefore in that ideal society which it is the business of Absolute Ethics to describe. The answer shall be given in his own words.

"At first sight it seems fairly inferable that the absolute ownership of land by private persons, must be the ultimate state which industrialism brings about. But though industrialism has thus far tended to individualise possession of land, while individualising all other possession, it may be doubted whether the final stage is at present reached. Ownership established by force does not stand on the same footing as ownership established by contract; and though multiplied sales and purchases, treating the two ownerships in the same way, have tacitly assimilated them, the assimilation may eventually be denied. The analogy furnished by assumed rights of possession over human beings, helps us to recognise this possibility.... Similarly at a stage more advanced it may be that private ownership of land will disappear. As that primitive freedom of the individual which existed before war established coercive institutions and personal slavery comes to be re-established as militancy declines; so it seems possible that the primitive ownership of land by the community, which, with the development of coercive institutions lapsed in large measure or wholly into private ownership, will be revived as industrialism further develops. The *regime* of contract, at present so far extended that the right of property in movables is recognised only as having arisen by exchange of services or products under agreements, or by gift from those who had acquired it under such agreements, may be further extended so far that the products of the soil will be recognised as property only by virtue of agreements between individuals as tenants and the community as landowner[1]."

[1] *Political Institutions*, §-540.

The extreme caution of this prophecy will not escape notice; "it may be doubted," "may eventually be denied," "this possibility," "it may be," "it seems possible," these phrases expressive of hesitation and doubt seem to me most appropriate. Certainly "it may be doubted whether the final stage" of property-law "is at present reached," and for my own part I do not wish to deny that some day the state (possibly mankind at large) may make itself the supreme landlord and let out the land on leases. But the final stage is the ideal stage, and the success of Absolute Ethics depends upon our knowing something, and something precise about the final stage. It is really a matter of some importance to know whether property in land is demanded, or sanctioned, or tolerated, or condemned by the law of equal liberty, and if from Absolute Ethics we get no more than leave to doubt whether such property is rightful, it is to be feared that after all we must fall back on the "moral infidelity" of utilitarianism. Mr Spencer compares the ownership of land to the ownership of slaves, and the comparison is apt for our purpose. As to the latter the law of equal liberty speaks unequivocally; for the right to personal freedom is perhaps the only right, save the right to life, that can be deduced therefrom. Even if we find some difficulty in persuading our law to condemn slavery founded upon contract, there is always open the way of escape to which Kant resorted, that, namely, of saying that the man who sells himself into slavery makes himself a thing, and being a thing can not be bound by his contract. But we must, if possible, prevail on the law to yield us as definite a conclusion about the ownership of land and goods.

We must perforce admit for the sake of argument that property in land was "established by force"—the first deeds shall be written not with the pen but with the sword if Mr Spencer so pleases. Nor will we dispute that property in movables is "established by contract," but to this phrase we must give some plausible meaning. It is true that in every civilised community the title to chattels is very often a title by contract, a title by sale. The *regime* of contract, to quote Mr Spencer's words, is at present so far extended that the right of property in movables is recognised only as having arisen by exchange of services or products under agreements, or by gift from those who had acquired it under such agreements. This is not quite true, for the only title a proprietor has may have arisen from long-continued peaceable possession, and the easy admission that such a title is good is a characteristic mark which distinguishes late from early law. Still Mr Spencer's proposition is in the main true, but then it is already just equally true of property in land. Purchase, gift, inheritance, undisputed possession, these are the titles to land as well as to goods. As a matter of fact, for the last three or four hundred years illegal force has had just as little to do with the transfer of land in this country as with the transfer of goods, and legal force has had quite as much to do in protecting the owner of chattels as in protecting the landowner. But of course it is not of the title to existing chattels that Mr Spencer speaks, for trace that title but two or three stages back and it is seen to involve a title to land and therefore to be established by force. It must

be of property as an institution and of the beginnings of that institution that he speaks, and it must be here that he finds reason for the antithesis of force and contract. Men have agreed that there shall be property in movables, they have not agreed that there shall be property in land. Now we must not seriously impute to Mr Spencer the queer old notion that men did not respect property in movables until, in due form of Natural Law, they had agreed to respect it, but he shall have the advantage of every hypothesis, however extravagant, as to the past. Suppose even that all men met together and made solemn compact that there should be property in movables. Suppose also that this display of ancestral wisdom demands our humblest reverence. All this is not to the point when we are considering the question raised in *Social Statics*, whether our present or any other distribution of proprietary rights can be sanctioned by that impracticable First Principle. How, we are driven to ask, are you to make good your right to the money in your purse, the wine in your cellar, the cotton in your warehouse? Some one owned a mine, a vineyard, a plantation, and you (to put your case at its best) have bought from him. But his property was established by force, his land was part of the common inheritance. "Would the original claimants be non-suited at the bar of reason because the thing stolen from them had changed hands? Certainly not[1]." Your right is "in an ethical point of view entirely valueless," and no historical theory can give it any value, unless, indeed, we are to suppose that property in land as well as

[1] ***Social Statics*, c. 9, § 3.**

property in movables is somehow or another "established by contract." At least this can not be done by any theory that will bear one moment's consideration. This qualification I add because in his latest work Mr Spencer contrasts private property in "things produced by labour" with private property in "the inhabited area which can not be produced by labour[1]." Of course, however, after his refutation of Locke and the backwoodsman he does not intend to base property on labour. The author of *First Principles* has not yet to learn that man does not make matter, the author of *Social Statics* has not yet to learn that mixing our labour with matter does not make that matter ours.

If this reasoning be sound it is hardly worth while to suggest any further difficulties. In these pages, at least, it would be unnecessary to say that should we deduce from our law of equal liberty the rightfulness of something *called property,* little is thereby accomplished. We want to know very much more than this before we can admit the success of Mr Spencer's method. We want, for instance, to know something about the extent of testamentary power which this law permits or prescribes, and there is still, outstanding, that old question which Locke put to Sir Robert Filmer—Who is heir by the law of nature? One remark must suffice to show the nature of these difficulties. It does seem, as Mr Spencer himself thought, quite out of the question, that his principle should permit a man to gain a right simply by persistent wrong-doing. But to admit that a right may thus be gained, is, as already said, a marked characteristic

[1] ***Political Institutions*', § 541.**

of civilised law, and the more civilised, the more industrial we become, the easier we make it for men to acquire property in this way. We do not even feign that the rightful owner has acquiesced in the usurpation or been negligent about the assertion of his rights. At one moment a man is a trespasser; the clock strikes, and he is the rightful owner. How can the law of equal liberty sanction or tolerate this, without sanctioning, or, at least, tolerating whatever rules imposed by prince or parliament prove for the convenience of mankind?

So much has here been said of proprietary rights, that little, if any, space remains for the consideration of those other rights which Mr Spencer proposed to deduce from his First Principle. His treatment of property has particular claims upon our attention both because it is, as yet, the most fully worked-out example of the results that may be expected from Absolute Ethics, and because the practical part of his political teaching requires that he should place proprietary rights beyond the reach of any assaults that may be made by socialist or opportunist. But a very brief glance may be cast at his deduction of some other rights.

The first rights which he sought to obtain were "the rights of life and of personal liberty[1]." These, as I think, must be conceded to him. If A kills B it is physically impossible that B should kill A, and if A puts B under lock and key, then so long as the restraint lasts, B is not free to do the same by A. One naturally expects that Mr Spencer will next deduce that right to

[1] ***Social Status*, c. 8.**

be free from bodily injury, from wounds and blows, which is nearly related to the rights just mentioned. It may be by an accident that he has omitted to do so, or he may not have thought it worth doing, but none the less the task has its difficulties. If A smites B, the latter not unfrequently finds himself perfectly free to repay the blow with interest. This is not always the case, and very antique law does draw a marked distinction between an injury that does and an injury that does not deprive the injured person of the power of fighting; but it would be a curious justification of semi-barbarism were maiming, condemned by our First Principle, the only principle at present capable of scientific development, while mere "dry blows" were subjected only to the empirical restrictions of negative benevolence. A way of escape might seem to be open to us in the doctrine that "every pain decreases vitality[1]," that every pain involves some loss of power and therefore some loss of liberty. But Mr Spencer distinctly refuses to avail himself of this refuge, and could hardly do so without falling into the unscientific utilitarianism. "A man may behave unamiably, may use harsh language, or annoy by disgusting habits; and whoso thus offends the normal feelings of his fellows, manifestly diminishes happiness[2]." Nevertheless we are told that his conduct is not condemned by the law of equal liberty; he merely fails in negative beneficence. What is true of the pain occasioned by harsh language is seemingly true also of the pain occasioned by a cuff or a kick; each, if Mr Spencer's biology and psychology be correct, will decrease vitality,

[1] *Data*, § 36. [2] *Social Statics*, c. 4, § 4.

but the latter need no more than the former prevent him who is hurt from having equal liberty with him who hurts.

Thus among the acts causing bodily pain for which men now are punished or compelled to make reparation we must distinguish those which do from those which do not infringe the law of equal liberty; for it is only the former that the state may use its power to suppress, and any attempt to suppress the latter by coercive action would itself be a breach of the law. The result will be not a little strange, but there seems no choice except to hold either that he who beats his neighbour is not to be punished or that he who speaks harshly to his neighbour may rightfully be punished if pain will be saved thereby.

A similar difficulty occurs when we pass to "the right of property in character[1]." Mr Spencer argues that a good reputation may be regarded as property, but in the end admits that possibly his reasoning may be thought inconclusive.

"The position that character is property may be considered open to dispute; and it must be confessed that the propriety of so classifying it is not provable with logical precision. Should any urge that this admission is fatal to the argument, they have the alternative of regarding slander as a breach, not of that primary law which forbids us to trench upon each other's spheres of activity, but of that secondary one which forbids us to inflict pain on each other."

This, he says, illustrates a remark previously made, namely, that the division of morality into separate sections, though needful for our due comprehension of it, is yet artificial[2]. Now it may at once be allowed

[1] ***Social Statics, c. 12.*** [2] ***Ibid.* § 3.**

that were this a question of mere classification, a question whether the rule which forbids slander looks best under the heading of Justice or the heading of Beneficence, it would hardly be worth discussing, being a matter of taste; but the question whether slander be forbidden by the First Principle is surely one of substantial importance, for on our answer to it depends whether or not the community may rightly strive to prevent slander by punishing the slanderer and giving the slandered a claim for reparation. To use coercion when it is not needed for the maintenance of equal liberty is to infringe the sovereign rule.

It may seem easy at first sight to get from this rule that "right of property in ideas[1]," for which Mr Spencer vigorously pleads, but really in this case there is just the same difficulty to be met as that which faced us when discussing property in material things. The poet, the artist, the inventor, the discoverer, has but like the confuted backwoodsman made unto himself a clearing, improved some part of the common inheritance and mixed his labour therewith. The cosmopolite must explain to him also, that appropriation is only lawful when " enough and as good is left in common for others." A man who wrote a book and could conscientiously say of it that nothing therein contained was due to any one but himself, would assuredly need no law of copyright to protect him in the enjoyment of his perfect originality. Mr Spencer does not say this, but he does grant that this proprietary right cannot be admitted without limitation, for it is highly probable that the causes leading to the evolution of a new idea

[1] *Social Statics,* c. n.

in one mind will eventually produce a like result in some other mind. "Such being the fact, there arises a qualification to the right of property in ideas which it seems difficult and even impossible to specify definitely[1]." "Such a difficulty does not," we are told, "in the least militate against the right itself," and yet another important department of law seems here handed over to the empiricist.

Of the rights of women, the rights of children and, above all, that crowning right, the right to ignore the state, it would hardly be fair to speak at present, since here we have both warning in the preface to *Social Statics* and some indications in other books that we are not yet in full possession of Mr Spencer's mature opinions. He perhaps would now say that the right to ignore the state will never exist as a right, but that the time will come when no society or community will wish to retain a member who wishes to be quit of it. Apparently he does not think that we have yet reached the stage when the law of equal liberty should without reserve be applied to women, and the liberties of children are certainly not what they were in 1850. "While an average increase of juvenile freedom is to be anticipated, there is reason to think that here and there it has already gone too fan I refer to the United States[2]." In mitigating his claim for a free nursery Mr Spencer has, as it seems to me, made a large concession to common opinion, but at the same time thrown fresh doubt upon his First Principle. "For, if it be asserted that the law of equal freedom applies only to adults ; that is, if it be asserted that

[1] ***Social Statics,* c. 11, § 5.** [2] ***Principles of Sociology,* § 341.**

men have rights, but that children have none, we are immediately met by this question—When does the child become a man? at what period does the human being pass out of the condition of having no rights, into the condition of having rights? None will have the folly to quote the arbitrary dictum of the statute-book as an answer[1]." The temptation to quote the arbitrary dictum is not overpowering, but some sort of answer is now required of Mr Spencer himself, and it seems likely that the word *man* in our supreme rule must be subjected to an interpreting clause which will be no better than a piece of most empirical utilitarianism.

It is still however possible to hope that Mr Spencer will make over, or has already made over, the law of equal liberty to its true owners, the metapoliticians, the people who would solve ethical and political problems by juristic methods. They know what to do with it, and by implying a contract here and inventing an estoppel there can turn out a result sometimes ingenious and not always anarchical. But Mr Spencer is much too great a philosopher to stoop to these little tricks of the trade, and will find, or perhaps has already found, that his practical teaching in politics has nothing to gain from alliance with this unmanageable formula.

[1] ***Social Statics,* c. 17, § i.**

THE EARLY HISTORY OF MALICE AFORETHOUGHT[1].

WHILE yet Mr Justice Stephen's *History of the Criminal Law* is fresh in the minds of many readers, a few supplementary notes concerning the phrase "malice aforethought," which has long formed part of our definition of murder, may perhaps be acceptable. To the very thorough historical account of that phrase, of which we are now happily in possession, little can be added that has any claim to be regarded as certainly true, but something may be guessed which may serve to make intelligible what is still a somewhat dark passage in the history of our law.

In 1531, wilful murder of malice prepensed became an unclergyable felony[2], and thenceforth there were two kinds of homicide for which the punishment was death, the one murder and an unclergyable felony, the other manslaughter and clergyable. But the phrase *malice prepensed* was by no means new in Henry the Eighth's day. Seemingly it had been in use early in the 14th century, to distinguish that homicide for which a man should be hanged, from that excusable homicide for which he should have a pardon of course

[1] *Law Magazine and Review*, August, 1883.

[2] 23 Hen. VIII., cap. 1.

under the Statute of Gloucester[1]. Then, in 1389, it received statutory sanction. An Act of Richard the Second[2] provided that a pardon for homicide should be of no avail if the deed had been done of prepensed malice, unless this aggravation of the crime was specially mentioned in the pardon.

The word *murder*, on the other hand, was a very old word, but had early gotten a very strange and technical meaning. Of this it was robbed by the Statute of 1340, which abolished the presentment of Englishry[8]. It had been murder if one whose English parentage could not be proved was found slain and the hundred did not produce the slayer. Before the Statute of Marlbridge[4], it had in some parts of the country been accounted a murder if a foreigner by any accident came to a violent death, that is to say, even in this case a murder fine had been levied. Mr Justice Stephen[6] shows very clearly that the Statute of Marlbridge does not countenance the doctrine put forward in the Year Book of 1348[6], and repeated with exaggerations by Coke[7], namely, that before this statute a man was hanged if he slew another in self-defence. The statute merely abolished the practice of fining the hundred when a foreigner perished accidentally. Probably this practice, of which there is good evidence[8], was an abuse which had gradually grown up. It is not

[1] 6 Edw. I., cap. 9; Stephen, vol. in., pp. 36-41.

[2] 13 Ric. II., stat. 2, cap. 1. [3] 14 Edw. III., stat 1, cap. 4.

[4] 52 Hen. III., cap. 25. [5] Vol. in., pp. 36, 41, 42.

[6] Y. B., 21 Edw. III., p. 17 b. [7] 2nd Inst, 148.

[8] Bracton, f. 135. *Abbrev. Placit,* p. 19. A certain man named Humfrey was drowned in the pond of Roger FitzEverard, at Herst; " Angieceria fuit presentata ad horam et terminum. Infortunium."

countenanced by the earliest authorities which speak of the murder fine, but to judge from the Pipe Rolls murder fines at one time formed no inconsiderable source of royal revenue, and since we know that one very strange presumption, namely, that every slain man is a foreigner, became firmly established, we need not be surprised that in some districts the rule was even stricter, and that a foreigner's violent death was always reckoned a murder, and a sufficient occasion for bringing money to the royal treasury. It may be worthy of note that Hobbes[1] long ago pointed out that Coke had misunderstood the Statute of Marlbridge, but Hobbes himself blundered into the very reverse of the truth, and said that the murder fine was levied only when the slain man was of English birth.

However, in 1340, the word murder lost this, its technical, meaning. But the word itself was a very old word, and we read of *morth* long before the time when the murder fine makes its first appearance. It occurs in several of the German Folk Laws or Leges Barbarorum and seemingly always points to some attempt at concealment, more especially to the hiding away of the dead man's body. In England, before the Conquest, it apparently bore a slightly different shade of meaning. It stood for manslaughter by poisoning, witchcraft or other diabolic practice, and such *morth* was punished as a true crime in days when mere deliberate manslaughter was hardly a crime at all in our sense of the word. But in Glanvill[2] that

[1] "Dialogue of the Common Law." (*Works*, ed. Molesworth, vol. vi., p. 83.)

[3] Lib. 14, cap. 3.

the deed is done in secret is the one mark which distinguishes *murdrum* from *homicidium simplex*, for Glanvill says nothing about the murder fine and makes no distinction between Frenchman and Englishman. The only difference that he thinks fit to note in the treatment of the two crimes which he thus distinguishes, is what looks to us like a mere matter of procedure, namely that in the case of murder, only the nearest kinsman of the slain can bring an appeal, while in the case of simple homicide the appeal may be brought by anyone who is related to the slain by blood or tenure, and who has been an eye-witness of the deed. We should be rash in concluding that there was no other difference, for Glanvill's treatment of the subject is extremely meagre. His distinction is very much that taken in the Assizes of Jerusalem[1] and there we find this difference between murder and mere homicide the foundation of some very curious special pleading. However, this is all that Glanvill has to say. Bracton[2] repeats Glanvill's distinction, but immediately blurs and probably perverts it by mentioning the murder fine. Murder, he says, is secret homicide, for the slayer is unknown. By this he means that were the slayer known and produced there would be no murder fine, no murdrum. From this we may conjecture that the word had already lost the sense attributed to it by Glanvill, namely, that of manslaughter done in secret. When, therefore, in 1340, it was set free from the very technical and peculiar sense given to it by the practice of fining the hundred, it did not apparently ever regain its oldest meaning, but came

[1] Capp. 84-92. [2] f. 134 b.

in course of time to signify a manslaughter by what was called malice prepense.

As already said, Sir James Stephen has traced the phrase *malice prepense* back to the first years of the 14th century. A story told by a contemporary chronicler of good repute[1], enables us to follow the trail a little further. In the year 1270 a suit between John of Warenne and Alan de la Zouche came to a hearing in Westminster Hall. The litigation degenerated into a brawl. Some of Warenne's retainers drew their swords and wounded Alan. Warenne fled away; Alan was left in the Hall half dead. With difficulty Warenne was brought to justice. He was sentenced to pay both a heavy fine to the king and heavy damages to the injured man ; but besides this, he, with fifty knights, was to go on foot from the Temple to Westminster, and there they were to swear "quod non ex prsecogitata malitia factum fuerat quod prsedictum est, sed ex motu iracundise nimis accensae," The story is remarkable as giving an instance of compurgation in a criminal case, for clearly these fifty knights were compurgators. It is not a case of homicide, for though Zouche died of his wounds, he seemingly did not die until after Warenne had been sentenced and had made his law. Perhaps we ought not to draw from this story many inferences as to the ordinary course of law, for Warenne was a very great man and terms had to be made with him before he would submit himself to justice. Still it seems plain that already *premeditated malice* was a term of the law

[1] Chron. T. Wykes, ann. 1270. (Rolls Series, *Ann. Monast,* vol. iv., pp. 233-235.)

and was contrasted with sudden anger. Whether this very term can be traced yet further I do not know, but there is a very similar term which certainly has a longer history.

Sir James Stephen has brought to light the important and neglected fact that the words malice prepense occur in a statute of 1389, the statute touching pardons already mentioned. A pardon which in terms is but a pardon for homicide is to be unavailing in case the slain man has been murdered or slain "par agait, assaut, ou malice purpense," Now these words, which are used several times in the statute to describe the worst kind of homicide, are most noticeable. Sir James Stephen remarks that they are very like the definition which the modern Penal Code of France gives of "assassinat," and this observation opens up a field for speculation into which we may venture a little way.

First may be cited the articles of the French Penal Code[1], to which Sir James Stephen refers :—" L'homicide commis volontairement est qualify meurtre. Tout meurtre commis avec premeditation, ou de guet-apens est qualifie assassinat . . . . . Le guet-apens consiste a attendre plus ou moins de temps dans un ou divers lieux un individu, soit pour lui donner la mort, soit pourexercer sur lui des actes de violence[2]." Certainly this "avec premeditation ou de guet-apens" may well remind us of the " agait, assaut ou malice purpense " of

[1] Arts. 295-6-8.

[2] Littre defines guet-apens thus:—"i. Embuche dressee pour assassiner, pour devaliser quelqu'un, pour lui faire quelque grand outrage. 2. Fig. Tout dessein pieinedite de nuire."

our own statute. Now it may somewhat confidently be said that the resemblance is not casual. Sir James Stephen sees no reason why the word "guet-apens" should have been introduced into the modern French code, and it is easy to believe that "the word seems to be regarded as surplusage by the Courts." But whether or no there is any reason for its appearance, the cause of its appearance is doubtless just the same as that which preserves in our own law the phrase "malice aforethought." It has a prescriptive right to take part in the definition of the worst form of homicide.

The appearance of "agait, assaut ou malice purpense" in the statute of 1389, and of "guet-apens" in modern French law may well set us asking whether any similar phrase had been known in England as a term of the law before the days of Richard the Second. Now this very phrase "guet-apens" occurs in a set of laws bearing the name of William the Conqueror[1]. The date of the document in question is very doubtful, but I think, for reasons it were long to give, that we cannot ascribe it to a time later than the 12 th century. In it we read as follows[2]: " E ki enfreint la pais le rei en Merchenelahe cent souz les amendes. Autresi de hemfore et de agwait purpense. I eel plait afert a la curune le rei." (And he who breaks the king's peace, in the Mercian law, the fine is a hundred shillings; so also of housebreaking, and of premeditated ambush; this plea belongs to the

[1] Will. Conq., 1. (Thorpe, *Ancient Laws;* Schmid, *Gesetze der Angehachsen).*

[2] Cap. 2.

crown of the king.) The writer is making a paraphrase of Canute's laws, among which is found a well-known clause[1] declaring what rights the king has over all men, in other words, what are the pleas of the crown. In Wessex and Mercia the king has mund-brice (otherwise grith-brice, breach of his special peace or protection), hamsocn (otherwise hamfare, or housebreaking), foresteal, and two other pleas here of no interest. There seems no doubt whatever that the writer of the Leges Willelmi used the French phrase *agwait purpense,* the modern *guet-apens,* as a translation of the English *foresteal.* Concerning this crime something may be learnt from the Leges Henrici[2]; "Si in via regia fiat assultus super aliquem forestel est, et c. sol. emendetur regi, si ibi calumpniam habeat, ut divadietur vel retineatur ibi malefactor, vel si est in socna regis.... Forestel est, si quis ex transverso incurrat, vel in via exspectet et assalliat inimicum suum ; sed si post eum exspectet, vel evocet, ut ille revertatur in eum, non est forestel, si se defendat." The Latin of these Leges Henrici is perhaps the oddest ever written, but by light which falls from other quarters we may probably explain this passage to mean, that the crime called foresteal is committed, and the king becomes entitled to a fine of a hundred shillings if A lies in wait for B on the king's highway, assaults him, and is taken in the very act, but it is not foresteal if A instead of attacking B on the flank lets him pass and calls him back, and then there is a fight in which B gets the worst. For most of this we have other authority. The Doomsday surveyors regarded foresteal as one of

[1] Canute, II. 12. [2] 80, sees. 2, 4.

the ancient pleas of the crown, and mention the fine of one hundred shillings. Foresteal, says one old glossary[1], is "force faite en real chimin," Another[2] explains it as "coactio vel obsistentia in regia strata facta." When Lanfranc in his celebrated suit asserted the privileges of the church of Canterbury, he proved[3] that throughout the lands of that church the king had but three rights (consuetudines). Of these three, one was that if a man committed homicide or other crime upon the king's highway and was caught in the very act, the king had the fine; if, however, he was not caught there and then, in that case the king had nothing. Foresteal, literally the anticipating of another, the placing of oneself before another, is then an ambush, a plotted assault upon the king's highway. Gradually the word is appropriated by a crime of quite another character, and at last forestalling comes to mean anticipating others in the market—speculating for a rise in the price of corn. But its old sense is sufficiently plain and well attested, and probably the writer of the Leges Willelmi was quite right in translating it by *agwait purpense.* The French words, whose modern forms are *guet, guetter, aguets,* though themselves of Teutonic origin and seemingly related to our word *watch,* are the immediate progenitors of the English *wait* and *await*[4], and guet-apens is prepensed awaiting. Here then, we have premeditated assault upon the king's

[1] Hoveden (Rolls Series), vol. I L , p. 242.

[2] Bromton (Decern Scriptores), p. 957 ; cf. Fleta, p. 63.

[3] Textus Roffensis. {*Anglia Sacra,* pp. 334-336; Selden's *Eadmer,* p. 199.)

[4] Littre, s.v. guet, aguets; Skeat, s.v. wait, await; Ducange, s.v. wachta.

highway a plea of the crown, at a time when by no means all assaults and by no means all homicides are pleas of the crown.

But has this any bearing on our later law? In Bracton's day every homicide was a plea of the crown and a felony—at least every homicide that was neither justifiable nor excusable. When, however, we ask, as we ought to ask, how this came to be so, all sorts of difficulties meet us. The elaborate account of homicide given us in the Leges Henrici, which, at least in their present form, cannot be much older than the book we ascribe to Glanvill, though very diffuse and disorderly, is a tolerably consistent account, and it lets us know for certain that the writer did not regard mere intentional homicide as a felony, or as a plea of the crown, or as a capital crime. It could be paid for according to a fixed tariff. This tariff, however, owing to the feudalizing process and consequent multiplication of seignorial claims, was extremely intricate. In a large and always increasing number of cases a man-slaughter was an infringement of the king's special rights, because of the circumstances, place, time and the like, in which it was perpetrated, and very likely the fines and compositions had become so numerous and heavy that practically the slayer had often to pay with life or member for want of gold. Probably the old system would sooner or later have been found intolerable and have broken down of its own weight. But the strange thing, the great peculiarity of our criminal law, is that it was not supplanted by a myriad local customs, but by one royal and common law. At a very early date the king gathered into his hands

almost all criminal justice, so that *crime* and *plea of the crown* became synonyms. The franchise of infangthief, dearly prized as it was, is but a poor reflection of what existed elsewhere. We may well regard as a curiosity the Halifax Gibbet Law, of which Sir James Stephen gives an interesting account; in Germany or Northern France it would have been no curiosity at all. Probably the chief device whereby the state of things represented by the Leges Henrici was converted into the state of things represented by Bracton, was legal fiction. Not of course that such fictions can really make any vast change in the conduct of human affairs; they can only be the machinery, not the working power. The facts which made possible the fictions are facts in the general history of England, but a word may be said of the fictions themselves.

It is perfectly true that of any fictitious machinery we see little on the surface of what Bracton writes about homicide and other crimes. But Bracton had a leaning towards Rome and Reason at a time when Romanism and Rationalism were all one, and this leaning, though it may have enabled him to lay down law for unborn generations and undiscovered continents, makes him an untrustworthy guide to the legal notions of his English contemporaries whenever he ventures beyond a mere description of what, as a matter of fact, was done in courts of law.

Without regard therefore to his theory of homicide, a theory derived from the Canonists, let us look at the words which were actually used in an appeal "de morte hominis." The appellant says that B killed C "nequiter et in felonia et in assaltu premeditato et contra

pacem domini regis ei datam[1]." Now all this may seem to us mere verbiage and common form. I imagine, however, that this brief formula contains no less than three legal fictions, the object of which is to show that the king's rights have been infringed. The necessity for such fictions may seem to us as strange as the fictions themselves. We cannot imagine a manslayer admitting that he has taken life, but questioning why the king, of all people in the world, should interfere; nor can we fancy a slain man's kinsfolk, or his landlord, or the landlord of the slayer protesting against any intervention of the king or his judges. But the twelfth century books require us to imagine all this. The king's criminal justice is hemmed in on all sides by the rights of others, rights to fines and compositions and forfeitures, and besides all this there is in the background the old notion that the quarrel is a very pretty one as it stands, and that the king has no business to meddle with it. The words just cited had probably become merely formal, though they were formally essential words in Bracton's day, and homicide was in all cases a plea of the crown,*but none the less they had once had a serious meaning.

We may indeed pass by *nequiter* as a vituperative adverb, but the charge of felony *{in felonia)* contains, as I believe, fiction the first. Of course it is impossible in a casual sentence to say anything profitable about the word *felony,* but one remark may be pardoned, namely, that whatever may have been its original meaning, whether deceit or cruelty, it came into English law as a foreign word, and when it first

[1] Bracton, f. 138.

appears in England it seems to be no general name for all grave crimes, but the name of a specific crime. That crime is treason, or rather, since the word treason also has changed its meaning, a breach of the obligation which binds a man to his lord; in short, very much such a crime as was afterwards called treason high and petty, when high treason still meant not a crime against "the State," but a crime directly touching our lord the king. I believe that nowhere save in England did felony ever come to stand for a vast class of crimes, or to include such a matter as theft; and it may be observed that in England it soon lost all descriptive power. It came to stand for a number of crimes which could be enumerated, but no definition of felony ever was or could be formed. To say that felony means treason may seem contrary to the first principles of our law, but some of those first principles were only settled late in the day, and looking abroad, more especially to France, whence undoubtedly the word *felony* came to us, there is good reason for supposing that it once connoted a breach of the feudal tie. Such a crime had long been in England, as elsewhere, the worst of crimes; it had been regarded as the unpardonable sin, the sin of Judas who betrayed his lord, and what is more to our purpose, it had been a crime whereby a man's lands were forfeited to his lord. The steps by which such crimes as mere manslaughter and theft became felonies it is now difficult to retrace, but probably the king's court permitted plaintiffs to "add words of felony," and did not permit the accused to dispute the charge thus made. Our foreign kings successfully asserted the principle that

every man, whosesoever man he may be, is the king's man, bound to the king by an immediate fealty ; and perhaps to this principle the word felony owes the enormously wide meaning which it gained in England.

Whatever may be the truth about this charge of felony, the charge of breaking the king's peace is almost certainly a fiction. It will be observed, that according to the words of the appeal, B killed C not merely "contra pacem domini regis," but "contra pacem domini regis *ei datam"* that is to say, the slain man had the king's safe conduct, or in some other way was specially under the king's protection, and breach of the king's protection was undoubtedly an ancient plea of the crown. When in the Latin version of Canute's code, and again in Doomsday, and in the would-be laws of Edward, William, and Henry the First, we read of a breach of the king's peace, we ought certainly not to import notions from our later law and to imagine that every common assault or even every homicide could be supposed a violation of that peace, or to think of breach of the king's peace as almost or altogether synonymous with offence. A charge of breaking the king's peace was a definite charge of having done an act of violence to a person, or at a place, or on a day specially privileged. Probably this had lost all practical importance before Bracton's time, and though of course it was absolutely essential to charge in words a breach of the king's peace, this peace was thought of not as a peculiar immunity attached to places, persons, times and occasions, but as the general peace and order of the realm. Still, to make assurance doubly sure, it might be well to charge

that a slain man enjoyed a peculiar peace *ei datatm,* and thus make the crime a definite breach of the king's *grith* or *mund.*

But the more important point is that the slayer was guilty of premeditated assault *(in assultu premeditate).*. He is thus, I take it, charged with foresteal, agwait purpense, guet-apens. Brae ton afterwards gives the words of an appeal "de pace et plagis," an appeal of wounds, and in this the appellant charges that on a certain day he was in the peace of our lord the king in such a place, or that he was in the peace of our lord the king, " in chimino domini regis[1]." This may show a trace, though only a trace, of the old notion that the king had a special interest in crimes committed upon his highway, though by this time, just as the king's peace was no longer a special privilege, so every highway had become, or was becoming, the king's highway. But the main point to be noticed is that the appeals "de morte hominis, de pace et plagis," and "de pace et mahemio," all contain the charge of premeditated assault. That this premeditatus assultus was probably a Latin equivalent for the French guet-apens seems very probable when we remember that the procedure by appeal and wager *of* battle was French, not English, and compare an extremely similar form of appeal for wounds given in the Norman custumal[2]. "Je me plaing de P., qui en la paix de Dieu et du Due me assaillit felonneusement a ma charue, *en aguet pourpense,* et me fist cest sang et ceste playe que je monstre

[1] **f. 144.**

[2] L'*Ancienne Coutume de Normandie* (ed. W. L. de Gruchy), cap. 74 (75).

& la justice," In the Latin version it runs:—"Ego conqueror de T. qui ad carrucam meam, *cum agueito prczcogitato,* in pace Domini et Ducis me crudeliter assaltavit, et plagam, fnaleficium et sanguinem mihi fecit, quod demonstravi judicio,"

This charge of premeditatus assultus, which contains the germ of malice prepense, appears in the appeal "de morte hominis" as given by Fleta[1]. At a much later date Staundford[3] copies the old form of words from Bracton, and I suppose that so long as men waged battle in criminal cases the form remained unaltered. Probably this phrase had a well-known French equivalent. Certainly in the 13th century, and I know not how much earlier, there was a distinction in French law, or at least in the law of some parts of France, between murder and simple homicide, and the distinguishing note of the former was guet-apens. Beaumanoir, who towards the close of the century committed to writing the custom of Beauvais, says that there are four crimes for which a man shall be drawn and hanged and forfeit his possessions. These are murder, treason, homicide and rape. Murder and homicide he thus distinguishes[3]:—"Murdres, si est quant aucuns tue ou fet tuer autrui *en agait apense* puis soleil couquant dusqu'a soleil levant, ou quant il tue ou fet tuer en trivesou en asseurement....Omicides, si est quant aucun tue aucun *en caude mellee,* si comme il avient que tencons naist et de la tenchon vient lede parole et de le parole mellee, por le quele aucuns

[1] f. 48. [2] Ed. 1583, f. 78 b.

[3] *Les Coutumes du Beauvoisis,* cap. 30, sees. 3, 6 (ed. Beugnot, vol. 1., p. 412).

rechoit mort souventes fois." This is very strikingly like English law as it emerges three centuries later in Staundford's *Pleas of the Crown.* Murder is marked by *guet-apens*; manslaughter is killing in what we have chosen to call *chance medley,* but what doubtless should have been called, and must once have been called, even in England, *chaude melee*. In an ordinance of St Lewis[1], and in other French records of the 13th century, the same distinction appears, and guet-apens was so well-established a term of the law, that Frenchmen writing in Latin were at pains to make such words as *agaitum, aguaitum**. But the more classically-minded seem to have preferred *insidia prcepensatce,* or *insidice prce-cogitata,* and this introduction of the word *insidia* is of importance, because of a certain text in the Vulgate, of which hereafter.

Nevertheless, the punishment for simple homicide was, according to Beaumanoir, the same as the punish-ment for murder. It may be noted by the way that the French law in the 17th and 18th centuries was quite as strict as the English in holding that every one guilty of homicide is in theory liable to be put to death. In case of excusable homicide, there was, in France, the same necessity of obtaining from the king " lettres de grace "—which, however, were granted as of course—that there was in England of obtaining a formal pardon[8]. But whatever may have been the

[1] Ann. 1245. *Ordonnances des Rois de France,* vol. 1., pp. 56-57.

[2] Ducange, s.v. agaitum, aguaitum, insidise, pensabiliter, pensa-menturn.

[3] Jousse, *Traite de la Justice Criminelle* (ed. 1771), vol. I I I , pp. 481-482 ; Denisart, *Collection de Decisions,* s.v. homicide, grace

origin of this state of things, which perdured until the Revolution, criminal homicide not amounting to "meurtre" was a capital crime just as meurtre was. I believe that sometimes, and in some parts of France, the murderer was broken upon the wheel, while the mere manslayer escaped with a hanging, but in Beaumanoir's time and district both were hanged. His distinction therefore may at first sight seem futile. Really it was of great importance, though it did not affect the fate of the criminal.

In France criminal jurisdiction was to a very large extent in other hands than the king's—in the hands of great lords and chartered towns. Now murder was a plea which belonged only to the highest jurisdiction. In the records of the 13th century there are many entries touching disputes as to whether some lord's jurisdiction extends to murders. A good illustration of the way in which the distinction between murder and simple homicide made itself felt may be found in a case which came before the king's court in 1264[1]. A man had killed his wife. The mayor and jurats of Noyon hanged him. The bishop of Noyon was aggrieved by this, for that, as he alleged, jurisdiction over murder (justitia multri) was vested in him. The mayor, however, pleaded that there had been no murder, but just a simple homicide en chaude melee (simplex occisio facta ad calidam mesleiam). Even late in the 18th century there was this distinction : homicide by guet-apens was, while simple homicide was not, "un cas royal," that is

(ed. 1790); Bouteiller, *Somme Rurale,* ed. L. Charondas le Caron, **1611, p. 287.**

[1] *Les Olim, ou Registres des Arrets* (ed. Beugnot), vol. i., p. 592.

to say, a plea over which only the king's judges had jurisdiction to the exclusion of the seignorial courts[1].

This, as it seems to me, may explain the appearance of *premeditatus assultus* in the form of words, whereby, according to Bracton, wager of battle is made. This plea, as say the Leges Willelmi, belongs to the king's crown. This, as say the laws of Canute, is one of the rights which the king enjoys over all men. It is " un cas royal," "placitum coronae." Perhaps the averment of premeditated assault was in Bracton's day merely formal. The king's judges must have been unworthy of their successors if they were not prepared to hold that an allegation giving the court jurisdiction cannot be contradicted, and somehow or another the great work of gathering into the king's hands all criminal justice was successfully accomplished. If, however, we are apt to forget that any such work had to be done, we should try to realize the state of things pictured by the Leges Henrici, and consider how easily that might have developed into the state of things that existed in contemporary France ; nor should we forget that Glanvill and Bracton give us but one side of a many-sided story, and that side the king's.

From *prcemeditatus assultus* it was no great leap to *prcecogitata malitia,* not nearly so great a leap as it is now from assault to malice, according to the common use of words. Undoubtedly, as Sir James Stephen suggests[2], it is but gradually that malice has come definitely to mean a motive, namely, spite, malignity,

[1] **Jousse, *op, at.,* vol. i., pp. 193-195.**

[8] **Vol. 11., p. 118 j vol. in., p. 56.**

pleasure in another's pain. " Sufficit diei malitia sua[1]" :—those familiar with such words as these can hardly have thought that *malitia* must always mean a wicked motive, nor did Wiclif scruple to translate them by "It sufficith to the dai his owne malice." The transition from premeditated assault to malice aforethought is rendered even easier than it would otherwise have been by the statute of 1389, which combines them in the phrase " agait, assaut, ou malice purpense." This probably is just such a generalizing crescendo as is at all times dear to the draftsman ; "assault" is somewhat wider than "ambush," and "premeditated evil" is a still more general phrase. The transition, however, is fortunately made yet easier for us by an almost contemporary French ordinance and an almost contemporary Scotch statute dealing with the very same subject-matter as this statute of 1389, for it seems that the royal prerogative of pardon was making itself felt as a nuisance in France and Scotland as well as in England.

In a French ordinance of 1356[2] this phrase occurs:—" Nous ne ferons pardons ne remissions de murdres ou de mutillacions de membres faiz et perpetres de mauvaiz agait par mauvaise volunte et par deliberacion."

A Scotch statute of 1369[3], provides that no one asking a pardon for homicide shall be heard until inquisition has been made touching the crime, and if it appears "quod factum fuerit per murthyr vel per

[1] S. Matth., cap. vi., v. 34 (Vulg.).
[2] *Ordonnances,* vol. iii., p. 129.
[3] *Acts of Parliaments of Scotland,* vol. 1., p. 151.

praecogitatam malisiam," a pardon shall not be granted without consent of Parliament. Here, plain enough, is malice aforethought part of the Scotch definition of the worst form of manslaying just twenty years before the same phrase receives statutory sanction in England. But the vernacular phrase in Scotland seems to have been, not *malice aforethought,* but *forethought felony.* In 1373, this occurs as a technical term in a statute[1], such as would now be called a temporary Coercion Act The king is to cause every manslayer to be seized and imprisoned " et incontinenti cognosci facere per assisam si homicidium fuit perpetratum ex certo et deliberato proposito vel per forthouch felony sive murthir, vel ex calore iracundiae vz chaudemellee " ; in the former case " incontinenti facienda est iusticia," while in the latter the criminal is to be proceeded against in the ordinary course of law. From this time onwards the contrast between *forthocht felony* and *chaude mellay* recurs at intervals in the Scotch statute book. The chief consequence of the distinction became one not very unlike that which existed in England after murderers had been deprived of benefit of clergy. In Scotland, the privilege of sanctuary or grith (the church grith of our own old laws) seems to have been a more inviolable impediment to penal justice than it was even in England. At length, however, in 1469, just about the same time that petty treason was made unclergyable in England, and before murder was made unclergyable, the murderer was excepted in Scotland from the privilege of sanctuary[2]. Those in charge of the

[1] *Acts of Parliaments ofScotland,* vol. i., p. 184,
[2] *Ibid.,* vol 11., p. 96.

sanctuary are to be informed "that sic a man has committit sic a cryme of forthocht felony tanquam Incediator [insidiator] viarum et per Industriam for the quhilk the law grantis nocht nor levis sic personis to Joise [enjoy] the Immunite of the kirk."

Passing by for one moment this recurrence at a late date of the old notion that waylaying, insidiae, guet-apens are the true marks of the worst kind of man-slaughter, we may note the close similarity between the phrases which in the latter half of the 14th century were employed in France, Scotland, and England, to designate the sort of crime which the king was not to pardon. In France it is perpetrated "de mauvaiz agait par mauvaise volunte et par deliberacion"; in Scotland "per praecogitatam malitiam," "ex certo et deliberato proposito vel per forthouch felony"; in England "par agait, assaut ou malice purpense." Probably, almost the same idea is expressed in all these phrases; it is a sort of homicide that is distinguishable from manslaughter en chaude melee. Some premeditation is of its essence, and the notion of waylaying or ambush is giving way to that of spite or malevolence.

But our last quotation from the Scotch statute book contains an allusion not to be missed. The Latin words "tanquam insidiator viarum et per industriam," which are introduced into a statute written in the vulgar tongue, are of great historical value. They refer to a passage in Exodus[1]. Our Authorised Version renders it thus:—"But if a man come presumptuously upon his neighbour, to slay him with

[1] **Exod., cap. xxi., v. 14.**

guile; thou shalt take him from mine altar, that he may die." In the Vulgate the words are, " Si quis*per industriam* occiderit proximum suum, et *per insidias,* ab altari meo evelles eum, ut moriatur."

Such an one, therefore, the clergy could hardly protect, for this was not merely a text of the Bible, it was a text of the Canon Law[1]. I imagine that this text had a most important influence on the criminal law of mediaeval Europe. It draws a line between two kinds of culpable homicide, and sanctions the belief that insidiae, waylaying, guet-apens, are the distinctive marks of the worse kind. There are other passages in the Pentateuch which in their Latin guise make *odium* as well as *insidice* characteristic of that man-slaughter which is beyond the privilege of sanctuary. It may be conjectured that these passages helped not a little to establish the notion that the real test is subjective, and to supplant premeditated waylaying by malice aforethought[2].

It is not impossible that the texts in the Vulgate about *insidice* are the root of the whole matter, the cause why the old notion that murder is slaying in secret, or slaying with concealment, was after the formation of the Canon Law replaced by the theory that the differentia of the worst homicide is guet-apens, premeditatus assultus. I imagine, however, that at least a co-operative cause was the fact that waylaying, "force faite en real chimin," was an infringement of the king's own rights, " un cas royal," an ancient plea

[1] Decret. Gregor. IX., lib. v., tit. 12, c. 1.

[2] Num., cap. xxxv., v. 20, seq.; Deut, cap. xix., v. 4, seq.

of the crown, for that the highway was the king's, and they that walked therein enjoyed his peace.

This may seem a superfluous attempt to explain the sufficiently obvious. We are wont to think, or to speak as if we thought that premeditated manslaying is the worst type of manslaying, and are perhaps rather surprised when Sir James Stephen points out that this is no universal truth, But whatever may be natural to us, we ought not to suppose that in the eyes of our remote ancestors the fact of premeditation would naturally have aggravated the guilt of manslaughter. The curious agreement between French and English law as to the necessity of obtaining a pardon in a case of excusable homicide, must suggest that this usage, for which Hale and Blacks tone make half-hearted apologies, and which may have owed its long continuance partly to texts in the Old Testament, partly to the fees payable by those who sought a pardon, had its origin not in any accident, or in any desire to extort money, but in the utter incompetence of ancient law to take note of the mental elements of crime. Of this incompetence there is plenty of other evidence. The rank of the slayer, the rank of the slain, the rank of their respective lords, the sacredness of the day on which the deed was done, the ownership of the place at which the deed was done—these are the facts which our earliest authorities weigh when they mete out punishment ; they have little indeed to say of intention or motive. When they do take any account of intention or motive, then we may generally suspect that some ecclesiastical influence has been at work, as when, for example, the compiler of the Leges Henrici borrows from Gratian

and St Augustine that phrase about *mens rea* which has found a permanent place in our law books. Secrecy, or rather concealment, it may be allowed, was from of old an aggravation of manslaughter, so was the taking of an unfair advantage. Of this we see something in the definition of foresteal already quoted; it is foresteal to lie in wait for one's enemy and to attack him on the flank; it is not foresteal to call him back and have a fight with him. But in the days of the blood feud, such days for example as are represented by the story of Burnt Njal, mere deliberation or premeditation cannot have been thought an aggravation of the crime; a man was entitled to kill his enemy provided that he was prepared to pay the price or bear the feud, but he was expected to kill his enemy in a fair, open, honest manner, not to take a mean advantage, not to fall upon him like a thief in the dark. In the fact therefore that premeditation became an element in the definition of murder, there is, as it seems to me, something that requires explanation, and towards such an explanation we have made some advance when we see that ambush or waylaying is an offence against the King, and that the book of Exodus excepts him who has slain another *per insidias* from the privilege of sanctuary.

THE SEISIN OF CHATTELS[1].

THERE is hardly a rule of our legal terminology better settled than that which is broken by the title of this paper. There is no such thing known to our law as the seisin of chattels ; one may be seised of land, but of a chattel, real or personal, one shall be possessed, not seised. Of course, one may seize chattels, and between seizure and seisin the etymologist may see a close connection, but he that would commit a really bad blunder let him speak of the seisin of chattels.

Seemingly, it has been the general opinion that this distinction, now well marked, between possession and seisin is of very ancient date, an outline of immemorial common law, and could we accept one common description or definition of seisin this opinion would be *forced* upon us as inevitable. "Seisin," said Lord Mansfield[2], and his words have passed into the text-books, "*is* a technical term to denote the completion *of* that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. Sciendum est feudum, sine investitura, nullo modo constitui posse. Feud. lib. i, tit. 25 ; lib. 2, tit. 1 ; 2 Craig, lib. 2, tit. 2." Here seisin appears as a distinctly feudal notion, and the question

[1] ***Law Quarterly Review,*** **July, 1885.**

[2] ***Taylor*** **dem.** ***Atkyns*** **v.** ***Horde,*** **1 Burr, 107.**

why there is no seisin of chattels is answered at once:—There is no tenure of movables, and the termor has no fee or feud. But it will have occurred to many readers as a little strange that Lord Mansfield, instead of vouching some English writer, Glanvill or Bracton, Littleton or Coke, to warrant what he thus said about a word which, for many centuries, had been constantly in the mouths of English lawyers, should have appealed to certain ancient Lombards and a modern Scotchman. The truth seems to be that there was no old English authority available for the purpose. Seisin is possession ; that is what Bracton says at the outset, that is what Coke says at the close of the mediaeval period ; one and the other would have been surprised to hear that any act or consent on the lord's part is necessary to constitute seisin.

Now, it can, as I believe, be shown that the notion of seisin, so far from having any very close connection with those ideas and institutions which we call feudal, had not even any exclusive reference to land. From time whereof there is no memory until the fifteenth century was no longer very young, English lawyers often, and in some contexts habitually, spoke about and pleaded about the seisin of chattels. Attempt will here be made to prove this assertion. The question is not one barely about the use of words. The gulf between what we call real property, and what we call personal property, is so wide and deep and ancient that we are constantly tempted to overrate its width, depth, and antiquity, and thus, perhaps, we sometimes miss important points in the history of the law. We shall hardly understand all that may be understood of

that history, if we steadily refuse to bring land and goods into any relation with each other. Especially is this true when we are dealing with possession or seisin. Seisin and disseisin seem so mysterious a matter that, in despair of rational explanation, we are glad to have so satisfactory a word as feudalism wherewith to hush the questioner. It may be possible, however, that some of the mystery might be even more effectually dispelled if we understood what our old law said about the possession of goods, and from possibility we might pass to probability, if we really found that it was once a common thing to be seised of goods.

Having to argue for a conclusion which, perhaps, runs counter to general belief, a considerable mass of evidence must be pleaded. The argument should be guarded against two objections. It must be made clear that we are not confusing seisin with seizure, seisin with being seised. It must be made clear that we have not fallen into a trap set for us by some pleader's blunder, some reporter's carelessness, or some text-writer's whim, but are tracing an orthodox and habitual use of words. While, however, the reader's patience is begged for a number of citations and references, he must be asked not to expect too much. The mass of our printed information concerning the treatment of chattels in the thirteenth and fourteenth centuries is small indeed, when compared with the vast bulk of materials for a history of real property, and for the more part we shall be forced to rely on replevin cases in whigh the possession of chattels is just mentioned, but the whole argument turns on the title to land or rent.

We will take just one step beyond the limit of legal memory in order to notice the Leges Henrici Primi. There we find two phrases which we shall meet elsewhere. The thief who is taken with the mainour is *de fur to seisiatus* (cap. 26). When a man has been distrained he is to be allowed to replevy his goods, *et seisiatus placitet,* that is, as I understand, he need not plead until he is seised (cap. 29, § 2).

We pass from this instructive apocrypha to the first book in the orthodox canon. Glanvill twice has occasion to mention possession of goods ; each time he calls it *seisina.* The pledgee of movables may have seisin of them—*cum itaque res mobiles ponuntur in vadium ita quod creditori inde fiat seisina* (lib. 10, cap. 6). The plaintiff in an assize of novel disseisin recovers seisin of the land and seisin of his chattels also, *seisinam omnium catallorum* (lib. 13, cap. 9).

In Bracton there is very much to be read of *seisina* and *possessioy* and to me it seems that he uses the two words as precisely equivalent, though, perhaps, for him *seisina* is the vulgar word, *possessio* the technical and correct Latin term to be found in the Roman law books. We shall return to this hereafter, when we speak of chattels real. Bracton has hardly ever occasion to mention the possession of movables, but with him, as with the writer of the Leges Henrici, the hand-having back-bearing thief is *seisitus de latrocinio,* and is *in seisina* (fol. 150 b, 154 b). Fleta (fol. 54, 62) copies, Britton (vol. 1., p. 56) translates these phrases. There can be no prosecution in the qpurt of a lord having franchise of infangthief, unless the accused *de rebus insecutis fuerint seisiti*; in other words it

is only over *mesfesours trovez seisiz* that such a lord has jurisdiction. Clearly, to say that a thief was taken *seisitus de furto,* or *seisitus de latrocinio,* was to use a technical phrase about an important point. It is used in the Assize of Clarendon—"si aliquis fuerit captus qui fuerit seisiatus de roberia vel latrocinio." Bracton again (fol. 122) says that if the coroner hears of treasure trove he must inquire *si aliquis inde inventus sit seisitus.* Elsewhere (fol. 440 b) he discusses what is to be done if the defendant in an action of debt will not appear; his suggestion is, *bonum esset adjudicare querenti ab initio seisinam catallorum secundum quantitatem debiti petiti*

Between Glanvill and Bracton we might have noticed an entry in the *Placitorum Abbreviatio* (p. *12)* of Richard the First's time. The roll of the King's Court says that the wax in question has been replevied, and that he whose it was is seised of it *(cera ilia fuit replegiata et ille cujus ilia fuit est inde saisitus).* Just from Bracton's time the same book gives a count in trespass, which charges the defendant with having sent his men to violently interrupt the proceedings of a jury, *et de quodam juratore abstulerunt quemdam gladium et adhuc sunt in seisina de eodem gladio* (p. 129, Mich. 37 & 38 Hen. III.).

An examination of rolls belonging to the first years of Henry the Third has supplied a dozen criminal cases in which the seisin (always *seisina* and never *possessio)* of chattels is treated as a most important matter. It is just a question of life and death whether the thief was taken in seisin of the stolen goods (*seisitus de bonis furatis),* whether the manslayer was

taken in seisin of the murderous weapon *(seisitus de cnipulo sanguinolento).* If he was seised he can be hanged offhand; if he was not seised, then, unless he will put himself upon his country, he cannot even be tried, he can only be kept in custody. Sometimes a phrase that is yet more " feudal " is found, the thief was " vested and seised " of the stolen goods. The Mayor and bailiffs of Wallingford took a man vested and seised of an instrument for clipping coins:—invenerunt ipsi predictum Johannem vestitum et seisitum de seisina ilia ; he of course denied the seisin, deffendit saisinam illam[1]. Another man had stolen tin at Bodmin ; the appellor saw him vested and seised of the tin and burying it in the ground :—ipsum vidit vestitum et seisitum de stagno furato[2]. One other case[3] is noticeable for many reasons. The justices in eyre who went to Devonshire in 1218 hanged two men for receiving stolen goods. Their sons appealed to the king against the consequent forfeiture—"et quia videtur consilio domini regis et iusticiariis de banco quod male et iniuste suspensi fuerunt eo quod non fuerunt seisiti de aliquo furto vel roberia, nee aliquam roberiam cognoverunt, nee per dictum iuratorum potuerunt de iure dampnari, consideratum est quod heredes eorum non exheredentur,

[1] **Roll for Michaelmas Term, 5 & 6 Hen. III. (known at the Record Office as Coram Rege Roll, Hen. III. No. 12), memb. 12. What he was seised of was a *tonsura.* I gather from the context that this means an instrument for clipping. See Ducange, s.v. *tonsura.***

[2] ***Ibid.* memb. 14.**

[3] **Roll for Michaelmas Term, 3 & 4 Hen. III. (Coram Rege Roll, Hen. III. No. 3), memb. 15, dors.**

et ideo preceptum est vicecomiti quod eis terram suam habere faciat etc., et iusticiarii in misericordia"! Justices at this date had occasion to know something about the seisin of chattels. As to *possessio* and *possideo,* I have never yet found these words on any of these early rolls save in one context. The exception is instructive :— the parson possesses *{possidet)* the church. Here we touch the domain of the Canon Law; the fact of possession is to be established by the bishop's certificate. But we will go back to the evidence already in print, which really is sufficient for our purpose[1].

The recently printed Year Books of Edward the First give us several examples. I quote Mr Horwood's translations.

> **21 & 22 Edwd. I, p. 10. Note, that in the Replegiari, the plea ought not to proceed while he who took the beasts is seised of what he took (est seysy de la prise).**
>
> **21 & 22 Edwd. I, p. 20. Note, that where one complains that B tortiously took his chattels, such as corn or other chattels (except beasts), he ought to mention the value, but there is no need to mention the value of beasts, although the taker is still seised of the beasts (tut seyt le pernur uncore sessi de les avers).**
>
> **21 & 22 Edwd. I, p. 56. Note, that where, in an action for taking of beasts, one counts against the lord, and the lord is seised of the beasts (e le seygnur seyt seysi de avers), and avows the taking, there is no need for the plaintiff to reply to the avowry until he has the deliverance made.**

The rule laid down by the first and third of these passages is that which seems to be indicated by the

[1] **There is a note about the seisin of stolen goods in MS. Add. 12,269, the note-book discovered by Prof. Vinogradoff; this I have copied in *Pleas of the Crown, Gloucester,* 1221, p. 152.**

seisiatus placitet of the Leges Henrici. If goods have been taken in distress they must be delivered to the claimant or security must be given for their delivery before he pleads to the avowry, and so *seisiatus placitet.* The second passage gives us the phrase *uncore sessi,* used to describe the distrainor when no deliverance has yet been made. That phrase will haunt us for some time to come.

21 & 22 Edwd. I, p. 589. Trespass for taking thirty swans. Plea the plaintiff himself is seised of the swans (seysy de synes).

32 & 33 Edwd. I, p. 197. Replevin; the plaintiff says that the defendant is still seised of the beasts (uncore seisi de nos avers).

It is only with the greatest caution that one may cite the *Mirror of Justices.* The author of that book, who probably wrote in Edward the First's reign, was moved by a bitter hatred of the King's judges, who, in his opinion, were distorting the ancient law and oppressing the people. Unfortunately, he was not content with stating his grievances, but chose to propagate a mass of fables about King Alfred and the old law. The book has never been carefully edited or thoroughly examined, and possibly its writer may hereafter be acquitted of that charge of wilful dishonesty which his would-be quotations from imaginary records very naturally provoke. But it is just worth notice that he speaks[1], in one and the same breath, of seisin and livery of seisin of lands and goods, and argues that the purchaser of goods ought to be considered as seised of the goods so soon as

[1] **Cap. s, sec. 1, § 73**

the vendor has quitted them. Livery of seisin is seemingly necessary to perfect the sale of a horse ; and the author, unless I have misunderstood him, complains that a brief but actual seisin by the purchaser has not been considered sufficient.

We have now to face the series of Year Books stretching, with some breaks, from Edward the Second to Henry the Eighth.

Hil., 14 Edwd. II, fol. 421. Count in replevin, the defendant has taken beasts *et uncore est seisi.*

Mich., 18 Edwd. II, fol. 561. Similar count, *vous estes unqore seisi.*

Hil., 10 Edwd. III, fol. S, pi. 14. Similar count, *et dit que il fuist uncore seisi des avers.*

Hil., 21 Edwd. III, fol. 51, pi. 3. Similar count, *et counta que il fut encore saisi del' boef.*

Mich., 38 Edwd. III, fol. 22. Trespass: the lord who has taken a heriot says, that because it was the best beast *nous le seisimes apres la mort G. et fuimes seisis tan que vous,* etc.

Hil., 39 Edwd. III, fol. 4. The king has been seized of an estray, *ad este seisi,* for a year and day.

Hil., 42 Edwd. III, fol. 6, pi. 18. Plaintiff counts that the defendant has arrested his wool *et adhuc in arrestatione detinet.* Plea, the plaintiff himself *ceo jour est seisie de les Mens.*

Mich., 47 Edwd. III, fol. 23, pi. 55. Plea in trespass de bonis aportatis: *un J. W. fuit seisie de mesmes les chateaux, et morust seisie, et fist mesme cestuy R. son executor, le quel seisist les chateaux.* In the discussion, possession and seisin are used indiscriminately.

Mich., 6 Rich, II [Fitz. Abr. tit. *Replication,* pi. 60]. *Nostre testa tour morust seisi de mesme les biens apres que mort nous les happamus et de eux seisi fuomus tanque les defendants les pristrent hors de nostre possession.* Three times in a brief note occurs this phrase—*morust seisi de mesmes les biens.*

Must we not say, with the reporter, *issint vide que moreant seisi de Mens est material?*

Pasch., 7 Hen. IV, fol. 15, pl. 20. Il *mesme est seisie de tnesmes les biens.*

Mich., 11 Hen. IV, fol. 2, pi. 4. // *detient uncore nos berbits et est seisie.*

This phrase, *still seised,* with which we are now becoming familiar, occurs also in a petition to the King in Parliament of 1321-1322. The parson of Kippax, in Yorkshire, complains that certain persons have driven off his horses and sheep, and that the beasts have come to the hands of the Earl of Arundel's bailiffs, who *uncor sunt seisis de eux. [Rot. Parl.,* vol. 1., p. 394, no. 41.)

I have not cited by any means all the instances in the books of Edward the Second and Edward the Third that have caught my eye, but I have probably cited quite enough to show that in the fourteenth century it was common to speak of a man as seised of movables. There is along, and I think unbroken,line of cases which show that the usual form of a count in replevin, when the beasts had not yet been delivered, stated that the distrainor was still seised of the beasts. But some of our examples will prove that similar phrases were used in other contexts. It was quite right to say, for example, that a testator died seised of goods, and that afterwards his executors were seised.

But now there begins a change in the terms used in replevin cases. In Pasch., 7 Hen. IV, fol. 11, pi. 2, we find *il detienl a tort,* where, according to precedent, we should have expected *uncore seisi* But the struggle between the two phrases is not yet over.

Twice in the early years of Henry the Sixth we meet with the older term.

Mich., 3 Hen. VI, fol. 15, pl. 20. *Nous vous disons que le defendant est uncore seisi de les avers.*
Nous disons que vous mesmes estcs seisis de eux.

HiL, 4 Hen. VI, fol. 13, pl. IT. *Le defendant est uncore seisi deV taure.*

These are the last instances that I have at hand. From this time onwards *uncore seisi* seems definitely supplanted by *uncore detient.* Thus we have :—

Pasch., 21 Hen, VI, fol. 40, pl. 8. // *uncore detient nos testes.*

Hil., 1 Hen. VII, fol. 11, pl. 16. *Il uncore detient.*

Mich., 5 Hen. VII, fol. 9, pl. 21. *Et le plaintiff counta sur un Uncore detient.*

I have kept back to the last, perhaps the most striking piece of evidence, because of its somewhat uncertain date. The *Novae Narrationes* is a brief collection of precedents for counts or declarations in French. It was printed by Pynson without date[1], and was more than once reprinted. Coke in one of his prefaces (3 Rep.) puts it into a class of old books along with Glanvill, Bracton, Britton, Fleta and Hengham, which he distinguishes from a class of newer books, comprehending the *Old Temcres,* the *Old Natura Brevium* and Littleton. In another of his prefaces (10 Rep.) he says that the *Novae Narrationes* was published "about the reign of King Edw. III." The Latin version of the same preface has the more definite "juxta *initium* regni Regis Edw. 3 in lucem prodiit,"

[1] "i? 1515 " *Cat. Brit Mus.*

This date, however, is too early for the book as printed, for just at the end of it there is a declaration on the Statute of Labourers, which declaration is supposed to be made after the third year of Richard the Second. More about its date I cannot say. Near the end of Henry the Sixth's reign[1] the judges treat *Les Novels Tales* as a very high authority. Coke says that the book to which they refer is the work now in question, the *Novae Narrationes.*

Now, this book contains a precedent for a count in replevin, which describes the distrainor as still seised, *unquore seist*[2] There is also a count in detinue by the purchaser of a cow, who has paid a penny in earnest *(en arras),* and it sets forth that *cesty A. luy bailla un denier en arras, et del denier ilfuit seisie*[3].

The appearance of such phrases in a book of precedents is strong evidence that they were at least permissible, but I am not sure that it is stronger evidence than that afforded by the Year Books. It should not be forgotten that some of the instances above cited come from a time when pleadings were jealously scanned, in the hope that some verbal flaw might be detected in them; but though it is easy to find examples of objections, and successful objections, which seem to us very captious and unreasonable, I have not met with any instance in which exception is taken to the use of this word seised in connection with chattels, personal or real.

Now, however, we must cite the decisive passage in Littleton's *Tenures* (sec. 324), which proclaims once

[1] Mich., 39 Hen. VI, fol. 30, pl. 43.
[2] Ed. 1561, fol. 62 b. [3] Fol. 68.

and for all that the differentiation between seisin and possession has taken place:—

"Also, when a man [in pleading[1]] will show a feoffment made to him, or a gift in tail, or a lease for life of any lands or tenements, then he shall say, by force of which feoffment, gift, or lease, he was seised, etc., but where one will plead a lease or grant made to him of a chattel, real or personal, then he shall say, by force of which he was possessed, etc."

Littleton, it is supposed, wrote between 1474 and 1481. We have brought down our series of counts in replevin containing the words *uncore seisi* to 1426. The series containing *uncore detient* begins in 1443. Of course very little stress should be laid on these dates, for many cases may have been overlooked, and it would be easy to draw false inferences from the casual use of a phrase. Still the evidence tends to show that there had been a change in the terms used in pleading, just long enough before Littleton's day to make his express statement intelligible.

We have not yet spoken of chattels real, and will in this instance reverse our procedure and work from the latest authority to the earlier. And here the first witness to be called is Littleton himself, for he says (sec. 567), "Also if a man letteth tenements for term of years by force of which lease the lessee is seised," thus himself using the very phrase that he has condemned as incorrect. We shall easily pardon this slip if we look to the older authorities, for at worst it was an archaism.

What we should expect in such a context of course

[1] The words in brackets are in some very old editions.

is "by force of which he is possessed," or, in the orthodox law Latin, "virtute cujus possessionatus est." Just about Littleton's time we find this phrase in the Year Books.

Mich., 21 Edwd. IV, fol 10, pl. i. *Par force de quel ilfuit possesse.* But some seventy years earlier the other phrase occurs.

Pasch., i Hen. V, fol. 3, pl. 3. Count in Ejectione firmae : lease for twenty years, *par force de quel ilfuit seisie.*

In the earlier Year Books there are very few instances in which a leaseholder pleads his title; but, skipping a century, we have

Mich., 6 Edwd. II, fol. 177. Count in Quare ejecit: lease for ten years, *par quel lese A.fuist seisi.*

Mich., 3 Edwd. II, fol. 49. Count in Covenant by lessee ; lease for 10 years to A., *par quel lees ilfuist seisi iiaunz.*

Instances from the reign of Edward the First are still plainer:—

32 & 33 Edwd. I, p. 529. Covenant; count by a lessee on a lease for five years of the provostship of Derby; the count, as enrolled in Latin, states that the lessees were *seisiti*

30 & 31 Edwd. I, p. 142. Covenant; count that J. leased the land to Roger for eight years *par quel lees il fut seisy* for a certain time, and that then Roger leased to Robert *par queuz lees il fut seisy* for four weeks.

21 & 22 Edwd. I, p. 23. Count in covenant by lessee of a rent; lease for ten years *par queu les yl fut seysy de cele par deus anz.*

20 & 21 Edwd. I, p. 254. Covenant by lessee; defendant says that by virtue of a lease for twenty years the plaintiff *fut sesy.*

20 & 21 Edwd, I, p. 278. Covenant by lessee's son; lease for twenty years to my father, *par quel les yl fut seysy un an.*

It will occur to the reader, that the value of this evidence depends on the comparative frequency of the words *seised and possessed* in counts by leaseholders ; I must say therefore, that while I can produce, from the Year Books of the two first Edwards, seven examples of pleadings which describe the termor as seised, I have not found one in which he pleads that he is possessed. Certainly, my investigations have been far from exhaustive, and have consisted rather in following the references given in indices and abridgements under hopeful headings, than in fairly reading from cover to cover, but unless, round about the year 1300, it was strictly and technically correct to plead that a termor is seised by force of his lease, I have had a very strange run of bad luck.

Lastly, we may again refer to the *Novae Narrationes* and there find several precedents of Covenant, Quare ejecit, and Ejectione firmae, in which the termors are made to say that they are seised. Thus, Hubert Mappe leased a messuage to Adam Pye for a term of years not yet ended, *per qui le dit Adam fuit seisy del mees avaundit.* On the other hand, in one of the precedents the termor is said to have been in peaceable *possession.* It is noticeable that this is a precedent in Ejectione firmae, a specialised form of trespass vi et armis, and a newer remedy for the termor than the Quare ejecit, or the still older writ of covenant. This would lead us to believe that it did not become definitely wrong to speak of the termor as seised until after the end of the fourteenth century, and we have seen one precedent which contains the objectionable phrase in the Year Book of 1413.

Here again, then, our evidence points to the fifteenth century as the time when the distinction was first firmly established. But probably the differentiation was a gradual process. At first possessio and seisina are the same thing. Take two very old maxims with which all lawyers are still well acquainted. If we ask *why possessio* fratris *de feodo simplici* facit sororem esse haeredem, the answer is because *seisina* facit stipitem. But gradually, as it seems to me, the words become appropriated, and the lawyers in the Year Books, though, in pleading, they will speak of a man as seised of chattels, begin to talk of possession directly they begin to argue. It looks as if *seised* was becoming an antiquated word to use of chattels, a word which one might still have to use in formal pleading, but one which struck the ear as antiquated, or, perhaps, even incorrect. But what flaw could be seen in it? The answer will probably be found in the curious history of leaseholds, for the beginning of which we may look in Bracton's book.

Now Bracton, as already said, has to mention *possessio* and *seisina* a very large number of times, and always treats them as interchangeable; as Dr Giiterbock has well said[1], beide Worte werden promiscue gebraucht. His definition of possessio is founded on the Roman authorities, but is taken directly from the Italian lawyer Azo. Possessio est corporalis rei detentio, i.e. corporis et animi cum juris adminiculo concurrente (fol. 38 b). Now, whatever Azo may have meant by this requirement of juris adminiculum (and he seems to have thought it necessary in order to

[1] ***Henrkus de Bracton,* p. 59.**

include certain cases of constructive possession), seemingly Bracton meant no more than that there are certain persons and things, such as free men and things sacred, of which there can be no possession (fol. 44 b). In general, he remains quite faithful to the notion that seisin or possession is pure matter of fact, the detention by body and mind of a corporeal thing. Nor is this mere Roman ornament, which can be stripped off without damage to the fabric of English law as reared by Bracton, for on this depends his whole learning about the scope of that commonest of all actions the assize of novel disseisin. Lord Mansfield's theory that seisin implies some act or concurrence on the lord's part most certainly is not Bracton's theory. Seisin with him is simply possession, and has little to do with homage or fealty[1].

It is, of course, possible that Bracton's very rational account of seisin is just a little too rational, but we have the clearest proof that it is not mere romance, and we may doubt whether on any other part of our law the Latin learning of the thirteenth century made so practical and so permanent an impression. We have, happily, now in print a considerable collection of assizes taken during that period, and they constantly put before us seisin as simply and merely possession, a matter of fact independent of feudal relationships and

[1] See Butler's note to Co. Lit. 330 b. Dr Heusler *{Die Geuvre*, p. 441), whose work I had not seen when I wrote the above, says that Bracton's seisin is Besitz einfach und schlechtweg. This seems to me perfectly true. I am happy in being able to add that in the last number of this *Reviciu* Mr Robert Campbell (p. 186) and Mr Justice Holmes (p. 168) have written what makes for the same end.

institutions. When the question is whether a certain person was seised, if there be any mention at all of homage or fealty, of suit or service (and such mention is comparatively rare), these matters are treated, not as constituting seisin, but as being evidence of seisin, evidence tending to prove that this man or that was really possessor. Roger Clifford, for example, in the 36th of Henry the Third, brings an assize of mort d'ancestor against his younger brother, Geoffrey. Geoffrey pleads a gift made to him by their father, John, in his lifetime. Roger replies that the gift is naught, because John never really gave up possession to Geoffrey, The words are remarkable : quia quamvis Johannes pater ipsorum terram illam ei [Galfrido] dedisset per cartam, nunquam se dimisit de terra ilia *corpore nee animo.* Then the assize finds the facts at length, and, among them, that John went on doing suit for the land after the gift. This is put before the court, not as conclusive, but as one of many facts which prove that John never ceased to possess, though he went through the idle form of going off the land and sleeping somewhere else for a night. *(Placit. Abbrev.,* p. 128[1].) This is a type of a considerable class of cases. Having no testamentary power, land-owners will try both to give and to keep. The court deals with such cases in a most reasonable way ; full statements of the relevant facts are obtained from the assize, and the decisions are really no more dictated by feudalism, in any sense of that hard-worked word, than

[1] I have seen this case on the roll. It was heard by Bracton himself, and perhaps the romanesque tag *(corpore nee animo)* may come from him.

are modern decisions about voluntary settlements. Doubtless, there was a constant tendency to make seisin a matter of forms and ceremonies, of sacramental acts with rod or twig or hasp of door. So long as possession has legal consequences some persons will always be trying to substitute mummery for the real thing. " Of which goods and chattels, I, the said T. A., have put the said F. C. in full possession by delivering to him one chair"; the date of this formula is not 1268 but 1868[1]. But the thirteenth century decisions on the question, seised or not seised, show a remarkable disregard for formalities, a remarkable determination to make that seisin which the law protects just a real and actual possession.

But this by the way; Bracton, though he does not distinguish between seisin and possession, has another distinction which is noteworthy. He repeatedly distinguishes between being in seisin and being seised, between being in possession and possessing. One who possesses or is seised has, if ejected, the assize of novel disseisin, but a person may be in seisin or possession nomine alieno, and if he be ejected the possessory remedy belongs not to him, but to that other on whose behalf he was in possession. Thus, in one place he turns our modern terminology just upside down ; the farmer is in seisin, but he does not possess (fol. 165); quia longe aliud est esse in seisina, quam seisitus esse, sicut longe aliud est esse in possessione quam possidere[2] (fol. 206). In the view that he generally

[1] L. R., 9 Eq. 511.

[fl] Aliud est enim possidere, longe aliud in possessione esse. Ulpian, Dig. de acquir. vel amitt possess. (41. 2) 10.

takes the termor does not really possess, he only holds possession for his landlord, and this is the reason why he has not the possessory remedy, the assize of novel disseisin.

We are familiar with the saying that, of old, the termor was little more than his landlord's servant or bailiff. Now, it is a very natural thing indeed to say that a servant does not possess his master's lands or goods, though he has sole charge of them. Mr Justice Holmes, in his lecture on possession, has well remarked how freehanded our old law was of its possessory remedies, how it attributed possession of goods to bailees whom the civilians would not have accounted possessors ; still it drew the line above the servant who, in his master's house, has custody of his master's goods. Now, in Bracton's opinion, the termor is denied the assize, not because he has a less estate than becomes a free man (is there really any record of a free man saying that a term of years was beneath his dignity?), but because *tenet nomine alieno*; in this he resembles the custos, procurator, usurarius, hospes, servus (fol. 165, 167 b, 168, 206).

Bracton's adoption of this phraseology prepared a difficulty for him which he had to meet (fol. 220) when explaining how, after all, the termor has a possessory remedy against some ejectors, and a remedy which will restore him to possession, the Quare ejecit infra terminum. But it seems from Bracton's own words that the difficulty was quite new, because this remedy had but recently been invented by the court (de consilio curiae), as a more efficient protection than the old writ of covenant. In later days tradition ascribed the

invention of the new writ to Bracton's contemporary, Walter of Merton *(Old Natura Brevium,* fol. 122 b), and more than once in the Year Books the writ is noticed as an innovation. Now, so long as the writ of covenant was the termor's one remedy, it was very natural and proper to deny that he possessed; he had not a possession which the law protected, he had merely a contractual right But the newly invented remedy had given him a sort of possession ; it enabled him to recover his term if ejected, at least if the ejector was a purchaser from his lessor, and, whatever may have been the rule at a later date, Bracton apparently thought[1] that this writ would enable the termor to recover his term even if ejected by a stranger. In describing this remedy he has to allow the termor a sort of possession, or rather, as it happens, a sort of seisin (fol. 220 b). His Roman authorities suggest to him that the termor has a usufruct, that a usufruct is but a servitude, something like a right of way. This, perhaps, should have led him to say that the termor has not possession of the land, but only quasi-possession of a servitude over land possessed by another (iuris quasi possessio), but I do not think that he quite accepts this doctrine, and the most explicit statement to be had from him is that both lessor and lessee are in seisin of the tenement, the one as of his term, the other as of the freehold, *quia istae duae*

[1] Fol. 220. Observe the words *contra quoscunque dejectores.* As to the later law see F. N. B. 197. The writ given by Bracton supposes a sale by the lessor to the ejector, but it seems to me that Bracton thought this only an example. It appears from F. N. B. to have been questionable whether the allegation of a sale was traversable.

possessiones sese compatiuntur in una re quod unus habeat liberum tenementum et alius terminum (fol. 13 b). Elsewhere (fol. 264) he can casually speak of tenant for years as *seisitus.*

Very probably Bracton's verbal distinction between being in seisin and being seised, between being in possession and possessing, was a little too subtle to catch the English ear; and certainly the suggestion that a termor's interest is a servitude over another's land, so that the termor is quasi-possessed of a servitude, but not possessed of land, did not take root in this country. It would have been difficult to work that suggestion into a system of law which, from the outset, most unhesitatingly gave seisin to the tenant for life. A student, fresh from Roman law or " general jurisprudence," maybe puzzled when he finds Mr Joshua Williams treating an estate in remainder or reversion as an incorporeal hereditament to be contrasted with that corporeal hereditament an estate of freehold in possession, but in our old law this seems an elementary idea of first importance ; the tenant for life is not a usufructuary with only a servitude and no land; on the contrary, he has the land, it is the reversioner who has an incorporeal thing. So, I take it that for some considerable time after Bracton's day it was a matter of much uncertainty how the termor's interest should be conceived ; and lawyers were free to say, and did actually say, that the termor is seised of the land as of his term, while his lessor is seised of the land as of freehold. There was no great need for the decision of an almost metaphysical question. During the thirteenth and fourteenth centuries the termor

played but a very insignificant part in English law. Gradually, however, he forced himself upon the notice of the courts, and acquired one remedy after another for the protection of his term. It became necessary to fix his position. What could be said of him? It was quite impossible to regard him any longer as one who holds possession on behalf of another; on the other hand, it was important to mark the fact that his remedies were very different from the old possessory remedies of the freeholder. He had never had, he never acquired, the assize of novel disseisin, though we may note by the way that the author of the *Mirror,* in several passages, declared that it is an abuse of the law to deny this assize to the termor and to the tenant in villenage[1]. A word to describe the termor's situation was wanted, and *possession* (a term comparatively free of technical implications) lay vacant and unappropriated. The termor, then, is possessed, not seised.

It is rather the verbal solution of the difficulty than the difficulty itself that is peculiar to England. In the yet unromanized law of mediaeval Germany *Gewere* (a word which we can only translate by *seisin)* plays, as I understand, very much the same part that seisin plays in England and in France; not quite so important a part, because Henry the Second's institution of definitely possessory remedies gave to possession a peculiar prominence in English and in Norman law, but still an important part. Now those who have of late studied the vast stores of old German law say that the German notion of *Gewere* differs from the Roman notion of *posscssio* in this, that at one and the

[1] Abuses of the Common Law, 72, 76, and again in the Articles on Stat. Westm. 2.

same time lord and tenant, or lord, mesne and tenant may have possession. The cultivator who is sitting on the land is seised of the land, but the lord also to whom he pays rent in money or kind is seised of the land. In a dispute between tenant and lord seisin and its procedural advantages are with the former, but in relation to outsiders each is seised. As Bracton says, *istae duaepossessiones sese compatiuntur in una re.* It would indeed have been hard to force the wonderfully variegated phenomena of mediaeval land tenures into the pigeon-holes of a theory which will ascribe possession to but one person at a time, and say of all others, Non possident. And this, it is said, is what obscures the discussion of the Roman *possessio* by commentators and glossators, by Azo, for example. With the facts of their own time before them they could not hold the faith unitarian and Roman of one *dominium* and one *possessio*; the lord has *dominium directum,* the vassal *dominium utile,* the lord possesses *civiliter,* the vassal possesses *naturaliter,* but none the less possesses for himself, and not for the lord : hence some wonderful confusions which Savigny had to clear away. We in England were fortunate in finding a second word at our disposal; so the termor is possessed and the freeholder is seised[1].

From this it would be no long step to the assertion that there is no seisin of chattels, neither of chattels real nor of chattels personal. For why is not the termor seised ? The ready answer would be because

[1] **Laband, *Die Vermogensrechtliche Klagen,* especially pp. 158-166; Heusler, *Die Gewere,* especially pp. 114-144, 299-304; and a brief account by Brunner in Von Holtzendorff, *Encyclopaedic,* Erster Theil (4^te^Aufl.), p. 248.**

he has but a chattel. The origin of this strange saying " a term of years is a chattel " is not very certain, but seemingly it meant that the term could be bequeathed ; for testamentary purposes it was *quasi catallum.* Bracton says (fol. 407 b) that the ecclesiastical court is not to be prohibited from entertaining a suit touching the bequest of a term, *quia ususfructus inter catalla connumeratur.* It was *catallum* as contrasted with that *laicum feodum* with which no Court Christian may meddle. The necessity for this fiction would in course of time be forgotten. The obvious facts would be that the termor is not seised and that the termor has a chattel; an inference would lie ready to hand. The time had long gone by when it could truly be said of the termor that he held nomine alieno, leases for years were becoming common and valuable, and it was easier to lay down as one of the final inexplicabilities of the law that of chattels, whether real or personal, there is no seisin, than to rake up an old story. It may seem a far-fetched doctrine that the reason why we cannot now be seised of a horse, or of a book, is because there was a time when the tenant of land for term of years had only a contractual right, but far-fetched though it be, it is fetched from England, not from Lombardy.

However, what has just been said is no better than guesswork, and is only submitted as such to the reader, who will easily discriminate what is stated as fact from inferences and conjectures. But he will notice that such evidence as has been produced tends to prove that the distinction between seisin and possession became a settled distinction just about the time when the termor's remedies against all men were finally

perfected. The early history of the special writ of trespass known as Ejectione firmae is still in some respects obscure. It became the termor's remedy against a stranger to the title who ejected him. Now, at the very end of the fourteenth century, it seems perfectly settled that this writ (unlike the Quare ejecit which will lie against a purchaser from his lessor) will only give him damages, and will not restore him to the land[1]. On the other hand, about the middle of the fifteenth century lawyers certainly speak as though possession might be recovered by this writ[2]. It is usual to refer to a decision in Henry the Seventh's reign as having finally settled the question in favour of restitution. May we not, therefore, conjecture that the daily increasing necessity of distinguishing the title to bring Ejectione firmae from the title to bring an assize, forced upon the courts the verbal distinction between possession and seisin ?

And when the middle ages are past and over, and Coke is summing up their learning, though he has many surprising things to tell us about the consequences of seisin, he can tell us no more about its meaning than that it is possession, but appropriated to freeholds. These are his sayings :—

Seisin or *seison* is common as well to the English as to the French, and signifies in the common law possession, whereof *seisina* a Latin word is made, and *seisire* a verb (Co. Lit. 153 a).

[1] Pasch., 6 Ric. II (Fitz, Abr. tit. *Ejectione firmae*, pi. 2). We are still dependent on Fitzherbert's extracts for cases from this important reign.

[2] Pasch., 7 Edw. IV, fol. 6, pl. 16 ; Mich., 21 Edw. IV, fol. ii, pl. 2.

Seisin is a word of art, and in pleading is only applied to a freehold at least, as *possessed,* for distinction sake, is to a chattel real or personal (200 b).

Seised, seisitus, cometh of the French word *seisin, i.e.* possessio, saving that, in the common law, *seised* or *seisin* is properly applied to freehold, and *possessed* or *possession* properly to goods and chattels ; although *sometime the one is used instead of the other* (17 a).

Nothing about investiture or admission of a tenant into the tenure, nothing feudal, simply possession, "*i.e.* possessio." The distinction has no mysterious basis in the eternal fitness of things ; it is a distinction which exists " for distinction sake." And, after all, of these two words, " sometime the one is used instead of the other." Probably this last phrase does not so much refer to the usage of Coke's own day (for the interpretation set upon several important Statutes, in particular the Statutes of Forcible Entry and the Statute of Uses, had by that time made it definitely incorrect for one to write of a termor as seised), as to the usage of an earlier day well known to Coke from his old books. Probably, he would indeed have thought scorn of the meagre list of examples which has been set forth above. In his day it was still too soon for an English Chief Justice to be severely and intelligently feudal. In course of time it became easier to read the *Libri Feudorum* than to read the Year Books, and " the total silence of Sir Edward Coke on the general doctrine of fiefs" became "a matter of some surprise." Therefore, seisin shall be deemed a " technical term to denote the completion of that investiture by which the tenant was admitted into the tenure."

We have been dealing, perhaps, too much with words, too little with rules; but a recognition of the fact that the lawyers of the thirteenth, and even of the fourteenth century, saw no harm in pleading about the seisin of chattels is of some importance, if the history of seisin, *"i.e.* possessio," is to be understood. It, at least, warns us away from an untrue explanation of that history. However strange may be the legal consequences which we find annexed to the seisin of land, they are not the result of a military policy, or anything of the sort, they are what were once considered the natural consequences of possession ; and there is good reason for believing that, if we look closely enough at our comparatively few and scattered authorities for the early history of personal property, we shall find very much the same consequences annexed to the seisin of chattels.

It is very unfortunate that the passage (f. 220 b) in which Bracton most definitely faces the question as to the nature of the termor's possession has become mere nonsense in the printed books. He is speaking of freeholder and termor and of the action Quare ejecit. This is what his latest editor makes him say; but the bracket [ ] is mine.

Poterit enim quilibet illorum sine praejudicio alterius, [quia recte dicimus totu nostrum fundum esse, et cum usus fructus alienus sit, quia no dominii pars est usufructus, sed servitus fit vel via etc.[1] Nee fals6 dicitur meum esse, cujus non potest pars dici[3] alterius esse] in seysina, esse ejusdem tenementi, unus ut de termino et alius ut de feodo et libero tenemento[3]. Et datur ista actio haeredibus et com petit contra haeredes ut supra in assisa novae disseisinae.

[1] " servitutis fit, ut via vel iter," MS. Rawl. C 160.

[2] " ulla pars dici," id.

[3] " et ejusdem tenementi unus ut de termino, et alius ut de feodo vel libero tenemento," MS. Rawl C. 160,

This of course is utter rubbish, and the translation of it given by Sir T. Twiss is neither better nor worse. I think it fairly certain that the bit of romanesque reasoning which I have placed within brackets is one of those marginal notes or glosses which, as Prof. Vinogradoff showed in the last number of this *Review*, have forced their way into the text. I have looked at twenty-one MSS. Six were indecisive, either because the whole passage had been abridged, or because it was missing or displaced. Five supported the printed text. Two others had done so when first written, but an attempt had been made to set the matter straight. Five give the bracketed passage after the words "et libero tenemento." Three and the printed Fleta give it after "in assisa novae disseisinae." Both of these last-mentioned arrangements make sense and the former makes good sense, but when there is so much doubt as to the place in the text at which some forty words should be introduced, the most natural inference is that they should not be in the text at all. Probably we ought to read the passage thus:—

Text

Poterit enim quilibet illorum sine preiudicio alterius in seisina esse eiusdem tenementi, unus ut de termino et alius ut de feodo vel libero tenemento. Et datur ista actio heredibus et competit contra heredes ut supra in assisa nove disseisine.

Note,

Quia recte dicimus totum fundum nostrum esse et cum usufructus alienus sit, quia non dominii pars est usufructus sed servitus sicut via vel iter, nee falso dicitur meum esse cuius non potest ulla pars dici alterius esse.

What I take to be the gloss is not quite in harmony with the text The text says boldly that each is in seisin of the tenement; the note suggests that the termor has only a servitude and no seisin of land. To harmonize English and Roman ideas was no easy task.

THE MYSTERY OF SEISIN[1].

ANY one who came to the study of Coke upon Littleton with some store of modern legal ideas but no knowledge of English Real Property Law would, it may be guessed, at some stage or another in his course find himself saying words such as these :—" Evidently the main clue to this elaborate labyrinth is the notion of seisin. But what precisely this seisin is I cannot tell Ownership I know and possession I know, but this *tertium quid*, this seisin, eludes me. On the one hand when Coke has to explain what is meant by the word he can only say[2] that it signifies possession, with this qualification however that it is not to be used of movables and that one who claims no more than a chattel interest in land can not be seised though he may be possessed. But on the other hand if I turn from definitions to rules then certainly seisin does look very like ownership, insomuch that the ownership of land when not united with the seisin seems no true ownership."

The perplexities of this imaginary student would at first be rather increased than diminished if he convinced himself, as I have convinced myself and tried to convince others, that the further back we trace our

[1] *Law Quarterly Review*, October, 1886.

[2] **Co. Lit. 17 a, 153 a, 200 b.**

legal history the more perfectly equivalent do the two words *seisin* and *possession* become, that it is the fifteenth century before English lawyers have ceased to speak and to plead about the seisin (thereby being meant the possession) of chattels[1]. Certainly as we make our way from the later to the older books we do not seem to be moving towards an age when there was some primeval confusion between possession and ownership. We find ourselves debarred from the hypothesis that within time of memory these two modern notions have been gradually extricated from a vague ambiguous *seisin* in which once they were blent. In Bracton's book the two ideas are as distinct from each other as they can possibly be. He is never tired of contrasting them. In season, and (as the printed book stands) out of season also, he insists that *seisina* or *possessio* is quite one thing, *dominium* or *proprietas* quite another. He can say with Ulpian, *Nihil commune habet possessio cum proprietate*[2]

There are some perhaps who would have for the student's questionings a ready and brief answer, satis-

[1] *Law Quarterly Review,* July, 1885. "The Seisin of Chattels." I am indebted to Mr M. M. Bigelow, Mr H. W. Elphinstone, and a learned critic in the *Solicitors' Journal {ox* several new examples, both very early and very late, of the use of the word *seisin* in connection with chattels. (See Litt. sec. 177, also *Paule* v. *Moodie,* 2 Roll. Rep. 131.) But as to the usage of the thirteenth century, I have now, after having copied more than a thousand cases, no doubt whatever: the words *possideo, possessio* are extremely rare, but one can be seised of anything, even of a wife or of a husband. I have known a woman assert, in proof of her marriage, that she remained seised of her husband's body after his death.

[2] Bracton, f. 113, from Dig. 41. 2 (de acquir. vel amit. poss.) **12, § 1.**

factory to themselves if not to him. If, they would say, you are thinking of ownership and applying that notion to English land, you indeed disquiet yourself in vain; dismiss the idea; it is not known, never has been known, to our law ; land in this country is not owned, it is holden, holden immediately or mediately of the king. The questioner might be silenced ; I doubt he would be convinced. In the first place he might urge, and it seems to me with truth, that the theory of tenure, luminous as it may be in other directions, sheds no one ray of light on the strangest of the strange effects which seisin and want of seisin had in our old law. In the second place he might appeal to authority and remark that Coke, who presumably knew some little of tenures, speaks freely and without apology of the ownership and even the "absolute ownership[1]" of land, while as to Bracton, who lived while feudalism was yet a great reality, for lands and for chattels he has the same words, to wit, *dominium* and *proprietas.*

But it may well be said, and this brings us to more profitable doctrine, that English law knew no true ownership of land because the rights of a landowner who was not seised fell far short of our modern conception of ownership. Deprive the tenant in fee simple of seisin, and he is left with a right of entry. Even now this would be the most technically correct description of his right. Until lately his right might undergo a still further degradation ; from having been a right of entry it might be debased into a mere right of action.

Now it is to the nature of these rights, whether we

[1] Co. Lit. 369 a, 17 a, b.

call them ownership or no, or rather to one side of their nature, that I would here draw attention. To simplify matters as much as possible we may for the moment leave out of account all estates and interests less than fee simple. The question then becomes this, what is the nature of the rights given by our old law to a person who is lawfully entitled to be seised of land in fee simple when as a matter of fact some other person is seised ? or (to use words which will not be misunderstood though they are not the proper words of art) what is the nature of the rights of an absolute owner when some stranger is in possession ?

Such a student as I have imagined might well be prepared to find that possession by itself, or possession coupled with certain other elements such as good faith and colour of title, or possession continued for a certain period, would have certain legal effects, effects which would consist in protecting the possessor against mere trespassers, in entitling him to recover possession if ejected by a stranger, in depriving the true owner of any right to obtain possession save by recourse to the courts, in at last depriving that owner of all right whatever and conferring on the possessor a title good against all men. He might expect too that in a system rich in definite forms of action, some possessory some proprietary, the outcome of different ages, these effects would be very complicated ; and certainly he would not be disappointed. He would, for example, find the ousted owner gradually losing his remedies one by one, first the remedy by self-help, then the possessory assizes, then the writs of entry, lastly the very writ of right itself. He would here find much to puzzle him,

for the rules as to the conversion of a right of entry into a right of action seem to us quaint and arbitrary. Still all these manifold and complex effects of possession and dispossession, seisin and want of seisin, are of a kind known and intelligible, partly due to formalities of procedure and statutory caprices, but tending in the main to protect the possessor in his possession and uphold the public peace against violent assertions of proprietary right; analogies may be found in other systems of law modern as well as ancient.

But this is far from all. Seisin has effects of a quite other kind. The owner who is not seised not only loses remedies one by one but he seems hardly to have ownership, and this, not because all lands are held of the king, but because as regards such matters as the alienation, transmission, devolution of his rights he seems to be in a quite different position from that in which we should expect to find a person who, though he has not possession, has yet ownership. Let a few rules be repeated that were law until but a short while since. They are well known, but it may be worth while to put them together, for they make an instructive whole.

(1) Until the 1st of October 1845, a right of entry could not be alienated among the living[1]. In other words, the owner who is not seised has nothing to sell or to give away.

An explanation of this rule has been found in the law's dislike of maintenance. It may be given in the words of Sir James Mansfield :—" Our ancestors got into very odd notions on these subjects, and were

[1] **8 & 9 Vict. c. 106, sec. 6.**

induced by particular causes to make estates grow out of wrongful acts. The reason was the prodigious jealousy which the law always had of permitting rights to be transferred from one man to another, lest the poorer should be harassed by rights being transferred to more powerful persons[1]." This bit of rationalism is of respectable antiquity; it is certainly as old as Coke's day[2]; and true it is that at one time our laws did manifest a great, but seemingly most reasonable[3], jealousy of maintenance and champerty, of bracery and the buying of pretenced titles. But still the explanation seems insufficient. Its insufficiency will be best seen when we pass to some other rules. In passing, however, let us notice how deeply rooted in our old law this rule must be. We come upon it directly we ask the simplest question as to the means of transferring ownership. What is the one "assurance," the one means of passing ownership, known to the common law? Why, if we leave out of account litigious proceedings real or fictitious, it is the feoffment, and there must be livery of seisin, that is, delivery of possession. One cannot deliver possession to another when a third person is possessing; so a right of entry cannot but be inalienable. Or put it this way: our old law has an action which is thoroughly proprietary, which raises the question of most mere right, the writ of right, the only hope of one who cannot base his claim on a recent possession. Yet even in the writ of right the demandant must count upon his own seisin or on the

[1] *Goodrigfit* v. *Forrester,* i Taunt, 613.
[2] Co. Lit. 213b; *Lampefs Case,* 10 Rep. 48 a.
[a] Stubbs, *Const. Hist,* § 295.

seisin of some ancestor, and thence deduce a title by descent; he cannot count on the seisin of a donor or vendor, "for the seisin of him of whom the demandant himself purchased the land availeth not[1]." This is a rule which can be traced from Coke to Bracton[2], a rule of procedure, be it granted, but a rule which shows plainly that he who has no seisin has nothing that he can give to another. But to this matter of alienation *inter vivos* we will return.

(2) Before the 1st of January 1838[8] a right of entry could not be devised by will. About devises of course we cannot expect much ancient common law. The question depended on the meaning of the statutes of 1540[4] and 1542[s]; but the manner in which these statutes were interpreted is worthy of note. Throughout the verb used of the person who is empowered to make a will is the verb *to have.* The person who *has* any manors, lands, tenements or hereditaments may dispose of them by will But though some modern judges did not much like the interpretation, still the old interpretation was that the disseised owner *has* not any land, tenement, or hereditament, and therefore has nothing to leave by his will[8]. A case from the year 1460 shows plainly that before the statutes a similar rule prevailed; to give validity to a devise under local custom it was essential that the testator should die

[1] Co. Lit. 293 a. [2] Bracton, f. 376. [a] 1 Vic. cap. 26, sec. 3.
[4] 32 Hen. VIII, cap. 1. [5] 34 Hen. VIII, cap. 5.
[6] The cases are collected in *Jarman on Wills,* 4th ed., vol. i., pp. 49, 50. Perhaps they leave open some questions which will never now be answered. But the main doctrine seems beyond dispute. See Co. 3 Rep. 35 a.

seised, though it was doubted whether he need be seised when making the will[1].

(3) Until the 1st of January 1834[2] *seisina fecit stipitem.* Now this when duly considered seems a very remarkable rule, for it comes to this, that a land-owner who has never been in possession has no right that he can transmit to his heir, or in other words, that ownership is not inheritable. Such a person may be (to use a venerable simile) the passive "conduit-pipe" through which a right will pass, but no one shall ever get the land by reason that he was this man's heir; a successful claimant must make himself heir to one who was seised. But what explanation have we for this? A fear of maintenance very obviously fails us, and as it seems to me feudalism must fail us also, unless we are to suppose a time when seisin meant not mere possession but possession given, or at least recognized, by the lord of the fee. But for imagining any such time we have no warrant. It seems law from the first that the rightful tenant can be disseised, though the lord be not privy to the disseisin, and that the disseisor will be seised whether the lord like it or no.

And to constitute a new stock of descent a very real possession was necessary. The requisite seisin was not a right which could descend from father to son; it was a pure matter of fact. Even though there was no adverse possessor, even though possession was vacant, the heir was not put into seisin by his ancestor's death; an entry, a real physical entry, was necessary. We all know the old story of the man who was half

[1] Y. B. 39 Hen. VI, f. 18 (Mich. pl. 23).

[3] 3 & 4 Will. IV, c. 106; Co. Lit. 11 b.

inside half outside the window, and who was pulled out by the heels. It was certainly a nice problem whether he possessed *corpore* as well as *animo*; but at any rate on this depended the question whether he had been seised and could maintain the novel disseisin against those who extracted him[1].

(4) The Dower Act of 1833[2] for the first time gave a widow dower of a right of entry; but for that statute the widow of one who has not been seised goes unendowed. It is true that in this case "a seisin in law or a civil seisin" would answer the purpose of "a seisin in deed[3]/' But this "seisin in law" only existed when possession was in fact vacant. A man was seised neither in fact nor yet in law if some other person had obtained and was holding seisin. If such an one did not get seisin during the coverture his wife would get no dower.

Here it may be remarked that seisin did to some extent become a word with many meanings or rather shades of meaning. The seisin which is good enough for one purpose is insufficient for another. "What shall be said a sufficient seisin" to give dower, to give curtesy, to constitute a stock of descent, to maintain a writ of right[4]—each of these questions has its own answer. But I believe that the variations are due (1) to the treatment of cases in which no one has corporeal possession of the lands, and (2) to the application of the idea of possession to subjects other than lands, namely, the incorporeal hereditaments, an application which must necessarily be difficult and may easily be

[1] 8 Ass. f. 17, pl. 27.
[2] 3 & 4 Will. IV, cap. 105.
[3] Co. Lit. 31 a.
[4] Co. Lit. 15 b, 29 a, 31 a, 181 a.

capricious. No fictitious seisin in law was, so far as I am aware[1], ever attributed to one who however good his title was clearly dispossessed, to one whose land was being withheld from him by a stranger to the title. And the "seisin in law" may well set us thinking. When we hear that *A* is *B* in law we can generally draw an inference about past history:—it has been found convenient to extend *to A a* rule which was once applied only to things which were *B* in deed and in truth; in short, there was a time when *A* was not *B* even in law. For a few but by no means all purposes we may say with the old French lawyers, "le mort saisit le vif"; the seisin in law would, *e.g.* give dower, but it would not make a stock of descent,

(5) To give a husband curtesy seisin during the coverture was necessary. This rule has never yet been abolished, though it has been somewhat concealed from view both by Equity and by statutes.

So far we have been concerned with rules which are still generally known, and one of them, the rule about curtesy, has not yet become a matter for the antiquary. It now becomes desirable to glance at some obscurer topics. Since we are sometimes assured that in one way or another the strange effects of seisin and want of seisin are due to feudalism, we ought to ask how the rights of a lord were affected by the fact that "the very tenant," the true owner, was out of seisin and some other person in seisirt.

Suppose tenant in fee simple is disseised and then dies without an heir, what can be plainer on feudal

[1] It may be more to the point that Mr Challis (*Real Property*, p. 182) has written to the same effect. See *Leach* v. *Jay*, 9 C. D. 42.

principles (feudal principles as understood in these last times) than that the land will escheat to the lord, that the lord will be able to recover the land from the disseisor or from any person who has come to the land through or under the disseisor? But such was not the law even in the last, even in the present century, and if it be law now, a point about which I had rather say nothing, this must be the result either of the statutes which have deprived feoffments and descents of their ancient efficacy or else of a convenient forgetfulness. In Coke's day it seems to have been settled that from the original disseisor the lord could obtain the land either by entry or by action (writ of escheat), provided that he had not accepted the disseisor as tenant. If however before the death of the disseisee the disseisor made a feoffment in fee, or died seised leaving an heir, there was no escheat at all, "because the lord had a tenant in by title"; he had, that is, a tenant who could not personally be charged with any tort. Of a right of action, as distinguished from a right of entry, there was no escheat; "such right for which the party had no remedy but by action only to recover the land is a thing which consists only in privity, and which cannot escheat nor be forfeited by the common law[1]." What is more, it had been held that the most sweeping general words in acts of attainder would not transfer such rights to the crown; they were essentially inalienable, intransmissible rights.

But if we go behind Coke we find that so far from the law having been gradually altered to the detriment of the lords, if altered at all it had been altered to their

[1] *Winchester's Case*, 3 Rep. 2 b.

profit. We come to a time when there seems the greatest uncertainty whether the lord can get the land from the very disseisor. The writ of escheat, his only writ, distinctly says that his tenant has died seised. 1 do not wish to dogmatize about a very obscure history, but it will be enough to say that under Henry VII Brian C.J. denied that the lord could enter or bring action against the disseisor[1].

It was so with the other feudal casualties. Coke says[2] that if the disseisee die having still a right of entry and leave an heir within age the lord shall have a wardship. Doubtless the law was so in his day, but the earliest authority that he cites is from the reign of Edward III and to this effect—" In a writ of ward it is a good plea that the ancestor of the infant had nothing in the land at the time of his death; for if he was disseised the lord shall *not* have a wardship, neither by writ of ward nor by seizing him [the heir],

[1] It may be convenient if I here collect in chronological order the main authorities as to escheat and forfeiture of rights of entry and rights of action. Reg. Brev. f. 164 (F. N. B. f. 144); 27 Ass. pi. 32, f. 136, 137; Fitz. Abr. *Entre Congeable,* pl. 38 (HiL 2 Ric. II); 2 Hen. IV. f. 8 (Mich. pi. 37); 7 Hen. IV. f. 17 (Trin. pi. 10); 32 Hen. VI. f. 27 (Hil. pl. 16), comp. Litt. sec. 390 ; 37 Hen. VI. f. 1 (Mich, pi. 1); 15 Edw. IV. f. 14 (Mich. pl. 17), per Brian ; 6 Hen. VII. f. 9 (Mich.pl.4); 10Hen.VII.f. 27(Trin.pl. 13); 13 Hen. VII.f. 7 (Mich, pi. 3); Bro. Abr. *Eschete,* pi. 18; Co. Lit. 240 a, 268 a, b; 3 Inst. 19; 3 Rep. 2, 3, 35 a; 8 Rep. 42 b; Hale, P. C. Part I, ch. 23; Hawk, P. C Bk. 2, ch. 49, sec. 5 : *Burgess* v. *Wheate,* Eden, 177, 243. It will be noticed that none of these authorities, except perhaps the writ in the Register, is older than the middle of the fourteenth century.

[2] 3 Rep. 35 a; Co. Lit. 76 b.

until the tenancy is recontinued[1]." But at all events of a right of action there was no wardship. On the other hand, if the disseisor died without an heir the lord got an escheat, if the disseisor died leaving an infant heir the lord got a wardship, though in either case his rights were defeasible by the disseisee. In short, the lord must take his chance; it is no wrong to him if his tenant be disseised ; he cannot prevent this person or that from acquiring seisin, yet thus he may be a great loser or a great gainer. The law about seisin pays no regard to his interests.

There is another side to the picture we have here drawn. He who is seised, though he has no title to the seisin, can alienate the land ; he can make a feoffment and he can make a will (for he who *has* land is enabled to devise it by statute), and his heir shall inherit, shall inherit from him, for he is a stock of descent; and there shall be dower and there shall be curtesy, and the lord shall have an escheat and the king a forfeiture, for such a one has land " to give and to forfeit." This may make seisin look very much like ownership, and in truth our old law seems this (and has it ever been changed[2]?) that seisin does give ownership good against all save those who have better because older title. Nevertheless we err if we begin to think of seisin as ownership or any modification of ownership; after all it is but possession. A termor was not seised, but certainly he could make a feoffment in fee and his feoffee would be seised. This

[1] Fitz. Abr. *Garde,* pl. TO.

[2] See *Asher* v. *Whitlock,* L. R. l Q. B. i. Holmes, *Common Zaw,* p. 244.

seems to have puzzled Lord Mansfield[1], and puzzling enough it is if we regard seisin itself as a proprietary right, for then the termor seems to convey to another a right that he never had. But when it is remembered that substantially seisin is possession, no more, no less, then the old law becomes explicable. My butler has not possession of my plate, he has but a charge or custody of it; fraudulently he sells it to a silversmith ; the silversmith now has possession: so with the termor, who has no seisin, but who by a wrongful act enables another to acquire seisin.

But, it will be urged, the termor's feoffee (here is the difficulty) acquires an estate in fee simple and no less estate or interest. Certainly, and what of the silversmith who buys of the fraudulent butler ? He has possession, and in a certain sense he possesses as owner; he claims no limited interest, such as that of a bailee, in the goods. How his rights would best be described at the present day we need not discuss, but it seems plausible to say that at least if an innocent purchaser, he has ownership good against all save those who have better because older title[2]. Regarded from this point of view the termor's tortious feoffment is no anomaly. It is true that in our modern law there may be nothing very analogous to the process whereby an infirm title gained strength as it passed from man

[1] **I refer of course to *Taylor* v. *Hordel,*i Burr. 60, a case which profoundly dissatisfied the great conveyancers of the last century, and which has lately put Mr Challis to his Greek *{Real Property,* p. 329). Butler's note on this case (Co. Lit. 330 b) seems to me the best modern account of seisin that we have.**

[2] **Holmes, *Common Law,* p. 241.**

to man, the ousted owner losing the right to enter before he lost the right of action ; still it is conceivable that in the interests of public peace law should, for example, permit me to take my goods by force from the thief himself, but not from one to whom the thief has given or sold them, nor from the thief s executor. Thus would my entry be tolled and I should be put to my action [1].

But this by the way, for the position of the non-possessed owner is more interesting and less explicable than that of the possessed non-owner. Now we seem brought to this, that ownership, mere ownership, is inalienable, intransmissible; neither by act of the party nor by act of the law will it pass from one man to another. The true explanation of the foregoing rules will I believe be found in no considerations of public policy, no wide views of social needs, but in what I shall venture to describe as a mental incapacity, an inability to conceive that mere rights can be transferred or can pass from person to person. Things can be transferred; that is obvious ; the transfer is visible to the eye ; but how rights ? you have not your rights in your hand or your pocket, nor can you put them into the hand of another nor lead him into them and bid

[1] **Coke (Co. Lit. 245 b) says that "by the ancient law" the entry of the disseisee was tolled not only by a descent cast, but by the disseisor's feoffment followed by non-claim for year and day. There was very similar law both in France and in Germany, as may be seen at large in Laband, *Die Vermogensrechtlichen Klagen* and Heusler, *Die Gewere.* I have never been able to find definite authority for Coke's statement, but it looks to me very probable. It deprives the descent cast of its isolated singularity, and fits in with the learning of fines.**

him walk about within their metes and bounds. "But," says the accomplished jurist, "this is plain nonsense; when a gift is made of a corporeal thing, of a sword or a hide of land, rights are transferred; if at the same time there is a change of possession, that is another matter; whether a gift can be made without such a change of possession, the law of the land will decide; but every gift is a transfer of ownership, and ownership is a right or bundle of rights; if gift be possible, transfer of rights is possible." That, I should reply, doubtless is so in these analytic times; but I may have here and there a reader who can remember to have experienced in his own person what I take to be the history of the race, who can remember how it flashed across him as a truth, new though obvious, that the essence of a gift is a transfer of rights. You cannot give what you have not got:—this seems clear; but put just the right accent on the words *give* and *got,* and we have reverted to an old way of thinking. You can't give a thing if you haven't got that thing, and you haven't got that thing if some one else has got it. A very large part of the history of Real Property Law seems to me the history of the process whereby Englishmen have thought themselves free of that materialism which is natural to us all

But it will be said to me that this would-be explanation is untrue, or at best must take us back to a merely hypothetical age of darkness, because from time immemorial there were rights which could be transferred from man to man without any physical transfer of things, namely, "the incorporeal hereditaments which lay in grant and not in livery." In truth however the treatment which these rights receive in our oldest

books is the very stronghold of the doctrine that I am propounding. They are transferable just because they are regarded not as rights but as things, because one can become not merely entitled to, but also seised and possessed of them, corporeally seised and possessed. Seisin, it may be, cannot be delivered ; I cannot put an advowson into your hand, nor can an advowson be ploughed and reaped; nevertheless the gift *of* the advowson will be far from perfect until you have presented a clerk who has been admitted to the church. In your writ of right of advowson you shall count that on the presentation of yourself or your ancestor a clerk was admitted, nay more, that your clerk exploited the church, took esplees thereof in tithes, oblations and obventions to the value of so many shillings[1]. But we may look at a few of these things incorporeal a little more closely.

And first then of seignories, reversions, remainders. These, it is said, lie in grant. But for all that the tenant of the land must attorn to the grantee; the attornment is necessary to perfect the transfer of the right. Such was the law in 1705[2]. Whence this necessity for an attornment ?

It may be replied :—Here at all events is a feudal

[1] ***Capiendo inde expleta*** **; this phrase conveys a sense of manifest and successful achievement. When the possessor takes a crop from his land, he achieves, exploits his seisin; his seisin is now explicit. See Skeat, s.v.** ***explicit, exploit.*** **There is a great mass of information in Ducange, s.v.** ***expletum.*** **Coke, 6 Rep. 58, gives almost the true meaning, though his etymology is at fault; he derives the word from** ***expleo*** **(instead of** ***explico)*** **and says that the grantee of a rent hath not a perfect and explete or complete estate until he hath reaped the esplees,** ***scilicet*** **the profit and commodity thereof.**

[2] **4 & 5 Ann. c. 16, sec. 9.**

rule. Just as (before the beginning of clear history) the tenant could not alienate the land without the lord's consent, so in the reign of Queen Anne the lord could not alienate the seignory without the tenant's attornment. There was a personal bond between lord and vassal; the need of attornment is to start with the need of the tenant's consent, though certainly in course of time he could be compelled to give that consent.

Now it may not be denied that in this region feudal influence was at work. To deny this one must contradict Bracton. But the sufficiency of the explanation should not be admitted until some text of English law is produced which says that the tenant can as a general rule refuse consent to an alienation. Bracton does say that except in exceptional cases there can be no transfer of *homage* unless the tenant consents ; on the other hand he says that all other services can be transferred and the tenant shall be attorned *velit nolit* It is of course possible to regard this state of things as transitional, to urge that in Bracton's day the tenant had already lost a veto on alienation that he once had; but before we adopt this theory let us see how much less ground it covers than the rules which have to be explained.

(a) The doctrine of attornment holds good not only of a seignory and of a reversion but of a remainder also[2]; but between the remainderman and the tenant of the particular estate there is *no* tenure, no feudal bond.

(6) Much the same doctrine holds good when what has to be conveyed is the land itself (immediate free-

[1] Bract, f. 81 b, 82. The writs for compelling attornment are the *Quid Juris clamat* and the *Per quae servitia.*

- Co. Lit. 309 a; Lit. sec. 569.

hold) but that land is in lease for years. Here the transfer can be made in one of two ways. There may be a grant and then attornment will be necessary[1], or there may be a feoffment. But if there is to be a feoffment, either the termor must be a consenting party or he must be out of possession[3]. If the termor chooses to sit upon the land and say " I will not go off and I will not attorn myself," there can be no effectual grant, no effectual feoffment; recourse must be had to a court of law. But surely it will not be said that in the days of true feudalism, when, as we are told, the termor was regarded much as his landlord's servant, he had a legal right to prevent his landlord from selling the land ?

(c) The doctrine of attornment holds good of rents not incident to tenure[3]. The terre-tenant will not hold of the grantee of the rent, nevertheless he must attorn if the grant is to have full efficacy. Indeed the learning of rents as it is in Coke[4], and even as it is at the present day, seems to me very suggestive of an ancient mode of thought. The rent is regarded as a thing, and as a thing which has a certain corporeity (if I may so speak); you may be seised, physically possessed of it; you have no actual seisin until you have coins, tangible coins, in your hand. On getting this actual seisin much depended; in modern times a vote for Parliament[5]. An attornment would give you a fictitious

[1] **Lit. sec. 567.**

[2] **Co. Lit. 48 b; *BettiswortKs Case,* 2 Rep. 31, 32.**

[3] **Co. Lit. 311b.**

[4] ***Bredimaris Case,* 6 Rep. 56 b.**

[5] ***Orme's Case,* L. R., 8 C. P. 281 ; *Hadfield's Case, ibid,* 306. The last Reform Act (48 Vict. c. 3, sec. 4) has, one regrets to say, made it improbable that we shall have in the future similar displays of antique learning.**

"seisin in law"; nothing but hard palpable cash would give you seisin in fact. Such an incorporeal hereditament as a rent can be given by man to man just because it occasionally becomes corporeal under the accidents of gold or silver; this seems the old theory.

Now as to attornment, a valuable analogy lies very near to our hands. Suppose that we shut Coke upon Littleton and open Benjamin on Sales. Describing what will be deemed an "actual receipt" of sold goods within the meaning of the Statute of Frauds, Mr Benjamin writes thus:—"When the goods, at the time of the sale, are in the possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser....A11 of the parties must join in the agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent[1]." This is familiar law, and surely it explains much. Baron Parke used a very happy phrase when he said that there is no "actual receipt" by the buyer "until the bailee has attorned, so to speak" to the buyer, a happy phrase for it explained the obscure by the intelligible, the old by the modern[2].

Without transfer of a thing there is no transfer of a right.

Starting with this in our minds, how, let us ask,

[1] Benjamin, *Sales*, 2nd ed., p. 132.

[2] *Farina* v. *Home*, 16 M. & W. 119. I believe that it was Parke, B. who first introduced the term "attornment" into the discussion of cases concerning the sale of goods; but in this I may be wrong.

can a reversioner alienate his rights when a tenant for life is seised, how can a tenant in fee simple alienate his rights when there is a termor on the land? There is but one answer. The person who has the thing in his power must acknowledge that he holds for or under the purchaser. If he does this, then we may say (as we do say when construing the Statute of Frauds) that the purchaser has "actually received" the thing in question. It is I admit difficult to carry this or any other theory through all the intricacies of our old land law. The fact that in course of time there came to be two legally recognized possessions, first the old-fashioned possession or seisin which no termor can have *(possessio ad assisas),* and then the new-fashioned possession which a termor can have *{possessio ad breve de Iransgressione),* complicates what, to start with, may have been a simple notion[1]. But the clue is given us in some words of Britton:—tenant in fee wants to alienate his land, but there is a farmer in possession; until the farmer attorns there can be no conveyance, *car la seisine del alienour sei continue tottz juirs par le fermer, qui use sa seisine en le noun le lessour*[1]; the seisin is held for the alienor until the farmer consents to hold it for the alienee. So when the person on the land is tenant in fee simple, here doubtless he is seised on his own behalf, seised in demesne, but the overlord also is seised, seised of a seignory, or, as the older books put it, he holds the land in service *(non in dominico sed in servicid)*; he holds the land by the

[1] **I have framed my Latin phrases on the model of Savigny's *possessio adinterdicta.* Seisin, we may say, is "assize-possession."**

[2] **Britton, vol. n., p. 303.**

body of his tenant; he can only transfer his rights if he can transfer seisin of the seignory; he transfers seisin when the tenant admits that he is holding under a new lord[1]. So with a rent which "issues out of the land"; we cannot make a rent issue out of land, or turn the course of a rent already issuing, unless we can get at the land; if some one else has possession of the land, it is he that has the power to start or to divert the rent. This phrase "a rent issuing out of land" would seem to us very wonderful and very instructive, had we not heard it so often. What a curious materialism it implies!

Bracton's whole treatment of *res incorporates* shows the same materialism, which is all the more striking because it is expressed in Roman terms and the writer intends to be very analytic and reasonable. *Jura* are incorporeal, not to be seen or touched, therefore there can be no delivery *(traditio)* of them. A gift of them, if it is to be made at all, must be a gift without delivery. But this is possible only by fiction of law. The law will feign that the donee possesses so soon as the gift is made and although he has not yet made use of the transferred right. Only however when he has actually used the right does his *possessio* cease to be *Jictiva* and become *vera,* and then and then only does the transferred right become once more alienable[2].

[1] I am not sure that it was ever technically correct to say that the overlord is seised of the land; but in thirteenth century cases, he certainly has and holds the land, he has and holds it not in demesne, but in service. See Br. f 432, 433. I have seen many cases to this effect; and I have seen *nunquam aliquant seisinam habuit nee in dominico nee in servieio.*

[2] Bracton, f. 52 b.

Of all these incorporeal things by far the most important in Bracton's day and long afterwards was the advowson in gross, and happily he twice over gives us his learning as to its alienability with abundant vouching of cases[1]. To be brief:—If *A* seised of an advowson grants it to *B*, and then the church falls vacant, *B* is entitled to present. Thus far have advowsons become detached from land. But if before a vacancy *B* grants to C, and then the parson dies, who shall present? Not C, nor *B*, but *A*. Not *C*, for though *B* had a quasi-possession when he made the grant he had no real possession, for he had never used the transferred, or partially transferred, right; he had nothing to give; he had nothing. Not *B*, for whatever inchoate right he had he has given away. No, as before said, *A* shall present, for the only actual seisin is with him. One has not really got an advowson until one has presented a clerk and so exploited one's right.

We may take up the learning of advowsons some centuries later. The following comes from a judgment not unknown to fame, the judgment of Holt in *Ashby* v. *White*". He is illustrating the doctrine that want of remedy and want of right are all one. "As if a purchaser of an advowson in fee simple, before any presentment, suffer an usurpation and six months to pass without bringing his *quare impedit* he has lost his right to the advowson, because he has lost his *quare impedit* which was his only remedy; for he could not maintain a writ of right of advowson; and although he

[1] **Bracton, f. 54, 55, 246. See Nichols, *Britton*, vol. II, p. 185, note f.**

[2] **Ld. Raym. 938, 953.**

afterwards usurp and die and the advowson descend to his heir, yet the heir cannot be remitted, but the advowson is lost for ever without recovery." So, as I understand, stood the law before the statute 7 Ann. c. 18. It comes to this, that if the grantee who has never presented suffers a usurpation, and does not at once use a special statutory remedy[1], his right, his feeble right, has perished for ever. Writ of right he can have none, for he cannot count on an actual seisin. Very precarious indeed at Common Law was the right of the grantee who had not yet acquired what could be regarded as a physical corporeal possession of a thing. Indeed when we say that these rights lay in grant we use a phrase technically correct, but very likely to mislead a modern reader.

Space is failing or I would speak of franchises, for even to negative franchises, such as the right to be quit of toll, does Bracton apply the notion of seisin or possession; and the more the history of the incorporeal hereditaments is explored, the plainer will it be that according to ancient ideas they cannot be effectually passed from person to person by written words: there is seisin of them, possession of them, no complete conveyance of them without a transfer of possession, which, when it is not real must be supplied by fiction. But now if we put together all the old rules to which reference has here been made (and I will ask my readers to fill with their learning the many gaps in this brief argument), does it not seem that these "very odd notions" of our ancestors, which Sir James

[1] Stat. Westm. the Second (13 Edw. I), c. 5. The law is clearly stated by Blackstone, vol 111., p. 243.

Mansfield ascribed to "particular causes," were in the main due to one general cause ? They point to a time when things were transferable and rights were not. Obviously things are transferable, but how rights ?

And here let us remember the memorable fact that the *chose in action* became assignable but the other day. The inalienability of the benefit of a contract, like the inalienability of the rights of the disseised owner, has been set down to that useful, hard-worked "particular cause," the prodigious jealousy of maintenance. The explanation has not stood examination in the one case[1], I doubt it will stand examination in the other. According to old classifications the benefit of a contract and the right to recover land by litigation, stand very near each other. The landowner whose estate has been "turned to a right" (a significant phrase) has a thing in action, a thing in action real. There is a contrast more ancient than that between *jus in rem* and *jus in personam,* namely, that between right and thing. Of maintenance there is, I believe, no word in Bracton's book, but that there can be no *donatio* without *traditio* is for him a rule so obvious, so natural, that it needs no explanation, though it may be amply illustrated by cases on the rolls. What the thirteenth century learned of Roman law may have hardened and sharpened the rule, but it seems ingrained in the innermost structure of our law.

I am far from saying that within the few centuries covered by our English books it has ever been strictly inconceivable that a right should be transferred without some transfer of a thing, or without some physical fact

[1] Pollock, *Principles of Contract.* 4th ed , Appendix, Note (J.

which could be pictured as the use of a transferred incorporeal thing. Should it even be proved that the Anglo-Saxon charter or "book" passed ownership without any transfer of possession, this will indeed be a remarkable fact, but far from decisive, particularly if the proof consist of royal grants. The king in council may have been able to do many marvellous feats not to be done by common men, and we know that ages before the year 1875 the king could assign his chose in action. But old impotencies of mind give rise to rules which perdure long after they have ceased to be the only conceivable rules, and then new justifications have to be found for the wisdom of the ancients, here feudalism, there a dread of maintenance, and there again a hatred of simony. So long as the rules are unrepealed this rationalizing process must continue; judges and text-writers find themselves compelled to work these archaisms into the system of practical intelligible law. Only when the rules are repealed, when we can put them all together and look at them from a little distance, do they begin to tell their true history. I have here set down what seems to me the main theme of that history. For this purpose it has been necessary to speak very briefly and superficially of many different topics, about every one of which we have a vast store of detailed and intricate information. Before any theory such as that here ventured can demand acceptance, it must be stringently tested at every point and other systems of law besides the English should be considered. But it seemed worth while to draw notice to many old rules of law which

we do not usually connect together, and to suggest that they help to explain each other and are in the main the outcome of one general cause[1].

[1] There is one rule of our present Common Law which, were it very old, would make much against what I have said, the rule, namely, that the ownership of movables can be transferred by mere agreement, by bargain and sale without delivery. I have not for gotten this, but it seemed impossible to discuss in a paper already too miscellaneous a question which has divided two masters of the Year Books. Serjeant Manning has maintained that the rule is quite modern. Lord Blackburn, on the other hand, has found it in the books of Edward the Fourth. He was not concerned, however, to trace it any further, and it seems to me that the law of an earlier time required a change of possession on the one side or the other, delivery or part-delivery of the goods, payment or part-payment of the price. Perhaps at some future time I may be allowed to state what I have been able to find about this matter. Since this article was in print examples (A.D. 1305) of pleadings referring to the seisin of chattels have been brought to my notice by Mr G. H. Blakesley: see *Rcgistrum Palatintim Dunelmense* (ed. Hardy), vol. iv., pp. 45, 49, 63. 73.

THE DEACON AND THE JEWESS; OR, APOSTASY AT COMMON LAW[1].

IN the year 1222, Archbishop Stephen Langton held at Oxford a provincial council, and of this council one result was that a deacon was burnt, burnt because he had turned Jew for the love of a Jewess.

I propose here to set in order the scattered evidence that we have for this story. This, so far as I am aware, has not yet been done, and it seems worth doing. The story became famous, for the passage in which Bracton made mention of it became the main, almost the only, authority for holding that, without help from any statute, English law can burn a heretic or, at least, an apostate. We have indeed no warrant for saying that from the death of this deacon until the death of Sautre in 1400 (whether Sautre was burnt under the statute of that year or under the common law, must not here be asked), no one in England was burnt for heresy, but we may say with some confidence that during this long period, near two hundred years, if English orthodoxy had a victim, there is no known record of his fate[2].

[1] *Law Quarterly Revieiw*, April, 1886.

[3] *Report* of Ecclesiastical Courts Commission, 1883, Historical Appendix, p. 52, a paper proceeding from the present Bishop of Chester.

Now for just so much of the tale as is told above we have testimony ample in quantity and excellent in quality. But I have purposely used a loose phrase :— the apostate's death was a " result " of the council. If we strive to be more precise and ask by what authority he was committed to the flames, who passed, who executed the sentence, we have before us a problem difficult but interesting. Not only in course of time did the solid tragic fact attract to itself some floating waifs of legend and miracle, but even our best witnesses have not been so careful of their words as doubtless they would have been had they known that they were writing for an ignorant nineteenth century. We must collate their testimonies, mark what they say, also what they do not say. So doing we shall be drawn into noticing another story about a man and a woman who were immured (whatever " immured " may mean), and this story also deserves being brought to light, for it is very curious.

That the council was held is quite certain. The scene and time we can fix exactly. The scene was Oxford, or, to be more particular, the conventual church of Osney[1]. The day is variously described, the day on which one reads in the gospel, " I am the good Shepherd," the day on which one sings in the introit, " The earth is full of the mercy of the Lord "; but all descriptions come to this, it was the 17th of April, and the Second Sunday after Easter, in the year 1222. The canons which the council published we have[2]. Naturally enough, being general ordinances, they say

[1] *Annates Monastici* (Osney), vol. iv., p. 62.

[2] Wilkins, *Concilia,* vol. 1., p. 585.

nothing of the deacon; but there are two of them which claim brief attention.

It was ordained that no beneficed clerk, or clerk in holy orders, should take any part whatever in the judicial shedding of blood[1]. This, even if it stood by itself, would assure us that no sentence of death was pronounced by the council. It may be that this canon was habitually disobeyed, or obeyed only according to its very letter. At this time, and for many years afterwards, the regular judges in our King's Court (to say nothing of abbots and even bishops sent out as justices in eyre) were for the more part ecclesiastics, and the judicial bench was often a step to the episcopal throne. But this seems to have been a scandal to churchmen of the straiter sort, and it would be quite one thing for this or that ordained clerk to hold pleas of the Crown, leaving to some lay associate the actual uttering of the fatal *suspendatur,* quite another for an ecclesiastical council to break while in the very act of publishing a law for the church[2].

Also the council had something to say about the mingling of Jews with Christians, something which suggests, what indeed seems the truth, that at this time the Jews in England, despite the exactions of their royal protector, and despite occasional outbursts of popular fury, were a prosperous thriving race. Jews are not to have Christian servants, it being contrary to reason that the sons of the free woman should serve

[1] Cap. 9.

[3] See Grossteste's protest against the appointment of the Abbot of Ramsey as a justice in eyre in 1236; *Letters of Grossteste* (ed. Luard), p. 105.

the sons of the bond[1]. Again, there being unfortunately no sufficiently visible distinction between Jews and Christians, there have been mixed marriages or less permanent unions; for the better prevention whereof, it is ordained, that every Jew shall wear on the front of his dress tablets or patches of cloth four inches long by two inches wide, of some colour other than that of the rest of his garment[2]. We might guess that the council was moved to this decree by the then recent and shameful crime of the apostate deacon. But there is no need for any such supposition, for in this and in most of its ordinances the Oxford Council was but endorsing and re-enforcing the acts of a still more august assembly, the Fourth Lateran Council held by Pope Innocent the Third in the year 1215.

The Lateran Council had prohibited the clergy from taking part in judgment of blood[3], also it had ordained that Jews and Saracens should wear some distinctive garb[4], lest under cover of a mistake there should be an unholy union of those whom God had put asunder. But this was but bye-work ; the suppression of flagrant heresy had been the main matter in hand. Of heresy England indeed had known little, almost nothing. It is true that in 1166 some heretics, Publicani or the like, had been condemned by an ecclesiastical council (this council also was held at Oxford), had been handed over to the secular power, and then by the king's

[1] Cap. 39.

[3] Cap. 40. It seems that this regulation was enforced by statute in 1275. See *Flores Historiarum* ("Matthew of Westminster") for that year. In *Statutes of the Realm* (vol. 1., p. 221) this appears as a statute of uncertain date.

[3] Cap. 18. [4] Cap. 68.

command whipt, branded, and exiled; some of them, it seems, perished very miserably of cold and hunger[1]. But even these were foreigners, Germans, and the writer who tells us most about them boasts that though Britain was disgraced by the birth of Pelagius, England, since it had become England, had been unpolluted by false doctrine. He boasts also, and apparently with truth, that well-timed severity had been successful[2]. Only one other case is recorded, and of this we know next to nothing. In 1210 an Albigensian was burnt in London ; we are told just this and no more[3]. It must not surprise us therefore if English law had no well-settled procedure for cases of heresy; there had been no heretics. But of course it was otherwise elsewhere. When the Lateran Council met the Albigensian war had been raging for some years, and it had been a serious question whether a considerable tract of France would not be permanently lost to the Catholic Church. So one great object of the council was to impress upon all princes and potentates the sacred duty of extirpating heretics. A definite method of dealing with them was ordained[4]. They were to be condemned by the ecclesiastical powers in the presence of the secular powers or their bailiffs (*saecularibuspotestatibuspraesentibus aut eorum baillivis)* and delivered to due punish-

[1] The original authorities seem to be *Rad. de Diceto* (ed. Stubbs), vol. 1., p. 318; *William of Newburgh* (ed. Hovvlett), vol. I., p. 131 ; *Mapes de Nugis Curialium* (Camden Society), p. 63; *Ralph of Coggeshall* (ed. Stubbs), p. 122.

[a] *Will Newburgh,* 1. c.

[3] *Liber de Antiquis Legibus* (Camden Society), p. 3. As to these two cases see the paper by the Bishop of Chester referred to above.

[4] Cap. 3. This is Decretal. Gregor. lib. 5, tit. 7, cap. 13.

ment, clerks being first deprived of their orders. Also it was decreed that if the temporal lord, when required and admonished by the church, neglected to purge his land of heresy, he should be excommunicated by the metropolitan and the other bishops of the province. If then for the space of a year he should still be contumacious, that was to be signified to the Pope, who would thereupon discharge his subjects from their allegiance. It was from taking part in such legislation as this that the English bishops had but lately returned when they met at Oxford. The council at Oxford, having recited and republished the Lateran canons, can have had little doubt as to how it ought to deal with a deacon who had turned Jew.

It will hardly be a digression, and indeed may lead us to the right point of view, if we notice that this same Lateran Council made (or if the word *made* be objectionable, then let us say *caused)* a great change in English criminal law. It abolished the ordeal, or rather it made the ordeal impossible by forbidding the clergy to take part in the ceremony[1]; no more remained for the council of the English king (the king himself was yet a boy) than to find some substitute for a procedure which was no longer practicable[2]. We may respect the motives which urged Blackstone to protest that no change in English law could be made by a body of prelates assembled at Rome[3]; but we shall scarcely understand the history of the time unless

[1] Cap. 18.

[2] See the orders issued to the justices in eyre; *Foedera,* vol i., p. 154. Among the justices were five bishops and one abbot.

[3] *Comment,* vol. iv., pp. 344-5.

we understand that the exclusive power of the church to rule things spiritual,—and the ordeal, the judgment of God, was a thing spiritual,—was unquestioned. It may be difficult now to grasp the old theory of Church and State, the theory of the two swords ; a distinction between things spiritual and things temporal may seem to us vain and impossible; still we must reverence facts, and the theories of a time are among its most important facts. Our own doctrine of sovereignty, our modern definitions of law, are out of place if we apply them to the middle ages. They will bring us but to some such unprofitable conclusion as that there were no sovereigns, no political communities, no law, nothing but "dormant anarchy."

Though it may delay us from our story, there is yet one question which should be asked and answered before we can fully comprehend the evidence that is to come before us. Who at Oxford in the year 1222 was the natural and proper representative of temporal power, who was the *mantis laicalis* ? Doubtless the sheriff of Oxfordshire. Now it happened that the sheriff of Oxfordshire was one of the most notable men in England; more than king in England ("plus-quam rex in Anglia") some said[1]. He was Fawkes of Breaute just at the full height of his power, a man not unlikely to act in a high-handed imperious way without much regard for forms and precedents, a man who very likely was already plotting revolt and civil war, a man somewhat given to disseising and otherwise pillaging the clergy, and therefore, it may be, not unwilling to do the church a service if that service would

[1] *Ann, Monast* (Tewkesbury), vol. i., p. 64.

cost him nothing. He was soon to find that the church could be a terrible enemy, that of all his foes Langton was the most resolute.

These things premised, we may call the witnesses, and first of all Bracton, not that his testimony is the earliest but because it is perhaps the best and certainly the best known. A lawyer writing for lawyers, he would be likely to see the case in its legal bearings and to speak of it carefully. We cannot assign any very precise date to his evidence, and he may well have given it between thirty and forty years after the event. Still it is from round about the year 1222, the year of the Oxford Council, that he collected the great mass of his case law. That was the great time when there were great judges whose judgments were worthy of record. Of their successors, his own contemporaries, he seems for some reason or another to have thought but meanly. It was to the examination of old judgments, as he himself expressly says, that he had given his mind[1]. He is speaking then, if not of his own time, yet of a time that he has studied. He has been telling us that a clerk convicted of crime is to be degraded by the Court Christian[3], He is to undergo no further punishment, degradation is punishment enough, " unless indeed he is convicted of apostasy, for then he is to be first degraded and then burnt by the lay power *{per manum laicalem),* as happened at the Oxford Council holden by Stephen Archbishop of Canterbury of happy memory, touching a deacon who apostatised for a Jewess, and who, when he had been degraded by the bishop, was at once *(statim)* delivered

[1] Bracton, f. 1. [2] Bracton, f. 123 b.

to the fire by the lay power." Two things we remark. In the first place there is no talk of any sentence of death being pronounced by any court, temporal or spiritual; the miscreant was burnt at once, on the spot, so soon as he has been degraded: there is no talk even of any royal writ. Secondly, the case is good law; it is a precedent to be followed when occasion shall require.

But Bracton does not stand alone. If he did, we should perhaps have some cause for doubting his testimony. It was an age very fertile of chroniclers and annalists, and there are. some dozen books in which we may hope to find a trustworthy and early, if not quite contemporary, account of an event which took place in 1222, an event which, though neither very marvellous nor of first-rate importance, was still picturesque and unprecedented. Some of these books are silent. The silence most to be regretted is that of Roger of Wendover. We would gladly have had an account from one so careful and so well informed. But he is taken up with more momentous matters, the loss of Damietta and a serious riot in London, not suppressed without the aid of Fawkes and his soldiery. Beyond this he tells of nothing but terrible tempests. And, indeed, the weather this year was abominably bad; about this all our authorities are agreed. It is the only fact that the annalist of Margan in Glamorgan found worthy of remark. The annals of Burton, of Worcester, and of Bermondsey do not even mention the council; those of Winchester and Tewkesbury tell as that the council was held, but tell us no more. The annals of Osney, to which we look hopefully, say merely

that the council was held, and held at Osney. But all this silence cannot, I believe, be reckoned as negative evidence. The monastic annalist, working with no definite plan, with no consistent measure for the greatness of events, jotted down what might interest his house or had struck his fancy, making sometimes what seems to us a very capricious selection of facts. He could pass by the fate of the perverted deacon, but he could also pass by very many things which, tried by any test, were much better worth recording.

But from the Cistercian house of Waverley in Surrey we have this[1]:—"In this council an apostate deacon who had married *(duxerat)* a Jewess was degraded and afterwards burnt. Also a countryman *{rusticus)* who had crucified himself was immured for ever." A somewhat longer version comes from Dunstable[2], and it seems to be the version of one who likely enough was an eye-witness, Prior Richard Morins, who was describing events as they happened year by year[3]. He had certainly been at the Lateran Council[4], and I suppose that it was his duty to be at the Oxford Council also. He must have been a careful man of business, for these Dunstable Annals are a long detailed record of litigation and legal transactions described in technical legal language. What he says is this:—"In this council there was condemned to the flames, after his degradation, a deacon who for the love of a Jewess had been circumcised; and he was burnt with fire

[1] ***Ann. Monast.*, vol. IL, p. 296. Dr Luard (Preface, p. xxxi) regards this as a contemporary record of events.**

[2] ***Ann. Monast.*, vol. 111., p. 76.**

[3] **Dr Luard's Preface, p. x. * p. 44.**

outside the town by the king's bailiffs who were present on the spot *{ibidem praesentes).* There also another deacon was degraded for theft. Also a woman who gave herself out to be Saint Mary and a youth who had given himself out to be Christ and had pierced his own hands, side and feet, were immured at Banbury." The prior certainly says that the pervert was condemned to the flames in (not *by)* the council. Could we now draw his attention to these words he would, I think, say (after a grumble about hypercriticism) that of course the council did not in so many words pronounce a sentence of death, but would add that it did what was for practical purposes the same thing, it convicted the man of apostasy and handed him over to the secular power; he might add, too, that no one for whom he wrote would have imagined that a *judicium sanguinis* was uttered by this assembly of ecclesiastics. Of any temporal court he says nothing, and nothing of any royal writ, but the king's bailiffs were present on the spot, as required by the Lateran Council, and they burned the convict.

The account which comes to us from the Abbey of Coggeshall in Essex is yet fuller[1]. It is contained in a very valuable chronicle, and in all probability was written within some five years after the event. Archbishop Stephen held a council at Oxford, and there " degraded an apostate deacon, who for the love of a Jewess had circumcised himself. When he had been degraded he was burnt by the servants of the lord Fawkes. And there was brought thither into the council an unbelieving youth along with two women,

[1] *Ralph of Coggeshall,* p. 190.

whom the archdeacon of the district accused of the most criminal unbelief, namely that the youth would not enter a church nor be present at the blessed sacraments, nor obey the injunctions of the Catholic Father, but had suffered himself to be crucified, and still bearing in his body the marks of the wounds had been pleased to have himself called Jesus by the aforesaid women. And one of the women, an old woman, was accused of having long been given to incantations and having by her magic arts brought the aforesaid youth to this height of madness. So both being convicted of this gross crime, were condemned to be imprisoned between two walls until they died *{jussi sunt inter duos muros incarcerari quousque deficerent).* But the other woman, who was the youth's sister, was let go free, for she had revealed the impious deed." We notice the appearance of Fawkes of Breaute, or rather of his underlings, remembering however that the *ministri domini Falconis* would also be the *ballivi domini Regis* mentioned by the Prior of Dunstable. We notice also that here there is no sentence of death, no royal writ.

Of about equal value and of about even date must be the account which, according to Dr Stubbs, comes from some nameless canon of Barnwell, the account which is preserved in the *Memoriale* of Walter of Coventry[1], "A priest and a deacon were there degraded inside the church before the council by the lord of Canterbury, the priest for homicide, the deacon for sacrilege and theft. But another deacon had sinned enormously; he had renounced the Christian faith;

[1] *Historical Collections of Walter of Coventry.* Preface by Dr Stubbs, vol. 11., p. ix.

blaspheming and apostatising, he had caused himself to be circumcised in imitation of the Jewish rite. He was degraded by the lord of Canterbury outside the church and before the people. Relinquished by the clergy, he was as a layman and captured apostate delivered over to be condemned by the judgment of the lay court, and being at once *(statim)* delivered to the flames he died a miserable death. In degrading the priest and the deacons, when the lord of Canterbury had stripped off the chasuble, or stole, or whatever it might be, by lifting it with the end of his pastoral staff, he made use of these words, ' We deprive you of authority' *(Exautoramus te)* There was brought into the council a layman who had allowed himself to be crucified, and the scarred traces of the wounds might be seen in his hands and feet and his pierced side and his head. There was brought also a woman who, rejecting her own name, had caused herself to be called Mary Mother of Christ. She had given out that she could celebrate mass, and this was manifested by some proofs which were found, for she had made a chalice and patten of wax for the purpose. On these two the council inflicted condign punishment, that enclosed within stone walls (m*uris lapideis inclusi)* they should there end life." One peculiarity of this life-like account is that it says nothing about the Jewess. But we have also to note the mention of the lay court, for of this we have hitherto heard nothing. The deacon was delivered over to be condemned by its judgment. These are the important words : " velut laicus et apostata captus traditur judicio curiae laicalis condemnandus." Nevertheless we do not read that he was

in fact condemned by or brought before any secular tribunal; on the contrary, he was forthwith committed to the flames.

I believe that I have now stated what may be called the first-rate evidence, and that it is far more than sufficient to establish the chief facts. It will not escape the reader's notice that all these early accounts of the matter are very sober, strikingly sober when the nature of the story and its subsequent fate are considered. We come to witnesses of a somewhat less trustworthy kind. And first there is Matthew Paris, who died in 1259. Roger of Wendover, as already said, does not even mention the Oxford Council. When Paris was absorbing Wendover's work into his own *Chronica Majora,* he inserted a notice of the Council and of the deacon's death. A more elaborate tale he set forth in his *Historia Minor* or *Historia Anglorum,* and to this we will turn first since there he cites his authority, and this authority an eye-witness, one Master John of Basingstoke, Archdeacon of London[1]. Of any such Archdeacon of London nothing is said elsewhere, but a John of Basingstoke was Archdeacon of Leicester[2]. Paris seemingly knew him well, and doubtless he is the person meant. He was a friend of Simon de Montfort and died in 1252. Paris, on the occasion of his death, speaks of him as a very learned man[3]. He had been to Greece and had learnt Greek, had learnt it from a young Greek girl of whose wonderful ac-

[1] *Historia Anglorum* (ed. Madden), vol. 11., p. 254.

[3] See lists of Archdeacons of London and of Leicester in Hardy's *Le Neve.*

[3] *Chron. Maj.,* vol. v., p. 284.

complishments he had strange things to tell; she could foresee eclipses, pestilences and even earthquakes, and had taught the archdeacon all that he knew. Perhaps while seated at her feet the archdeacon not only learnt but forgot; perhaps as a traveller he acquired a habit of telling good stories. At any rate the story that he told to Paris was this:—"An English deacon loved a Jewess with unlawful love, and ardently desired her embraces. 'I will do what you ask' said she 'if you will turn apostate, be circumcised and hold fast the Jewish faith.' When he had done what she bade him he gained her unlawful love. But this could not long be concealed, and was reported to Stephen of Canterbury. Before him the deacon was accused; the evidence was consistent and weighty; he was convicted and then confessed all these matters, and that he had taken open part in a sacrifice which the Jews made of a crucified boy. And when it was seen that the deacon was circumcised, and that no argument would bring him to his senses, he solemnly apostatised before the archbishop and the assembled prelates in this manner:—a cross with the Crucified was brought before him and he defiled the cross[1], saying, 'I renounce the new-fangled law and the comments of Jesus the false prophet,' and he reviled and slandered Mary the mother of Jesus, and made a charge against her not to be repeated. Thereupon the archbishop, weeping bitterly at hearing such blasphemies, deprived him of his orders. And when he had been cast out of

[1] Et minxit super crucem.

the church, Fawkes, who was ever swift to shed blood, at once carried him off and swore, ' By the throat of God! I will cut the throat that uttered such words,' and dragged him away to a secret spot and cut off his head. The poor wretch was born at Coventry, But the Jewess managed to escape, which grieved Fawkes, who said, ' I am sorry that this fellow goes to hell alone.'"

Eye-witness and archdeacon though Master John of Basingstoke may have been, we cannot believe all that he said. In the first place, he will have the deacon's head cut off, while all our best witnesses agree about the burning. In the second place, either the charge of crucifying a boy is just the mere " common form" charge against the Jews (the Jews were always crucifying boys, as every one knew, and were now and again slaughtered for it), or else the archdeacon has muddled up the history of the deacon with that of the labourer who was immured for crucifying himself. Nor does it seem likely that the assembled prelates gave the apostate an opportunity for manifesting his change of faith in a fashion at once very solemn and very gross. But what is said of Fawkes of Breautd does deserve consideration. Fawkes when this story was told was long since banished and dead, and it may well be that he had become a bugbear, a mythical monster to whom, under Satan, mischief of all sorts might properly be ascribed. But what mischief, what evil doing had there been ? Why should a perfectly lawful execution be converted into a hurried and secret act of this cursing and bloodthirsty enemy of mankind, this

Fawkes of Breaute, "ever swift to shed blood," with imprecations about the throat of God? Certainly the impression left on the archdeacon's mind seems to have been that of a deed which, though perhaps lawful, was indecently hasty.

What Paris says in his *Chronica Majora*[1] is briefer, but it has a new marvel for us, and shows that we are already on treacherous ground. He introduces us to a hermaphrodite. A man has been apprehended who has in his hands, feet and side the five wounds of the crucifixion; he and an accomplice, a person *utrmsqtte sexus, scilicet, Ermofroditus,* confess their offences and are punished by the judgment of the Church. "Likewise also a certain apostate, who being Christian had turned Jew, a deacon, he too was judicially punished *(judicialiterpunitus)*; and him Fawkes at once snatched away and caused to be hanged (*quern Falco statim arreptum suspendi fecit).*[1"] The poor deacon who has been already burnt and beheaded is now hanged; this we may pass by, nor will we discuss the question how the old woman who called herself St Mary became a hermaphrodite, but we again notice that the slaying of the apostate is due to Fawkes, and seems a lawless or at least irregular act. Doubtless the Abbey in which Paris wrote was just the place in which stories discreditable to Fawkes would be readily believed and invented, and Paris himself seems to have cherished a bitter hatred for "the great enemy and despoiler of St Alban's[2]." But again we have to ask, whether and why there was anything reprehensible in putting

[1] Vol. in., p. 71.
[2] Dr Luard's Preface to vol. HI., p. xii,

to death this degraded clerk, and, if not, why that evil principle, Fawkes of Breaute, should be invoked to account for what was perfectly natural and right?

Another ornate version is given by Thomas Wykes, who, it is believed, wrote near the end of the thirteenth century and in the monastery of Osney, the scene of the council[1]. "In this council there was presented a deacon who, some time ago, had for the love of a Jewess rejected Christianity, apostatised, and been circumcised according to the Jewish rite. Being convicted of this he was first degraded, then condemned by a secular judgment *{saeculari judicio condemnatus)* and burnt by fire. It was said that this same apostate, in contempt of the Redeemer and of the Catholic faith, had even dared to throw away in an ignoble place (*in loco ignobili)* the Lord's body which had been stolen from a church. A Jew revealed this, and in corroboration of the Christian faith the Lord's body was found unpolluted, uncorrupted, in a fair vessel, prepared for it, as one may well believe, by angel hands. And there was brought into the same council a country fellow (*rusticus)* who had come to such a pitch of madness that, to the despite of the Crucified One, he had crucified himself, asserting that he was the Son of God and the Redeemer of the world. He was immured by the judgment of the Council, and shut up in prison he ended his life, fed on water and hard bread." This is, I think, the first and only account which states that the deacon was condemned by a lay court, and I believe that it comes from too late a time to be trusted; the legend about the consecrated wafer shows

[1] *Ann. Monast,* vol. iv., p. 62. See Dr Luard's Preface, pp. x-xv.

that the story was already being improved by transmission.

There is not much more to be said. Later writers repeat with more or less accuracy what we have already read. Just one new ornament is added, and a pretty ornament too. Having learnt how the *rusticus* (such is the stereotyped description of the miserable man, and it well may mean that he was a villein) crucified himself, and how the deacon assisted at the crucifixion of a Christian boy, we may read in the pages of Holinshed and elsewhere how the council crucified a hermaphrodite, a version of the tale which good Protestants must think very proper and probable[1].

Such being the evidence, were I to venture a guess as to what really happened it would be this:—No one in England doubted for one moment that this deacon ought to be burnt, except, it may be, the deacon himself and his fellow Jews. It is not necessary here to assume that had his offence been mere heresy, his fate would have been the same, though I believe that of this there can be little doubt. But his crime was enormous, he had piled sin on sin. A deacon of the Christian Church he had turned Jew, turned Jew for love and for the love of a Jewess. Excommunication would have awaited the king, interdict the nation, if mere heresy had gone unpunished, and England had lately had some sad experience of interdicts. But in such a case as this no ecclesiastical threat would be

[1] Holinshed (ed. 1807), vol IL, p. 251. But the confusion is older; see Knighton (Twysden's *Scriptores),* p. 2429 : it must, I think, have originated in the clerical blunder of someone who wrote *crucifixus* instead of *immuratus.*

needed ; every one would agree that this self-made Jew must be burnt, that his death was demanded by all laws human and divine. It was the duty of the council to degrade him, to demand that he should be punished, to see that he was punished; but the council could not pronounce upon him any sentence beyond that of degradation. He was degraded then, not inside the church like the manslayer and the thief, but outside the church, before the people, and he was then handed over to the sheriff or his bailiffs. He was at once burnt; most of our witnesses bring out this fact that he was burnt at once and without any further formality. Possibly it was intended that there should be some further formality, some sentence pronounced by a lay tribunal; one of our best witnesses, the canon of Barnwell, seems to say as much, and the story about the indecorous haste of Fawkes points the same way. Possibly, then, Fawkes or his subordinates did act with unexpected promptitude; Fawkes, unless he is maligned, was not much given to waiting for orders. One writer at the end of the century says that the man was condemned by the lay court. I take this to prove that by that time, when the relation between Church and State had undergone some change, it was thought that there ought to be, assumed that there must have been some sentence by a lay tribunal, at least some writ from the king. But whatever was expected and omitted was but a bare formality, the registration by the king's court of a foregone conclusion. By an informality the deacon gained a speedier release from a painful world. Any notion that he would have been saved had he been brought before the king's justices

we may dismiss as idle. Those justices, almost to a man, would have been ecclesiastics, and among laymen he would assuredly have fared no better. There was no statute, there may perhaps have been no precedent to the point; such a case is not foreseen in advance, and when it happens it is of course unprecedented; but that a deacon who turns Jew for the love of a Jewess shall be burnt, needed no proof whatever. Bracton, as I think, knew that there had been no judgment of any lay court ("qui cum esset per episcopum degradatus, *statim* fuit igni traditus per manum laicalem"), and he fully approved of what had been done and so far generalized the case as to state for law that an apostate clerk (a layman would have been in no better plight, but Bracton, as it happens, is discussing clerical privileges) is to be delivered to the lay power and burnt.

The fate of the man and woman who were immured, fanatics, lunatics, impostors, enthusiasts, or whatever they were, is really quite as remarkable as the fate of the deacon. The notion that for breach of monastic vows persons were sometimes bricked up in walls was once current and may still be entertained by some who take their *Marmion* too seriously. Scott indeed sanctioned it not only by verse but by a solemn prose note. Very possibly the main foundation of this notion is some version of the story that has here been before us, for I believe that this is almost all that is to be found about immuration in any English records or chronicles. We see plainly (and this might, I take it, be fully proved from foreign books) that our witnesses do not mean that two persons were suffocated in brick or stone. They were imprisoned for life and fed on

bread and water. Doubtless the imprisonment was very close and strait, otherwise we should not have this same *immuratus* from writer after writer when *incarceratus* and *imprisonatus* lay ready to hand, and one writer says that they were enclosed between two walls, not between four; but still they were fed, though water and hard bread were their fare. But what most deserves attention is that they were sentenced to imprisonment, life-long imprisonment, by an ecclesiastical council, and that the sentence was carried out. What is more, they were lay folk. The sentence here was no *judicium sanguinis*, and by pronouncing it the council broke no canon of the Church. But what of the common law? At common law could the ecclesiastical court send a man to prison? This seems to me a vain question; every question about what was [11] the common law" is vain that does not specify some date. But suppose that the year 1222 be mentioned, then apparently our answer must be this:—In that year two persons were sent to imprisonment for life by the judgment of an ecclesiastical council, and, in the absence of evidence to the contrary, the natural presumption is that they were imprisoned lawfully.

THE BEATITUDE OF SEISIN[1].

I.

THE subject of this essay is an episode in the history of English law, which has hardly received all the attention that it deserves. It is in itself curious and interesting, and a full understanding of it might lead to the understanding of some other passages in our legal history, which are not very intelligible. It concerns the protection which our law of the middle ages cast over seisin, and more especially the protection of seisin against proprietary right.

Now a doctrine of possession and a system of possessory remedies seem to find their most critical test in the question—How, and in what circumstances, is possession protected against ownership? It may well be, as some think, that to protect possession against ownership has not been the object of those by whom possessory remedies have been instituted and developed. In protecting possession they may have had chiefly in their view possession by those who have right; they may have wished to facilitate proof in favour of owners; and it may have been but an accident in their schemes, though an inevitable accident, that they were forced to maintain the sanctity of possession even against ownership. But though this

[1] *Law Quarterly Review*, January, 1888.

may be so, still it is hard to determine whether, or in what sense, a remedy is "possessory," until we have seen it conceded or denied in cases in which it would act as a limit to proprietary rights. When the contest is merely between a possessor and one who claims no right in the thing, then it is often possible to dispose of the question by saying that "possession is evidence of ownership," or again, to contend that possession engenders title of a sort—title good against all who have no better, because older, title. When however we see the possessor protected against one who admittedly is the owner, or against one who is ready and willing to prove his ownership, then we know for certain that possession itself is protected by law, and protected for its own sake. By this phrase, "for its own sake," I mean not to stir any question about the ultimate reason for protecting possession, but only to point out that when we see an owner succumbing to a possessor, forced to deliver up what is his own, or forced to pay damages for having touched what is his own, then there can be no doubt that the law really does protect possession, and does not merely regard it as affording evidence of title, or as giving a title good against those who have no better. Thus it becomes an important inquiry as regards any system of law, whether and how the rights of owners are limited by the rights of possessors. To such an inquiry let us subject our medieval law.

Looking then at the state of affairs at the end of the middle ages,—the accession of Henry VII will be a good moment to fix, and we can turn to Littleton's *Tenures* as to a very recent book,—we may be in*

clined to think for one moment that the common law (as distinct from statute law of no great antiquity) never protects either the old-fashioned seisin or the more modern " possession " against ownership, against the entry and even the forcible entry of "him that right hath." The statutes to which reference has just been made are of course the Statutes of Forcible Entry, of which the earliest is no older than 1381[1], and of which for the present we will take no further notice. It has been the general opinion that nothing but those statutes stood in the way of a forcible entry on the part of one who had a right to enter. But then stress must be laid on the phrase "a right to enter": it at once reminds us that a person might well be owner of land and as such be entitled to be seised and possessed of it, and yet might have no right whatever to enter upon it. The methods whereby this state of things might be brought about were those which we are wont to group under the two heads of Descent Cast and Discontinuance. To put the matter very briefly : — If a disseisor (or the alienee of a disseisor) died seised and the ousted owner had not by continual claim kept alive his right to enter, then he could not enter upon the heir of him who had thus died seised; "the descent cast had tolled his entry," his entry was no longer *congeablc.* Then, again, if an abbot seised in right of his monastery, a husband seised in right of his wife, or a tenant in tail made a feoffment in fee simple, this was a discontinuance, and the successor, wife, issue, might not enter on the feoffee. In these scattered cases, which we need not at this moment define more

[1] 5 Ric. Il Stat. 1. c. 7.

accurately, seisin was protected against ownership; and very effectually protected ; the true owner, the person who of all the world had the best right to be possessing the land, might not set foot upon it.

We can hardly think of these rules otherwise than as rules which exist for the protection of seisin,—not indeed of every seisin, or even of every seisin that has colour of title, but of seisin acquired under certain particular titles. But the scope of these rules is so narrow and (as it must seem to us) so capriciously defined, that we have great difficulty in conceiving them as forming part of a rational coherent theory of possession; we are tempted to pronounce them quite unintelligible, and therefore presumably "feudal." The explanation which I shall here hazard is that they are the last relics, somewhat casually preserved, of a coherent theory of possession, of an extremely rigorous prohibition of self-help, of a system of possessory remedies which was once a simple and effective system, but which fell to pieces in the course of the fourteenth century. The main outline of this historical explanation is suggested by a passage in Coke upon Littleton[1]; but to fill up some part of that outline seems a reasonable purpose; for really the treatment of seisin in our oldest common law must be understood if ever we are to use the vast store of valuable knowledge that lies buried in the Plea Rolls and the Year Books. If we were free to write history out of our own heads, it would be a plausible doctrine that gradually and steadily the right of a dispossessed owner to right himself, to take what is his own, is curtailed by law;

[1] Co. Lit. 237.

that in the law of the later middle ages, the law of Littleton's time, we may see the first tentative and clumsy advances towards a protection of possession against ownership. But such a doctrine would be quite untrue; the sphere allowed to self-help by the law of the twelfth century is almost infinitely narrower than that allowed by the common law of the fifteenth. This seems to me an important fact, and I shall here attempt to collect some proofs of it.

We have every reason to believe that our possessory actions, the three assizes of novel disseisin, mort d'ancestor and darrein presentment, were not developed out of ancient folk-law but were of positive institution, that they were established by ordinance early in the reign of Henry the Second. Their very name " assizes," the express testimony of Glanvill[1] and Bracton[2], to say nothing of later tradition[11], the equally clear testimony of the Norman books as to the origin of the Norman assizes[4], all point the same way, and it is even possible that we have "the text of the law on which the assize of mort d'ancestor was founded[5]." We may add to this that a definitely possessory remedy does not seem native to the law of our race; that when it appears in England or in Germany or in France, it

[1] Glanvill, xiii. c. l.

[2] Bract, f. 164 b.

[3] Mirror, c. 2, § 25; 2 Inst. 24.

[4] Brunner, *Entstehung der Schwtirgerichte,* pp. 297-303.

[5] Stubbs, *Const Hist,* § 145; *Assize of Northampton,* c. 4. Madox *(Hist. Exch.,* vol. 11., p. 549) gives from a roll of 14 Hen. IL an entry to the effect that Ralf son of Huilard was amerced for a disseisin done against the king's assize. The assize of novel disseisin seems therefore to have been in force as early as 1168.

bears witness to the influence of alien jurisprudence, of Roman law working either directly, or through the medium of the Canon Law. At the same time we must not think of the Norman or the English assizes as copies of the interdicts or of the actio spolii. It would be easy for us to exaggerate the amount of Roman law that can have been known in the court of Henry the Second. Much more had become known by Bracton's time; but Bracton had great difficulty in finding the assizes in the Roman books[1]. They were not pedantries, but lively, effective institutions, well suited to the Normandy and the England of Henry's day, and they struck deep root and flourished. A century after Henry's death the Novel Disseisin was still "festinum remedium," the most summary proceeding known to the Chancery[2].

If we ask for the motive of this new institution, we ought perhaps to distinguish between motives which are and those which are not avowed. Henry's main object may have been to strike a heavy blow at

[1] **Item est "petitoria haereditatis actio" [this means the writ of right], et competit illis, quibus jus merum descendit ab antecessoribns sicut haeredibus propinquioribus. "Possessoria" vero "haereditatis petitio" est de possessione propria, et quae dicitur "actio unde vi," per quam restituitur spoliato, et dici poterit "assisa novae disseisinae." Item dicitur "possessoria petitio" de possessione aliena, sicut alicujus antecessoris de aliquo tenemento de quo antecessor obiit seisitus ut de feodo, quae dicitur "actio quorum bonorum," sive "assisa mortis antecessoris." ... Est etiam interdictum sive actio "quorum bonorum," quae non oritur ex maleficio sed ex quasi contractu. Bract f. 103 b, 104. These are learned after-thoughts. We do not suppose that the appeal of homicide was modelled on an "actio legis Aquiliae de hominibus per feloniam occisis."**

[2] **Stat. West. 11. c. 25.**

feudalism,, to starve the feudal courts, to weaken the tie between man and lord, to strengthen the tie between subject and king, to make every possessor feel that he owed the blessedness of possession to a royal ordinance, to the action of a royal court. Also it is not to be disguised that he made money out of his assizes[1]. But he could not have succeeded had there not been a strong feeling that a possessory action was a right and good thing, that the peace ought to be maintained, that proof should be easier, that the dilatory processes of the old actions were working injustice. The avowed motive for the new institution was, at least according to Norman tradition, the protection of the weak against the mighty, the poor against the rich; along with this we have the homely thought, that the plough must not be disturbed, that he who sows should also reap[2]. Perhaps at the base of the new remedies there was no one clearly thought-out principle, but rather several different ideas, which, though for a while blent and harmonious, would in course of time become separate and discordant.

Of all the possessory assizes the Novel Disseisin is by far the most interesting; and since everything depends upon the words of its formula, that formula, the question which the recognitors were summoned to answer, must here be set forth :—

Si *B* injuste et sine judicio disseisivit *A* de libero tenemento suo in *X* post [ultimam transfretationem

[1] Bigelow, *History of Procedure*, p. 187.

[2] Brunner, pp. 297-300, 328-330; see the *Siatuta et Consuetudines* published by Warnkonig at the end of the second volume of his *Franzosische Staats- und Rechtsgeschichte*, especially p. 11.

domini Regis in Normanniam—or other the time of limitation].

Glanvill speaks but very briefly of this assize, and gives us no information as to the precise meaning of the terms used in its formula[1]. Again, Palgrave's *Rotuli Curiae Regis* give us but little help. We may indeed see that in Richard's reign and John's the new remedy had become very popular; it was doing a great work. But just because it was working well, the records of its working are uninstructive. In case after case there is no pleading at all, and the jurors answer the question put to them with almost monosyllabic brevity—"disseisivit eum"—"non disseisivit eum"; they well understand what is meant and do not pray the aid of the justices. During Henry the Third's reign special pleas (exceptiones) become not very uncommon, and special verdicts become still commoner. The ideas answering to the terms "injuste," "disseisivit," "libero tenemento" are being developed and defined, and it is becoming rather rash for laymen, over whose heads an attaint is pending, to swear that *B* has unjustly disseised *A* of his free tenement. Then from the middle of the thirteenth century we have Bracton's book with an elaborate doctrine about the scope of the assize.

Before we turn to that account it will be well to remember how summary an action this Novel Disseisin was, how sharp was the contrast between it and other actions[2]. To begin with, "personal service" (to use a modern term) was unnecessary; to attach the defendant's bailiff was enough; there could be no essoin;

[1] Glanv. xiii. 32-9. [2] Compare 2 Inst. 411; 8 Rep. 50,

there could be no vouching to warranty of any one not named in the writ; the assize could be taken by default; no pleading to issue was necessary; the question for the recognitors was defined in the writ. Lastly, this was the only action in which one could recover both land and damages. It is not, in Bracton's view, a real action ; it is a personal action founded on tort[1].

Now in order that we may understand the spirit of this assize as administered in Bracton's day, we had better at once put the extreme case, which is also the simplest case:—*A* is the true owner, or very tenant in fee simple, of land and is seised of it; he lives on it and cultivates it himself; there comes one *B* who has no right whatever; he casts *A* out and keeps him out, by force and arms. When, we must ask, does *A* cease to be seised and when does *B* begin to be seised ? Doubtless in one sense or for one purpose, *A* is disseised so soon as he is put off the land ; he can at once complain to a court of law that *B* has disseised him. Indeed to found such a complaint no actual ouster was necessary; had he repulsed *B* he might still have complained of a disseisin. The assize serves the purpose of an interdict for retaining, as well as that of an interdict for recovering possession ; had *B* but entered with an intent to assume possession this would have been disseisin enough. In many cases the mere troubling of possession is a sufficient disseisin, if the person seised choose to complain of it as such[2]. But even when *A* has been extruded from the land, *B* is not at once seised (at least as regards *A),* that is to say, he is not protected by the assize (at least as

[1] Bract, f. 104, 164b. [2] Bract, f. 161b, 216 b.

against *A)*; if within a certain limited time.A returns and ejects *B, B* will have no ground of complaint Bracton sometimes expresses this principle in a romanesque form, derived from what is now held to be a misinterpretation of a famous sentence in the Digest[1]; one can retain possession animo solo. The ejected *A* so soon as he has been de facto ejected has ceased to possess corpore, but he has not ceased to possess animo; he has lost possessio naturalis, he has not lost possessio civilis. When however we come to ask what this really means, we find that the talk about a man retaining seisin animo solo—apart from any objection about the misuse of Roman terms—is somewhat misleading. Really there seems to be a set of hard and fast rules about the matter. *A* must turn *B* out within four days; otherwise *B* will have a seisin protected by the assize. Such is the case if *A* was actually on the land and was himself cast out. If however he was away from the land when the disseisin took place, then a longer time will be allowed him. In the first place, he will not be disseised until the act of disseisin is brought to his knowledge. In the second place, he will then have a reasonable time within which to come to the land, and after that he will have his four days. The " reasonable " time is in several cases determined by the parallel rules about essoins. Thus the man who is in Gascony or on a pilgrimage to Compostella has forty days, two floods and an ebb, fifteen days and then the four days. Bracton, if I

[1] Dig. de diversis regulis juris (50. 17), 153. Ut igitur nulla possessio acquiri nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contrarium actum est. See Bract, f. 38b, 39,

understand him rightly, seems to think that for a man in England fifteen days would always be reasonable, but says that at the present time this rule is not observed. The four days he tells us are allowed a man for'the purpose of collecting friends and arms[1]. Fleta[2] and Britton[3] repeat, though not very clearly, this curious doctrine ; four days seems still the fixed time within which a person who has himself been cast out of the land may lawfully enter upon and eject his ejector.

Mr Nichols in his fine edition of Britton has supplied a gloss from a Cambridge MS., which there is some reason for attributing to John of Longueville, a justice of Edward the Second's time[4]. The first words of it are very interesting:—" Where the disseisin is done in the presence of the disseisee, the disseisor must be ejected within five days; because the law of ancient time granted that the disseisee should go one day to the east, the second day to the west, the third day to the south, and the fourth day to the north, to seek succour of his friends all the country round." This same MS. contains a Bracton as well as a Britton, and in the margin of the Bracton I have found a Latin note, to the following effect:—"*A* being at London is disseised of his free tenement in York, for his family is ejected ; if it be asked within how long a time he may lawfully re-eject his ejector by his own force, I am safe in saying *{dico secure),* within fourteen days, or fifteen; for in five days a messenger may come from York to London to give him notice; then *A* himself can go

[1] Bract, f. 163. [2] Fleta, p. 216.
[3] Brit. vol. 1. p. 294. [4] *ibid.*

thither in other five days, and four days being spent in obtaining the aid of friends, he can re-eject the ejector on the fifth. And so wheresoever he be, by computing the days reasonably necessary for coming and going (the allowance being more or less liberal according to the discretion of the justices) and four days for getting the help of friends, one can decide whether time has run against him or no[1]." It would seem then that in the opinion of some lawyer of the fourteenth century this rule about the four days was still law. We shall have some difficulty in reconciling this with the testimony of the Year Books; but we know how legal texts are haunted by the ghosts of dead doctrines.

If a somewhat close attention is paid to Bracton's words, we shall find that a period of four days is mentioned more than once in connexion with the acquisition of seisin; some attention is necessary, because, as it seems to me, he was inclined to speak vaguely of it and to rationalize it away. Thus if *A*, who has been ejected, die without having purchased a writ, his heir will not have the mort d'ancestor against the ejector, unless *A* die within four days after the ejectment[2]. If he die within the four days then he "dies seised" within the meaning of the writ of mort d'ancestor[3]. Again, a case is put in which I enfeoff you to the intent that you marry my daughter; you marry some one else; I may eject you, but must do so *infra triduum vel quartum diem, vel aliquantulum ulterius, sed cum causa.* Seemingly this means that I must enter within four days, but that a longer time will

[1] MS. Dd. vii. 6, at f 34 c! of the Bracton.
[2] Bract, f. 218 b. [3] Bract, f. 262.

be allowed me if there be cause, if e.g. I am not on the spot[1]. Then, again, Bracton considers personal liberty and personal villeinage as the subjects of a sort of possession or seisin. A runaway serf must be captured *infra tertium vel quartum diem,* otherwise he will be *in possessione libertatis,* will be *statu liber,* and the lord will be put to his action[2]. This term of four days must be carefully distinguished from the term of year and day, by dwelling for which in a privileged place a villein may gain the right of liberty. It will take him a year to gain a right to his freedom ; but in four days he may get possession, legally protected possession, of it.

A term of four days seems therefore the time during which one who has ousted the owner must de facto hold the land in order that he may have a seisin of it, legally protected against the owner. On the other hand, if one comes to the land by good title, no lapse of time is necessary; the feoffee is seised so soon as the feoffor has delivered seisin. But even within the region of conveyance, we in one case meet with a requirement of a four days' seisin. If a man is going to enter religion and to endow the religious house with his land, he must deliver seisin *per tres dies vel qtiatuor* before he becomes professed[3]. Bracton speaks rather casually about this point, and it would be rash to lay much stress upon what he says; but it deserves remark that we here come across something not unlike the "sessio triduana" of German medieval law.

In certain cases, German law of Bracton's time

[1] Bract, f. 23. [2] Bract, f. 6 b.

[3] Bract, f. 27 b. . See also Y. B., 20 & 21 Edward I. pp. 8, 82.

required of a man that he should remain ,in a very actual and obvious possession of land—should steadily sit upon the land—for three days and three nights. In what cases and to produce what legal results this was required, have been controverted questions. At one time it was maintained that the purchaser of land would not have acquired a legally protected possession, until he had held the land for the three days[1]. Recent writers have come to a different opinion. The commonest of all the "common assurances" of Germany was the " Auflassung," a proceeding closely akin to our own Fines and Recoveries. It took the form of a fictitious action between seller and buyer, in which the land was adjudged to the latter. Having been put into possession, it seems to have been required of him that he should abide on the land three days and three nights. The object however of this requirement, according to modern authorities, was not the acquisition of a legally protected seisin, but rather the preclusion of any claim on the part of the seller or of any one else who was present in court when the Auflassung was made[2]. The origin of this period of three days, it is said, was this:—In old times a Ding ("a judicial session/' I suppose we must say, unless we prefer "a moot") lasted three days, and the person who acquired land by a judgment was not safe until the Ding was over, until court and suitors were dispersed[3]. So the English suitor must await his adversary four days in

[1] Albrecht, *Gewere,* pp. 75-78.

[2] Laband, *Vermogensrechtliche Klagen,* pp. 236-244; Heusler, *Gewere,* pp. 167-172.

[9] Sohm, *Altdeutscke Reichs- und Gerichtsverfassung,* p. 365.

court. I •know not whether the rule that we find in Bracton that a disseisor may be ejected *infra quartum diem* has any direct connexion with the German rule ; very possibly not, for I believe that in Germany the disseisee would have been allowed at least a year and day for the re-ejectment of his disseisor. But Bracton's rule has all the appearance of being very ancient. We may perhaps detect its origin in yet older law. In the Lex Salica it makes a great difference to the man who is following the trail of stolen cattle, whether he comes upon them before or after three nights have elapsed. On this depends, what is all important in ancient law, the burden, or rather the benefit of the proof[1]. The idea at the base of this distinction seems to be that after three nights a theft is no longer flagrant; the malefactor will not be caught in the act. It is not impossible that in the *Jadicia Civitatis Londoniae,* the statutes of the London peace-guild, which seemingly belong to the reign of Athelstan, we may find a trace of the same idea. He whose cattle have strayed must announce the loss to his neighbours "infra tres noctes," otherwise the guild will not make good the loss[2]. So in the law of Bracton's day a disseisin ceases to be flagrant "infra quartum diem." A curious confirmation of this rule, and of the fact that before the end of the thirteenth century it was no longer observed, occurs in *The Mirror.* The writer, who is a conservative and an antiquary, complains that " force holds in disseisins after the third day of peaceable seisin," This, he says, is an abuse, " forasmuch as he is not worthy

[1] L. Sal. 37. *Essays in A.-S. Law,* p. 210.

[2] iEthelst vi. 8. §§ 7, 8. *Essays in A.-S. Law,* p. 206.

of the law's help who contemns judgement and uses force[1]"

But be the origin of the rule about the four days what it may, this allowance of a certain time for re-ejectment becomes of considerable importance. That there should be some such allowance, more or less precisely defined, is of course, according to our modern ideas, very natural, especially if there is to be a possessorium so strict that it will protect even a vicious possession against the self-help of the owner. The disseisor who has forcibly turned the owner out, or who has come upon the land during the owner's absence, cannot be protected directly he is the only person on the land, at all events he cannot be protected against the owner. "A mere trespasser," says modern authority, " cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in possession[2]." It was held in the case just cited that a trespasser who had been occupying a house for eleven days had not acquired "what the law understands by possession." A trespasser, it is said, "does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner[3]." The writer who says this thinks also that until there has been something like acquiescence on the part of the rightful owner, the

[1] *Mirror,* " Abuses of the Common Law," No. 4.
[2] *Browne* v. *Dawson* (1840), 12 A. & E. 624, 629; 10 L. J., Q. B. 7.
[3] Pollock, *Torts,* p. 312.

trespasser who is on the land will have no possession legally; protected even against outsiders, supervening trespassers. This, for anything that I know, may be the modern law. If so, any one who now wishes to make a theory of possession has an easier task than that which was set before Bracton; for clearly it was law in his day that in the very moment of the ejectment the wrongful ejector gained a seisin protected against persons in general[1]. To account for this out of the theoretic materials ready to his hand was difficult. He had to hold that a man may be seised as regards some, not seised as regards others, and to speak of the disseisor obtaining a naturalis possessio which is protected against those who have no right, before he acquires the civilis possessio which is protected even against those who have right.

However, the main point which needs attention is this, that when once the short period of four days (or it may be a little longer) has elapsed, the disseisor has acquired a seisin which is protected against all men. If ejected even by the rightful owner, he will have the assize and he will be reinstated in his possession. If we are to use the terms of later law, we must say that the disseisee's entry is already tolled. There is no need for any descent cast, there is no need for any alienation by the disseisor to a third person, there is no need for any such lapse of time as can have (at least to our minds) a prescriptive effect: all that is needful is that the disseisor shall have really obtained possession of the land, and that he has done so is sufficiently manifested if he has remained undisturbed

[1] **Bract f, 209 b.**

for four days, the disseisee being in the neighbourhood and cognizant of the disseisin.

But what a most rigorous possessorium have we here! It protects even a "vicious" possession. If *A*, having been cast out by *B*, lets four days elapse, and then has recourse to self-help, *B* will bring the assize against him, and it will be useless for *A* to except that *B* obtained his possession by force, and by force used against him, *A*. This extreme rigour is so remarkable and yet has so seldom been remarked, that were not Bracton's text very clear I should doubt whether I had understood it; but I think that if others will read the whole book on the Novel Disseisin they will come to the conclusion that has here been stated. It is necessary to read the whole book, because Brae ton has a way of speaking about time which is very apt to lead modern readers astray. He constantly speaks as though lapse of time were necessary in order to give the disseisor a seisin protected against the true owner:—he must have time on his side, a long time, a long interval, a long and peaceable seisin; and again, the true owner loses the right of self-help when he has ceased to have the mind to possess, when he has dissimulated the injury, when he has acquiesced. The truth that such words as "long" and "short" are very vague words will be forcibly brought home to us when we discover that by "a long time" in this context Bracton means four days.

Distinct from the case of the disseisor is that of the intruder, of one who enters on a vacant possession, on a possession, for example, left vacant by the death of a tenant for life. He may be ejected *antequam habuerit*

longum tempus et pacificum; but then this *longum tempus* is to our minds not very long; it is but year and day—at least such is one opinion[1]. Britton remarks that an intruder ejected by the true heir within year and day cannot recover his possession. To this the Cambridge glossator objects, "because it seemeth to me that an intruder should not be in a worse condition than a disseisor would be[2]"; a remark which shows once more that, in his opinion, a disseisor would gain protection in less than a year. Probably the explanation for this seeming favour shown to a disseisor as contrasted with an intruder, is that (albeit a disseisin is a much more serious injury than an intrusion) the person who is really entitled to be in possession is much more likely to get speedy notice of a disseisin than of an intrusion; he may well not know that a right to enter has accrued to him until the intruder has been upon the land for some months.

Bracton of course has no doctrine about discontinuances or descents cast. He has no need of any, because he has a comprehensive doctrine of possession. Even the disseisor himself in a very short time, at least in what seems to us a very short time, will have a seisin protected against the disseisee, and as to alienees of the disseisor, or disseisors of the disseisor, the question whether the original disseisee may eject them will be the question whether he has stood by for four days since the original disseisin.

All this seems to me so plainly written on page after page of Bracton's book, that I should have said that there could be no doubt about it whatever, were

[1] Bract, f. 160 b, 161. [2] Brit. vol. ll. p. 288.

it not that Mr Justice Holmes has written something which seems to contradict it. "English law," he says, "has always had the good sense to allow title to be pleaded in defence to a possessory action. In the assize of novel of disseisin, which was a true possessory action, the defendant could always rely on his title[1]." Now in a certain sense, though not as it seems to me a very precise sense, this is true of days much later than Bracton's, and very possibly the word "always" was not intended to comprehend so remote a time as the thirteenth century; but as some of the many readers of one of the best of books may suppose that this sentence refers to the law of Bracton's time, I am bound to controvert it, and that too in Bracton's own words.

In the following passage we have perhaps his fullest statement of the principle that possession is to be protected even against ownership :—

Si autem verus possessor negligens erit post disseisinam, et negligens impetrator, patiens et dissimulans injuriam, impotens omnino, vel de potentia sua desperans, ut praedictum est, ita quod utramque amisit possessionem, naturalem videlicet et civilem, non succurritur ei nisi per assisam. Et si forte assisam contemnat, et possessionem suam (viribus utens non judicio) sibi usurpare praesumat, *competit spoliatori propter usurpationem assisa*, non quia "injuste" disseisitus sit, sed quia "sine judicio," et quia per negligentiam veri domini utramque habere incepit possessionem, naturalem videlicet et civilem. Et si verus dominus habere velit regressum, vix aut nunquam audietur, nisi tantum super proprietate; si autem velit ad assisam recurrere, quae ei primo competebat, non poterit: quia assisam demeruit et gratiam juris, et quia frustra legis auxilium invocat qui in legem committit[2].

[1] *The Common Law*, p. 210.

[2] Bract, f. 163 b.

Bracto.i afterwards treats at very great length the possible pleas in bar to the assize. The defendant can only prevent the assize being taken by excepting to some of the words of the writ. The writ inquired " whether *B* unjustly and without a judgment disseised *A* of his free tenement in *X*.[11] If it was found that *B* had done this, then *A* recovered his seisin. Now there may seem to us to be two terms in the writ which might be attacked by the true owner who, after some delay, had ejected his disseisor. He might plead that what he did was not done "unjustly," or again he might plead that the tenement from which *A* was ejected was not *A's* free tenement. At either point however the law of Bracton's day would meet him and defeat him. As to the "unjustly," Bracton almost explains this word away by saying that every disseisin done " without a judgment" is done " unjustly," *injuste quia sine judicio*; the only force of the word seems this, that a disseisin may be unjust even when there has been a judgment.

Quamvis verus dominus jus habeat in re et "juste" ejiciat, tamen "injuste" ejicit, quia "sine judicio," et quia propriis viribus reposcit quod per judicem [*corr*. judicium] reposcere debuit, *idea per judicium restituat quod sibi sine judicio viribus usurpavit;* nunquam postmodum, nisi vix tantum super proprietate, erit audiendus; et hoc si post tempus ejiciatur quod sufficere possit pro titulo ad hoc quod sine brevi non teneatur tenens respondere; secus autem esset si incontinenti rejiciat disseisitorem[1].

It would be difficult to say in plainer language than this that the true owner, despite his title, may be compelled by a court of law to yield possession to

[1] Bract, f. 205.

a disseisor. Then as to the term "freehold" or "free tenement" in the writ. It is competent for the defendant to except that the plaintiff was not seised of a free tenement, and in this form divers objections can be made. It may be asserted that the tenement was held of the defendant in villeinage, it may be asserted that the plaintiff was merely in as bailiff or as termor. Such pleas as these are beside our point. But suppose that *B* with no sort of title but his own strong arm put *A* out of the land, and that *A* let some time go by without doing anything, but then returned and cast *B* out; *A* has disseised *B* of B's free tenement; and the Court not heeding, not permitting any talk about ownership, will put *B* back again.

In hoc autem quod dicitur in brevi "de libero tenemento" cornpetit exceptio tenenti contra quaerentem; sed ad omnes non pertinet exceptio, quia licet "juste" ejicere possunt, tamen non possunt "sine judicio," licet jus habeant ejiciendi. Jus tamen habet recenter, post tempus autem nequaquam; unde si verus dominus allegaverit quod "juste," replicari poterit quod "injuste" quia "sine judicio." Et unde si verus dominus excipiat quod jus habeat et liberum tenementum, et "injuste et sine judicio" ejectus sit, et quod quaerens qui injuste ejecit feodum et liberum tenementum habere non possit, replicare poterit de tempore, quod verus dominus liberum tenementum amisit, per cursum temporis, per patientiam sive negligentiam vel per impotentiam. Patientia enim longa trahitur ad consensum, et negligentia sive dissimulatio obolent injuriam. Et unde disseisitor cum tempus habeat pro se et quasi liberum tenementum, sine brevi et sine judicio disseisin non potest Et unde si fuerit sine judicio disseisitus et portaverit assisam, non obstabit ei quod liberum tenementum non habuit quaerens, propter usurpationem sine judicio quantum ad verum dominum, et propter tempus quantum ad disseisitum[1]."

[1] Biact. f. 209 b.

It must certainly be admitted—or rather let us particularly observe—that Bracton does here and elsewhere account for the law's protection of the disseisor partly at least by referring to the disseisee's delay; he has acquiesced, he has dissimulated, he has been negligent—this very probably is an important moment in the history of our possessory actions; but of the owner's being able to rely on his ownership there is no talk. On the next page we have these conclusive sentences:—

Videamus quae poena teneat eos qui seisinam suam in causa spoliationis [*corr.* teneat eos in causa spoliationis qui seisinam suam] post tempus viribus usurpaverint: *intrusor vel disseisitor erit restituendus non obstante atiqua exceptione proprietatis.* Et si obstare non debeat exceptio proprietatis in persona veri domini, ut si dicat "Juste disseisivi vos, quia tenementum meum est et ego dominus, et tu nullum liberum tenementum habere potes quia non habes ingressionem nisi per intrusionem vel disseisinam," ita exceptio non valebit ei, quamvis "juste" se ponat in seisinam quantum ad jus, "injuste" tamen hoc facit quia "sine judicio," ut supra dictum est Prius enim cognoscendum est de vi quam de ipsa proprietate.

An examination of the records of Bracton's time will I believe fully bear out his doctrine. But still I think we can see both in them and in Bracton's own pages a certain growing doubt as to whether " seisin of free tenement" does not imply title, not of course good title, but title good or bad. He occasionally hesitates about saying that the disseisor acquires " liberum tenementum," and allows him only "quasi liberum tenementum " ; and he is inclined to base the requirement of "tempus" on the necessity for some acquiescence, or negligence, or dissimulation on the part of the disseisee. Seemingly it was a further reflection upon

and development of this idea of "liberum tenementum," which set at work that great change which makes the law as it is in Littleton so very different from the law as it is in Bracton. Very probably these words in the writ—"de libero tenemento suo"—were originally intended merely as a denial of the assize to the tenant in villeinage; the obvious, primary opposite to "liberum tenementum" is "villanum tenementum." To have given every villein a possessory remedy in the king's own court would have been too daring an infringement of the manorial system even for Henry the Second; to give such a remedy to every possessor of land not burdened with villein services was a sufficiently high-handed invasion of the first principle of feudalism. But in course of time new contrasts are found for the "liberum tenementum." The assize is denied to the termor; according to Bracton because he holds merely on behalf of his land-lord; tenet nomine alieno; so the termor has no free tenement. Then there slowly creeps in the idea of "an estate of freehold"; "freehold" begins to imply a certain kind of proprietary right. Parallel with this process is the growth of special pleading. In Henry the Third's reign pleas in bar of the assize are becoming frequent. Even if we regard the assize as still in the very strictest sense a possessory remedy, such pleas have their proper place. The defendant's view is that he has committed no disseisin, that he has ejected nobody, that he obtained his possession under some judgment, fine, feoffment, covenant; he specially pleads this matter, because he is naturally anxious that delicate questions of law shall not be left in a lump to a dozen

laymen. such pleas go to the question of possession and dispossession, and I have seen no instance of a plea which, admitting the disturbance of a settled possession, justifies that disturbance as an exercise of proprietary right. But still the development of pleading begins (in a manner which should be familiar to us) to turn matter of fact into matter of law.

But not to anticipate what must come before us hereafter as belonging to a later age. Bracton's doctrine as to the scope of the assize seems in brief this :—it protects possession, untitled possession, even " vicious possession." As to this last point, he expressly accepts the words of the Institutes which describe the scope of the interdictum unde vi as it was in Justinian's day. If *0,* the owner, turns *P,* the possessor, out, *P* will recover his possession even though he obtained that possession from *O* vi vel clam vel precario. A wrongful ejector however does not acquire possession directly he is the one person on the land, or rather he does not at once acquire possession as against the owner whom he has ejected. Such an ejector will at once be protected against mere outsiders, but he will not be protected against the owner until some days, or it may be months, have elapsed. How to account by a rational theory for this state of things is the difficulty. Bracton is unfortunately, but very pardonably, misled into supposing that according to Roman theory a person who has ceased to possess corpore can go on possessing animo solo. This brings him to lay stress upon acquiescence, to speak as though it were the owner's acquiescence (for four days or so) that gives the ejector a claim to protection, as though this

acquiescence were equivalent to "title," or were itself a sort of title. It is but a short though an important step forwards from this position to say that what the law protects is not possession, but titled possession, to hold that the "seisin of freehold" which the plaintiff in an assize must prove, is seisin acquired by some lawful title, some act in the law, or else seisin fortified by lapse of time.

Dr Heusler, to whose excellent account of Bracton's theory of possession[1] I owe whatever is good in this paper, says that the assize of novel disseisin gradually becomes a sort of Publiciana, and that in Britton's book the process is complete, "die Besitzklage ist eine formliche Publiciana." We do not, as it seems to me, find much change in the actual rules of law as we pass from Bracton to Britton; we still hear, though somewhat indistinctly, of the four days; but there is a change of theory. In great part this is just a change from clear thought to muddled thought. The grip of possession which a few years ago seemed so assured has been relaxed. By his definition Britton goes so far as to make "property" an essential element of possession:—"possessioun proprement est seisine et tenir de acune chose par cors et par volonte *oveke la proprete*."[2] No comment on this is possible, except that the writer was too stupid to understand Bracton[3]. Still we can make out that "title" has now become

[1] *Die Gewere*, B. 3. c. 3.

[2] Brit. vol. 1. p. 258.

[3] Bract, f. 33 b. Possessio est corporalis rei detentio, i.e. corporis et animi cum juris adminiculo concurrente. By these last words, which he had from Azo, Bracton only means that there are certain things of which there cannot be a legally protected possession.

essential to "free tenement." The plaintiff in the assize must have had "title de fraunc tenement." This he may have got by inheritance, by feoffment or the like, or again by peaceable seisin after a vicious entry[1]. The law therefore no longer endeavours to protect possession against ownership ; but it will protect, even against ownership, something that stands as it were midway between possession and ownership, some *tertium quid,* that can only be described as " title de fraunc tenement." It is attempting to steer a very difficult course. Of its subsequent adventures hereafter[2].

[1] Brit. vol. 1. p. 309,

[2] As I do not wish that any one should trust my account of Bracton's theory of possession further than he can see it in Bracton's own pages, I will here give references to the most important passages. I regard the discussion on f, 162 b-164 b as governing all that is said in other parts of the book. Here Bracton is expressly answering the question, Within what time may I eject my disseisor? Then see f. 165 b, 168 (line 8), 183b-184b, 195 b, 196, 205, 209-210 b, 212 b (line 23); also f. 3ob-31 b, 51 b-52 b. It seems to me clear that Bracton in speaking of time has but two sets of phrases, *(a)* post longum tempus, post longum intervallum, post longam et pacificam seisinam, &c, *{b)* statim, incontinenti, nullo intervallo, flagrante disseisina, &c.; the disseisor who is not ejected while the disseisin is "flagrant," is not ejected until after "a long seisin." As to excepting against a plaintiff that his possession was acquired 77 ; contrast what is said on f. 160, line 6 (a passage not very intelligible as it stands) with f. 210b, lines 7-13, where Bracton quotes the Institutes "is qui dejecit cogitur ei restituere possessionem, licet is ah eo qui vi dejecit vi, clam, vel precario possidebat." The Normans seem to have come to a different result in developing their assize, and to have refused this remedy to a plaintiff who had obtained his seisin by force used against the defendant. See Heusler, pp. 371-2.

II.

BY a previous paper I have tried to draw attention to a great and very remarkable change which came over our law in the course of the later middle ages. Does the law protect possession against property? If we ask this question in Bracton's day, the answer must be: Yes, it protects possession, untitled and even vicious possession; if *O*, the owner, has been ousted by *P*, he must reeject *P* at once or not at all; should he do so after a brief delay, then *P* will bring the Novel Disseisin against him and will be put back into possession. But if we ask this question in the days of Littleton, the answer must be: No, the common law does not protect possession against ownership, except in those comparatively rare cases in which there has been a descent cast or a discontinuance, one of those acts in the law (their number is very small) which have the effect of tolling an entry. In the present paper I propose to collect some cases which illustrate this change, and then to say a little about its causes.

The fourteenth century produced no great text-writer, and we have therefore to rely upon the Year Books. It may be well therefore to observe that the Year Books are for this or any similar purpose very

unsatisfactory material, because they are chiefly concerned with points of pleading, and by the middle of the fourteenth century pleadings had become very unreal things. Often the whole object of the defendant s pleader is delay, and the elaborate story that he tells has in all probability but little connexion with fact; he is just trying to puzzle the court and his adversary, and so no wonder if he puzzles us. A good selection from the Plea Rolls would be much better material; because at least occasionally we should find in it some real facts, some cases in which the assize was taken, in which special verdicts were returned and judgments given upon those verdicts. Even in the fourteenth, even in the fifteenth century, some real justice was done, but as it is we can hardly see the justice for the chicane,

It will be remembered that the Novel Disseisin lies if *B* unjustly and without a judgment has disseised *A* of his free tenement. The plaintiff therefore must have been " seisitus de libero tenemento." What does this imply? This is the question which successive generations have to answer. We have heard Bracton's answer, and Britton's. The latter requires that the plaintiff shall have had "title de fraunc tenement," but peaceable seisin for a long time after a vicious entry is enough to give " title de fraunc tenement[1]," that is to say the disseisor himself may acquire a possession protected against the disseisee. In the following notes of cases we may, I think, see this requirement of " title " growing ever more and more stringent: the assize is gradually denied to any one who has himself

[1] **Brit. vol. 1, p. 310.**

been party to a disseisin, then to the alienee of a disseisor, then to the alienee of the alienee of a disseisor, until at last the cases in which the true owner is debarred from entering are quite few and very anomalous. All the while the theory, so far as there is one, remains this, that one who is "in by title" (as contrasted with one who is "in by tort") ought not to be ejected without process of law; but as to what "title" is, we get no clear statement.

1292. (Y. B. 20 & 21 Edw. I, p. 221.) *M* is tenant for years, *A* tenant in fee; *M* enfeoffs *X*; *A* suffers *X* to remain in possession for a quarter of a year and then turns him out, the term not having yet expired; *X* brings the assize against *A* and succeeds. Otherwise would it have been if *A* had ejected *X* at once; as it is, *A* has suffered *X* to continue his seisin "e entant granta le franc tenement estre le seu."

1292. (Y. B. 20 & 21 Edw. I, p. 267.) *M* is tenant for years, *A* tenant in fee; *M* dies during the term; his wife *N* remains in possession for a quarter of a year, and then enfeoffs *X*, who remains in possession for a quarter of a year and is then ejected by *A*; *X* recovers seisin against *A* in an assize. It is said of *A* that "par sa suffraunce demeyne si acrut franc tenement a le feffe." Counsel for *A* says that if a termor alien in fee, yet even if the feoffee continue his estate for half a year, he may be ejected by the reversioner after the end of the term; "quod non credo verum generaliter," says the reporter,

1302. (Y. B. 30 & 31 Edw. I, p. 123.) Land is settled on husband and wife and the heirs of their bodies; they have a son *A*; the husband dies; the

wife marnes *X*; the wife dies; *X* claims curtesy and remains in possession for ten years; *A* ousts *X*; *X* recovers seisin against *A* in an assize. Even if *X* was not entitled to curtesy, still he entered claiming a freehold and ought not to have been ejected after ten years. The case is a good illustration of possessory procedure, for *A* at once brings a formedon against *X*. In this he fails; but only because the conditional gift was made before the Statute *De donis*, and so *X* really was entitled to curtesy.

1318. (Y. B. 11 Edw. II, f. 333-4.) It is said by counsel that if tenant for life alienates, and the reversioner does not assert his right for three or four years, the feoffee will be able to recover his seisin against him in an assize.

1327. (1 Ass. f. 2, pl. 13, and Y. B. 1 Edw. III, f. 17, 22, Trin. pl. 1, 10.) Land is recovered from *A* the true owner by one *X* whom *A* had ejected; such title as *X* had was derived (without any descent cast) from a grant made by *M* who had no title, but whom *A* had suffered to occupy the land; *A* had stood by while the land had been dealt with by *M* and persons claiming under *M*. Counsel urges that it is "inconvenient" to award seisin to one who has no estate; but the judgment shows the true possessory spirit, "quod licet *A* jus habeat ut videtur...tamen de facto suo proprio sine judicio intrare non potuit; ideo *X* recuperet seisinam suam." Brooke (Abrid. *Entre Congeable,* 48) notices that this case, and that last cited, imply a doctrine which in his day was no longer law. He rightly remarks that in cases of this date stress is laid on the fact that the person who has come

to the land by a feoffment, will, in case he he ejected without action, lose the benefit of vouching his feoffor to warranty.

1334, (8 Ass. f, 17, pl. 25.) On the death of tenant for life, *M* who has no right enters ana enfeoffs *X; A* who is the reversioner enters and is busted by *X*; *A* recovers from *X* in an assize. The reporter calls on us to note that *X* was in by feoffment, but that *A* entered immediately on the livery of seisin.

1344. (17 Ass. f. 53, pl. 27; Y. B, 18 Edw. I l l, f. 35, Mich. pl. 16.) *M* is tenant for life, *A* has the remainder by fine; *M* enfeoffs *X* in fee ; *M* dies; *A* may not enter on *X*.

1347. (21 Ass. f. 86, p. 23.) It was said that a man may enter on the feoffee of his disseisor even though the feoffee has continued his estate for ten years. "Tamen quaere," says the reporter.

1348. (22 Ass. f. 93, pl. 37.) *M* doweress, *A* heir; *M* demises to *X* for years and dies within the term ; *X* holds on after the term ; *A* may enter on *X*\ but it is argued that he may not: the decision is based upon the fact that *X* was " party to the tort." Counsel for *X* says that after the death of *M* " nous continuamus nostre possession ans et jours " : of which phrase notice must be taken hereafter.

1368. (Y. B. 42 Edw. I l l, f. 12, Pasch. pl. 18.) It seems assumed that a disseisee may enter on the alienee of a disseisor and on the alienee's alienee, but may not enter on the disseisor's heir; the question is raised, Why should this be so, as both heir and alienee are in by title ?—but no answer is found.

1369. (43 Ass. f. 273, pl. 24.) Tenant in tail

after possibility of issue extinct makes a feoffment in fee and dies; the reversioner may enter on the feoffee even after the lapse of six years; but the justices of assize had doubted this and adjourned the case to Westminster.

1369. (43 Ass. f. 280, pl. 45.) *A* tenant for life, *B* tenant in remainder; *A* enfeoffs *X* in tail, remainder to F; X dies without issue, *Y* enters; may *B* enter on *Y?* Yes, he may; but the case is discussed at length and the decision is put upon the ground that *Y* by entering has made himself a party to the forfeiture and a disseisor, and it still seems the opinion of the justices that one may not enter upon a person who is "in by title." Brooke (Abrid. *Entre Congeable,* 85) comments on this case thus, " In those days one could not enter on him who was in by title, except in a special case (such as this was) where he was party to the tort, and one could not enter on one who was seised for a long time (que fuit seisie ans et jours), as appears frequently in the Book of Assizes. But otherwise in these days, for a man may enter on the twentieth alienee if there has been no descent to toll the entry, or something of the sort."

1376. (Y. B. 50 Edw. Ill, f. 21, Mich. pl. 3.) *M* tenant for life; *A* reversioner; *M* enfeoffs *X* for life with remainder to *Y* in fee ; *M* dies; *X* dies and *Y* enters ; *A* or *A's* heir may enter on *Y.* This is decided after much debate. It is however asserted by counsel that a reversioner cannot enter on the feoffee of the feoffee of the tenant for life; at all events if he is to enter he must do so at once.

It seems unnecessary to trace this matter further,

and we have come to the gap in our authorities due to the fact that no Year Books of Richard II's reign are yet in print. Before the death of his grandfather the common law seems to be taking its final form; possession is not protected against ownership except in certain very exceptional circumstances. We shall here do well to observe that Coke, like Brooke before him, well knew that there had been a change in the law. "In ancient times," he says, "if the disseisor had been in long possession, the disseisee could not have entered upon him. Likewise the disseisee could not have entered upon the feoffee of the disseisor, if he had continued a yeare and a day in quiet possession. But the law is changed in both these cases, only the dying seised, being an act in law, doth hold at this day[1]." In the margin Coke refers to Bracton, Britton and Fleta, and to some of those cases in the Year Books which have already come before us.

Now as regards the owner's right to enter, we seem fully entitled to say that Coke had good warrant for his opinion that there had been a great change in the law, a change in favour of the owner; he had gained a right to enter in many cases in which it would formerly have been denied to him. But for the more precise rule that a disseisor's feoffee must not be disturbed after year and day, I have not been able to find any definite authority. I think that Coke may have taken it from a statement in Brooke's Abridgement which has been mentioned above. The phrase however which Brooke uses is not "an et jour," but "ans et jours," and this I believe means vaguely

[1] **Co. Lit. 237.**

"a considerable time." Coke's rule was not the rule of Bracton's day, for this was yet more favourable to possession. Still even in Bracton's time a year's possession was required of an intruder before he could claim protection against the remainderman, and it seems to me very possible that the gradual dissolution of the old law was checked for a moment at the point when protection was still given to a disseisor's feoffee if he had been in possession for year and day. There are certain reasons, which I hope to give on another occasion, for thinking that this may have been the case.

But now how are we to understand this episode in our legal history, this gradual victory of the rights of ownership over the rights given by possession? If, with Mr Justice Holmes, we regard it as a mark of "good sense" that a defendant in a possessory action should be allowed to rely on his title, then we may regard this as a gradual victory of good sense. But let us first note that after all the victory was but partial. It was the nineteenth century before a defendant became able to rely upon title, if by title be meant a right to *possess* the land. The only "title" that, even the fully developed common law enabled him to assert was a right to *enter upon* the land[1]. In 1833 it was still possible that the person entitled to be in possession of land should have no right to enter upon it "sine judicio"; if he entered and ousted the possessor, he would, I take it, have had no defence to an action of ejectment or to an assize[2]. That in

[1] 3 & 4 Will. IV, c. 27, s. 39.

[2] *Smith* v. *Tyndal,* 2 Salk, 685.

actual practice this happened very seldom was not due to the good sense of the common law, but to statutes which had helped the common law out of the bad mess into which it had got in Littleton's day. A statute of 1540 confined the doctrine of descents which toll entries within very narrow limits[1]. Another statute of the same year prevented a husband from effecting a "discontinuance" of his wife's lands[2]. The dissolution of the monasteries and legislation as to other ecclesiastical corporations, left tenant in tail the one person who could "discontinue the possession," and this power of his became unimportant because generally he could do much more than "discontinue the possession," he could utterly bar his issue, remaindermen and reversioners[3].

Now by way of explanation of what happened between Bracton's time and Littleton's, it might be suggested that in the course of civilization wrongful ejectments became much rarer, and that therefore it was needless, and if needless then unjust, to maintain the old possessory action in all its pristine rigour.

[1] 32 Hen. VIII, c. 33.

[2] 32 Hen. VIII, c. 28, s. 6.

[3] **Mr M. M. Bigelow has kindly informed me that the old rule about descents tolling entries, as modified by the statute of 32 Hen. VIII, prevailed in Massachusetts until 1836, in Vermont until 1839, in New York until 1849. I know of no book in which the outlines of the ancient law of real property are so well stated as Stearns, *Real Actions*, a course of lectures delivered in the University of Harvard about seventy years ago. The learning of real actions was much better preserved in America than here, because some at least of the States had the good sense to reject our action of ejectment with its intricate fictions, and to renovate the old direct remedies.**

But it may well be doubted whether during the period of which we speak wrongful ejectments became rarer. The fifteenth century was at least as lawless as the thirteenth. This was the time of forcible entries and private wars, of maintenance and champerty. "In 1399," says Dr Stubbs, "the commons petitioned against illegal usurpations of private property; the Paston Letters furnish abundant proof that this evil had not been put down at the accession of Henry VII[1]." "Forcible entry and disseisin with violence," says Mr Plummer, "were every-day occurrences, and were almost restored to the position of legal processes which they had held before the invention of the grand assize[2]." Not a little of the blame for this state of things should rest upon the judges who, by allowing the utmost license to mendacious pleadings, had made the assize of novel disseisin anything but the festinum remedium which it still was in the days of Edward I. That assize must have been very badly handled; otherwise the Statutes of Forcible Entry would never have been necessary. In 1381, 1391, 1402, 1429, statutes were made which ransack the whole armoury of the law for weapons against disseisors, indictments, summary convictions, imprisonment, ransom, actions of trespass, special assizes, restitution, treble damages, treble costs. Even under the strong rule of Henry VIII it was necessary to furbish up these weapons. So late as 1623 there is a new statute for the protection of

[1] **Stubbs,** ***Const Hist.*** **vol. in. p. 270.**

[8] ***Fortescue on the Governance of England,*** **Introduction, p. 21. Mr Plummer, I imagine, intends to refer rather to the assize of novel disseisin than to the grand assize.**

possessors who are not freeholders[1]. It may I think be gathered from these statutes and the decisions upon them, that the true remedy for a crying evil was found in making forcible entry a crime. The judges refused a civil remedy under the statute of 1429 to a possessor forcibly ejected by an owner whose right of entry had not been tolled; although such a possessor could have obtained restitution in criminal proceedings[2]. Whether the makers of the statute meant this may perhaps be doubted; but at any rate the decision shows how far the judges had departed from Bracton's position; they could not conceive that a possessor with no title or bad title could be "disseised" by a person who had good title, and whose right to enter had not been tolled by descent cast or discontinuance. "Disseisin" in such a context had come to imply something more than dispossession of a possessor, something more than dispossession of a possessor who has colour of title; it had come almost to mean dispossession of one who has relatively good title by one who has relatively bad title.

It may be that for a long time past the judges had felt that there was some want of "good sense" in allowing *A* to recover possession from B_y when *B* was willing to prove that he had a right to be in possession; some want of good sense because this would be putting *A* into possession merely in order that a question might be raised in some future action,

[1] **s Ric. II, stat. 1. c. 7; 15 Ric. II, c. 23 4 Hen. IV, c. 8; 8 Hen. VI, c. 9; 23 Hen. VIII, c. 143 31 Eliz. c. 11; 21 Jac. I, c. 15.**

[2] **Y. B. 9 Hen. VI, f. 19 (Pasch. pi. 12) decided the year after the statute was passed. Bro, Abr. *Forcible Entrie,* pl. 27.**

which might very well be decided once for all in the present. But then the judges of Bracton's day saw no want of good sense in this, so we have to account for the change of mind. What is more, we may never safely refer great changes in the common law directly and immediately to opinions as to what is politic or expedient, least of all changes which took place in the period of the Year Books. Judges and counsel talk little of public policy; "Fiat justitia, ruat coelum," is their maxim; the social fabric may fall in with a crash, but their legal logic must have its way. Thoughts of the common weal must be expressed in forensic terms, "seisin" and "freehold" and so forth, before they can influence decisions. To a full explanation of the process indicated by those notes of cases which I have given above we shall hardly at present attain; but a little may be done towards clearing the way for other investigators.

In the first place something may be learned from the history of the law touching the time within which an assize must be brought. It seems that from the first the Norman writ of novel disseisin, which probably we ought to regard as the parent, or perhaps elder sister, of our own, could only be brought by one who had been disseised since last August. Each harvest set a term of limitation running; if a man was disseised at harvest time he had a full year within which to complain; if he was disseised shortly before harvest, then he had but a much shorter time. Year and day seems regarded as the normal term of limitation, but it is assumed that harvest time is the great time for disseisins. This gives to the Norman law

a curiously homely character[1]. In Englard no such annual limitation was established. Glanvill tells us that the period within which an assize can be brought is fixed from time to time by royal ordinance. The writ that he gives mentions the king's last journey into Normandy, an event that must have been quite recent[2]. Such ordinances were issued after Glanvill's day; we find Richard's first and second coronations, John's coronation, John's return from Ireland, Henry's coronation, Henry's journey to Gascony, are chosen as limits behind which a plaintiff may not go. When this last event was chosen it was but seven years old or thereabouts[3]. The Statute of Westminster I, while it altered the time for other writs, left this unaltered : so in 1275 it seems to have been considered that a disseisin committed five and forty years ago was yet "novel." This means a great change, but is little to what follows; for no other time was limited until the reign of Henry VIII, so that in 1540 a disseisin three hundred years old was still "novel[4]." Now this should be had in mind, for though in theory it may well be possible that an action shall be thoroughly and truly possessory, and yet be subject to no rule that limits a time within which it may be brought, still it would be difficult to maintain the theory in practice. If I be permitted to demand restitution of land on the ground that you ejected me eighty or even twenty years ago, whatever we may call this complaint, it will be difficult

[1] Heusler, p. 373; Brunner, p. 329.
[3] Glanv. lib. 13, cap. 32.
[8] Stat Merton, cap. 8; Ann Burton, p. 252; Bracton, f. 179.
[4] Stat. 32 Hen. VIII, c. 2.

to think of it as other than a demand that you should restore to me what is mine, difficult to think of it as based not on proprietary right but on injured possession, and difficult because substantially unjust to prevent your pleading whatever title you may have.

We ought to look below this curious history to its cause, which is not to be found altogether in the remissness of parliament. In 1275 parliament in a splendid outburst of youthful vigour was beginning to overhaul the whole law of the land; and yet a term of more than forty years was not thought too long for the assize of novel disseisin. Ten years later the secret is revealed. "Forasmuch," says the Statute of Westminster II, "as there is no writ in the Chancery whereby plaintiffs can have so speedy a remedy as by a writ of novel disseisin." Here is a summary remedy for the recovery of land, why not extend its beneficent operation? Why insist that the defendant shall have obtained possession so very recently, or by what is technically called a disseisin? If we have come by a good form of action, why not use it? This seems the view of the matter taken by the parliaments of Edward I. A sensible, practical view it may be; but legal principle avenges itself. If we try to make our possessorium do the work of a petitorium, it will soon refuse to do its own proper work; questions of title will be raised in it and will be decided.

Thus the most elementary notions of the law are blurred. Take for instance the classification of actions as real and personal, or real, personal and mixed. This in all probability was not native in our law and was never thoroughly at home there. Bracton intro-

duces it He holds indeed that an action for goods cannot be *in rem,* because the defendant has the option of paying the value of the goods instead of surrendering them; but he knows too much of Roman law to call an action "real" merely because the successful plaintiff will thereby obtain possession of a specific thing. The Novel Disseisin, for example, is *actio personalis*; it may be *rei persecutoria,* but it is *personalis*[1]. So the cognate writ of intrusion is *omnino personalis*[3]. So the *Quod perntittat* is *potius personalis quam realis*[3] With him the test is rather the nature of the mesne, than the nature of the final, process. If the mesne process is against the thing, if e.g. the land is seized into the king's hand, the action is real, but if, as in the assize of novel disseisin, the process is attachment, then the action is personal. The active party in such litigation is not a demandant, he is a plaintiff, he is not *petens,* but *quaerens.* This last distinction perdured to the end ; it is a mistake to speak of a "demandant" in an assize. But after a while an action becomes "real" merely because land is obtained thereby, and it is "mixed" if damages also can be obtained[4]. Indeed even an action on a covenant may be a real action[5]. Had Bracton been a pupil of Savigny he could not have stated more clearly than he has done, that the Novel Disseisin is

[1] **f. 164 b.** **f. 161.**

[3] **f. 284 b.**

[4] Lit. s. 492 and Coke's comment.

[5] The writ of covenant real, whereon fines were usually levied, was abolished in 1833 along with other "real and mixed actions." See *Bl Com.,* vol. iii. p. 157.

a personal action founded on tort[1]. The mere change in terminology, a retrogressive change as it may seem to some, may be explained by the fact that our law became always more insular, our judges always more ignorant?of any law but their own ; but that the Novel Disseisin fell into the general mass of real actions requires some further explanation.

This we may find if we turn to another famous distinction, that between possessory and proprietary actions. Between the proprietary writ of right and the possessory assizes there grows up a large group of actions, the writs of entry. Of their history I hope to write a little on another occasion. Here it must be enough to say that in Bracton's view they are, with some exceptions, distinctly proprietary actions. In course of time however they come to be called possessory. This one fact by itself is enough to warn us that the distinction becomes exceedingly obscure. Now these actions became quite as easy as the assize ; indeed it would seem that they became even easier, for a particular form of writ of entry (the writ of entry in the nature of an assize, or writ in the quibus) came to be commonly used in the fifteenth century instead of the Novel Disseisin. As regards simplicity and dispatch, the equalising process seems to have been rather one whereby the possessorium was deteriorated than one whereby the petitorium was improved. So far as mere "process" is concerned the Novel Disseisin must down to the very end, down to 1833, have been a fairly rapid action, quite as rapid I should think as the action of ejectment. Why it went out of use is

[1] **Bract, f. 103 b, 104, 164 b.**

no very easy question; but apparently the subtleties of pleaders "feigned, dilatory and curious pleadings" worked its ruin[1]. The formulation in the original writ of the question for the jurors, was a device only suitable to an age whose law was as yet but meagre. As such terms as "freehold" and "disseisin" become more and more technical, the pleader of one litigant becomes more and more anxious that the question so formulated shall not be answered, and the justices take that pleader's side, for they hold that matter of law is for the Court and only the purest fact for laymen. The pleadings in assizes become at least as complicated and "colourable" as the pleadings in other actions, perhaps more complicated'and "colourable," because there is a fixed question for the jurors which has to be evaded. And so the assizes fall into the ruck of "real actions," Now it is not inconceivable that a possessory action should be strictly possessory, although it is not distinguished from proprietary actions by a specially summary procedure. But that this should be so must imply a legal theory of possession and of the reasons for protecting it, fully developed and precisely defined. Such a theory our lawyers of the fourteenth century had not got, and the momentous contrasts in procedure were things of the past. It was easy in Henry Il's time to distinguish the rapid possessory procedure in the king's court from that proprietary procedure in the feudal courts wherein the tenant after manifold essoins could always wage battle if he pleased. In Edward II's time, when normally all questions of fact (and no other questions) were

[1] See Coke's Preface to 8 Rep.

tried bya jury, when there was as much pleading in an assize as in any other action, when there were writs of entry which some thought possessory and others proprietary, when there was hardly any "real" action in which damages could not be recovered, no wonder that the theory of the Novel Disseisin was not maintained, no wonder that it refused any longer to protect possession against ownership, or only did so in a spasmodic, capricious, half-hearted way.

Coming a little nearer to our problem, we see that the process which gradually extends the sphere of self-help allowed to the ousted owner begins by permitting him to enter, regardless of lapse of time, upon the person who has himself been guilty of a disseisin. Bracton, we have seen, had apparently inherited a set of ancient positive rules determining the time for re-ejectment ; normally it must be accomplished within four days, but a longer time is allowed to an owner who is absent when the disseisin is committed. But he rationalizes these rules by speaking of patience, negligence and acquiescence. In this there is no harm, even on a very strict theory of possessory remedies, provided acquiescence in the mere physical fact of adverse possession be carefully distinguished from any such acquiescence as will serve to confer or extinguish proprietary rights. But even Bracton himself does not bring this out very clearly; a *longa et pacifica seisina* protects the possessor against the owner's self-help ; a *longa et pacifica seisina* bars the owner from his action and acts as a *usucapio*[1]. The old positive rules being rationalized away, such

[1] See especially f. 52.

language becomes very dangerous. The problem then becomes this, What length of seisin will serve to confer a "title de fraunc tenement," "an estate of freehold." There is no answer ready; it is a matter for judicial discretion; the judges lean towards the owner; there is no longer a striking contrast between possessory and proprietary procedure to direct their thoughts; they no longer feel, what Bracton felt, that for an owner to take the law into his own hands, to make himself judge in his own cause, is a usurpation of judicial functions, a contempt of court; they no longer feel the force of the phrase, "injuste quia sine judicio." The notion of acquiescence is an insecure foot-hold, and gradually it slips away. No distinction can be found between the acquiescence which bars entry, and the acquiescence, or rather lapse of time, which bars action. So on the disseisor himself the owner may always enter.

But cannot firm ground be found in the protection of titled possession? Let the owner enter on one who is "in by tort," but not on one who is "in by title." It seems that our law was arrested at this spot for a while. But really the ground is not firm. To protect possession as such even against ownership, may be wise; and to protect possession acquired by title and in good faith, may also be wise; but to require title and yet ask nothing as to good faith can hardly serve any useful purpose. Suppose that *A* has been disseised by *B*; we refuse to protect *B* against *A's* self-help. Then *B* enfeoffs *C*; shall we protect *C* against *A*, and this without inquiring whether *C* took the feoffment in good faith? To do so is absurd; for if

we do it every disseisor will have a *C* ready to hand. Had a requirement of good faith been introduced, then indeed a halting-place might have been found. But this could not be done; a psychological investigation was beyond the means, beyond the ideas, of our law. "The thought of man shall not be tried, for the devil himself knoweth not the thought of man."

Then again reference must be made to a statute. The Novel Disseisin was so convenient a remedy that its scope was enlarged. The statute of Westminster 11, as already said, informs us that "there is no writ in the chancery whereby plaintiffs can have so speedy a remedy as by a writ of novel disseisin." Therefore this writ is to be extended to cases in which as yet it has not lain. If a tenant for years or a guardian aliens in fee, both feoffor and feoffee are to be adjudged disseisors[1]. It seems probable both from the words of the statute and from Bracton's text that before this act the feoffee was no disseisor, though I know that according to later opinion—at least according to the opinion of some later lawyers—this statute was made "in affirmance of the common law." But this only means that in course of time the same rule was applied to cases not within the very words of the clause: the feoffee of a tenant at will, or by suffrance, or by elegit, or statute merchant was held to be a disseisor[2]. Such a feoffee therefore was not "in by title." This must have opened up the question, What then is title? since the mere fact that a person had come to the land by feoffment was inconclusive. For this question there was no easy answer, and we soon find

[1] **Stat. West. I I . c. 25.** [2] **2 Inst. 412; compared with *ibid.* 154.**

that one who takes a feoffment even from a tenant for life (a person who is seised), is regarded as "party to the tort." It seems to me that the rule which treated a feoffment in fee made by a tenant for life as a forfeiture was not yet well settled in Bracton's day, and that as the law of forfeiture grew stricter the position of feoffees grew worse and worse. Then, as may be seen in some of the cases noted at the beginning of this paper, the question arises as to the feoffee of a feoffee. But no logical rest can be found; twenty feoffments may be made in one day, and the last feoffee will be just as guilty as the first. So as a general rule the feoffee has no more protection than the feoffor has; he is unprotected against the owner. The "discontinuances" remain outstanding as exceptional cases. No forfeiture is involved in them; if a husband alienates his wife's land, this of course cannot be a forfeiture; husband and wife are too much one for that: if an abbot alienates the abbey lands, there is no one who can have any right to take the land from the feoffee so long as that abbot is abbot; as to the tenant in tail, it would have been very difficult to hold that by alienating he forfeited his estate to his own issue. So in these few quite exceptional cases the feoffee comes in without there being any disseisin or any forfeiture; here then the old rule still prevails, he has a seisin of freehold in which the law protects him even against the true owner.

The doctrine of descents cast is another relic. Blackstone seeks to account for the law's protection of the disseisor's heir by some ingenious arguments :—

(1) the heir comes to the land "by act of law, and not by his own act"; (2) "the heir may not suddenly know the true state of his title"; (3) this rule was "admirably adapted to the military spirit of the feodal tenures, and tended to make the feudatory bold in war; since his children could not by any mere entry of another be dispossessed of the lands whereof he died seised." Such reasoning as this seems to me conspicuously absent in the Year Books. If Blackstone's object was to explain the history of the rule and not to find some excuse for retaining it in the eighteenth century, then he asked the wrong question; instead of inquiring "Why is the disseisor's heir protected?" he should have inquired, "Why is not the disseisor's feoffee protected; why is not the disseisor himself protected?" It seems to me that English law having once given up the attempt to protect mere possession against ownership, stumbled forward towards the "good sense" (if such it be) of never giving any civil remedy against a person, who being entitled to possession, takes possession. But it knew not well whither it was going. For a long time, for a century and upwards, it had before it a vague idea that though mere possession is not to be protected against the owner, still innocent possession deserves protection. The disseisor's feoffee loses protection because in very many cases he is party to a forfeiture and a tort. On the other hand the heir enters innocently; death and descent cast are not wrongful acts; there is no fraud in entering upon that of which one's ancestor dies seised. The law demands innocence; but innocence it judges by rude external standards. To our minds

of course the possessor, who of all others is best entitled to favour, is not the heir but "the bona-fide purchaser for value" who has honestly but unfortunately bought a bad title. But an inquiry into good faith, a respect for valuable consideration, these do not belong to the law of the fourteenth century, and if we suppose ourselves unable to try the thought of man, then we shall think that the heir's position is stronger than that of the feoffee. Very probably the latter has been guilty of some tort, very possibly he is but a man of straw behind whom the disseisor himself is lurking; but the heir is presumably innocent, and undoubtedly he comes to the land by "title." If however we read Littleton's chapter on "Descents which toll Entries," we shall hardly fail to observe that the protection which is still given when a descent has been cast is given very grudgingly; every sort of excuse seems accepted for allowing "him that right hath" to enter upon what is his own. The rule which protects the heir looks as if it were being pared to the quick. It has become an isolated anomaly; that it did not disappear altogether may be in great measure due to Littleton's genius; a man of his ability had it in his power to stereotype the law at an evil moment. Then, as already said, Parliament came to the rescue and the tolling of an entry became an anomaly, and in actual practice a rare anomaly; but it was not until 1833 that the long experiment, the experiment of Henry Fitz Empress, was brought to a formal and final end. Practically for the last three hundred years and more, theoretically as well as practically for the last fifty years and more, we have had no action in

which an, ejected possessor could recover possession from the owner who ejected him: certainly this is a fact which deserves the consideration of all who are troubled with theories of possession[1].

[1] Since this article was in print, Mr H. W, Elphinstone has suggested that the curious rule of Norman law which makes the last harvest a term of limitation is very intelligible if a system of common fields and common agriculture was prevalent: it is only at harvest time that an owner does any act which manifests an exclusive ownership.

THE SUITORS OF THE COUNTY COURT[1]

WHO were the suitors at the county court? The generally accepted answer is, all the freeholders of the county. But as regards the thirteenth century there seems to be a great deal of evidence that this was not so. The opinion which our documents favour is much rather this: that suit to the county court was not an incident of freehold tenure, but had become a burden on specific lands; and that when the number of freeholders was increased by subinfeudation, the number of suitors was not thereby increased. This vill or this manor or this tract of land which belongs to *A*, owes suit to the county court; *A* enfeoffs B, *C*, and *D*, with pieces of land; the whole vill, manor, or tract still owes the accustomed suit, but it owes no more; by whom this suit shall be done is a matter that *A*, *B*, *C*, and *D* settle among themselves by the terms of the feoffments. In this respect the burden of suit of court is very like the burden of scutage; the amount of scutage is not increased by the creation of new sub-tenancies, but the ultimate incidence of scutage can be settled by feoffor and feoffee.

The Hundred Rolls of 1279 supply a large stock of illustrations, a few of which shall be given. In Cambridgeshire the greater part of the vill of Bot-

[1] *English Historical Review*, July 1888.

tisham is held of the earl of Gloucester by the priors of Anglesea and Tunbridge; but there are two tenants of the earl's there who do suit to the hundred and county courts for the whole township: *Dominus Simon de Mora tenet unam virgatam terre de eodem Comite et facit sectam ad comitatum et hundredum pro Comite et pro tota villata ;* Martin son of Eustace holds two virgates on the same terms[1]. The abbot of Ramsey has a manor at Burwell in the same county; the jurors do not know that he does any service for it except two suits to every county court; *facit duas sectas comitates Cantebrigie de comitatu in comitatum.* But these two suits are actually done for him by two tenants ; J. A. holds a hide and does one suit to the county and to the hundred from month to month for the abbot; B. B. holds ninety acres and does one suit to the county and to the hundred for the abbot". In Croxton in the same county there are two manors; the lord of one does two-thirds of one suit *(duaspartes unius secte)* to the hundred and county ; the remaining one-third is done by a freehold tenant of the other manor[3]. The suit is thus split into fractions ; at Yaxley a tenant owes a half-suit to the county court and an entire suit to the lord's court *(dimidiam sectam, sectam integrant)*[4]. At Isleham again the suit has been partitioned; for half the year it is done by H. H., for the other half of the year by two tenants of his[5]. Indeed in these rolls it is a quite common thing to find some one of the freehold tenants marked out as doing the suit for

[1] *Rotuli Hundredorum,* n. 488.
[2] *R. H.* 11. 499.
[3] *R. H.* 11. 508, 509.
[4] *R. H.* II 640.
[5] *R. H* 11. 504.

the manor or the vill[1]; this is the service or part of the service whereby he " defends " his land against the lord *(defendit duas virgatas terrce faciendo sectam ad comitatum Huntingdonie et ad hundredum de Normancros pro dicto domino*[2]. In Oxfordshire the jurors have a technical name for such a tenant; he is the *attomatus feoffattis.* At Shifford the abbot of Eynsham has a manor for which he must come twice a year to the hundred court, and he owes suit from three weeks to three weeks by *{per)* William Freeman his enfeoffed attorney and his only freehold tenant[3]. The prior of Deerhurst owes one single suit *(debet unicam sectam)* to the county of Oxford for his manor of Taynton, and this is done for him by J. S. his attorney enfeoffed for this purpose in ancient times *{attomatum suum ad hoc antiquitus feoffatum)*[4] Many of the Oxfordshire landowners owe suit to the county court but twice a year.

In the monastic cartularies we find the same thing. Thus, at Hemingford, according to the Ramsey Cartulary[5], Simon Geoffrey's son holds two virgates for which he " defends " the township at the county and hundred, and when the justices in eyre come round he must appear as reeve *(erit loco prepositi).* At Ellington, John John's son holds a hide for which he does suit to every third county court[6]; at Holywell, Aspelon of Holywell does the suit to the county and hundred[7], at Broughton it has been done by Nicholas Freeman[8]. We can trace John of Ellington from the

[1] *E.g. R. H.* IL 434, 559, 627-8-9. [2] *R. H.* 11. 659.
[3] *R. H* II 701. [4] *R. H* II 733, another case'on p. 743.
[6] *R. H.* 1. 382. [6] *R. H.* 1. 491.
[7] *R. H.* 1. 296. [8] *R. H.* 1. 333.

cartulary to the hundred roll, and still find him doing his "one-third part of one suit" to county and hundred[1]. Turning to the Gloucester Cartulary, we find a charter of feoffment whereby the feoffee is bound to acquit the vill from suit to all courts of the hundred, or of the county or of justices in eyre, and all other suits which pertain to the said vill[2]. At Clifford, R. E. and another freeholder pay no rent, but are bound to do the lord's suit to the county and hundred; and if by their default the lord be distrained, they must indemnify him[3]. At Northleach is a freeholder who in respect of his land owes suit for the lord to the county court of Gloucestershire and to all the hundred courts of Cirencester, and must remain before the justices in eyre during the whole of their session[4]. A particularly clear case occurs on the Ramsey manor of Cranfield in Bedfordshire : there are four virgates which pay no rent because they defend the whole township from suit to the hundred and county courts —they are virgates *quce seqimntur comitatum et hundredum pro tota villata*; and this is an ancient arrangement, the result of some *vetus feoff amentum**.

All this seems inconsistent with the notion that every freeholder as such owes suit to the county court. The quantum of suit due from the whole county is regarded as having been once for all fixed at some remote time. Very usually a vill is the unit which owes a full suit. In that case the lord of the vill, if the vill is owned by one lord, is primarily liable to do the suit or get the suit done: usually he has

[1] *R. H.* 11. 656. [2] *R. H.* 1. 386. [3] *H. H* 111. 49.
[4] *R. H.* in. 180. [5] *Cart Rams.* i. 438, 439.

stipulated that it shall be done for him by one of his feoffees—the feoffee, let us say, of a particular virgate. Then as regards the feoffor that virgate is'burdened with the suit, and the burden will lie on that virgate into whosesoever hands it may come.

Really when one looks at the Hundred Rolls it is quite impossible to suppose that every freeholder did suit to the county. There are too many freeholders for that On many manors, it is true, there were hardly any freeholders; this is true in particular of the manors belonging to the religious houses; such houses were as a rule very chary of creating freehold tenancies; they kept but two or three freeholders, one of whom had often been enfeoffed for the special purpose of doing the suit due from the whole manor or township. But on the estates of lay lords there were often many small freeholders. Thus at Bottisham the earl of Gloucester seems to have over forty freeholders. Are they bound to go to the county court month by month? No, two of them do the suit for the whole vill[1]. The *plenus comitatus* was not a very large assembly.

As regards suit to the hundred court we have some yet clearer information. The view taken by the jurors from whose verdicts the Hundred Rolls were compiled, very distinctly was that suit was a burden upon particular tenements, and that the subdivision of those tenements by the process of subinfeudation ought not to increase the number of suitors. They complain that the earl of Surrey, who owns the hundred court of Gallow, has not observed this rule.

[1] ***R. H.* 11. 488.**

There was, for instance, a tenement in South Creake containing 100 acres; it owed a single suit; it has been divided into forty tenements, and forty suits are exacted. Many other examples are given[1]. A similar complaint goes up from the hundred of Humbleyard[2]. So, again, when the tenement becomes divisible among coheiresses, the number of suitors should not be increased; the burden of the suit should lie on the share of the eldest sister. That this rule has been infringed is matter of complaint in the hundred of North Erpingham[3]. So in the Bingham wapentake of Nottinghamshire there are but twelve tenements which owe suit; their holders have been enfeoffed for the purpose, and there ought to be no other suitors[4]. The wapentake of Rushcliffe in the same county has but six suitors, each owes suit in respect of a particular tract of land[5].

How could this somewhat capricious distribution of the burden, to which the Hundred Rolls bear witness, have been effected? By way of answer to this question we may suppose—this can be but an hypothesis, for evidence fails us—that when Henry I revived and enforced the duty of attending the local courts, that duty was conceived as being incumbent on all freeholders, or rather (and the exception is important) on all freeholders who or whose overlords had no chartered or prescriptive immunity; but that it was also conceived as being, like the taxes of the time, a burden on the land held by those freeholders, so that when the land held by one of them was split

[1] *R. H.* 1. 455-
[2] *R. H.* 1. 477.
[3] *R.H.i.* 498.
[4] *R. H.* 11. 318.
[5] *R. H.* 11. 28.

up by subinfeudation or partition among heiresses, the number of suits due was not increased. Some such supposition seems to be warranted by the "Leges Henrici Primi," which after Dr Liebermann's researches we may ascribe to Henry I's reign. All the *terrarum domini* are bound to attend; but if any lord attends by himself or his steward, he thereby acquits his whole demesne[1]. This last passage may very well mean that if he bestows part of his demesne on a feoffee, a single suit will acquit them both. That during the thirteenth century the number of freeholders increased rapidly, there can be no doubt; but an increase in the number of freeholders did not mean an increase in the number of suits due to the county court.

Of course it may be that on special occasions, in particular to meet the justices in eyre, all the freeholders were bound to attend the county court. But it is possible to doubt even this. The words in the writ of summons directing all freeholders to come may well have been understood to mean all freeholders who owed suit. An examination of the amercements for non-attendance and the "essoins of the general summons" found on the eyre rolls might throw some light upon this problem; to a superficial glance they do not seem nearly adequate to support the received opinion. But at any rate it seems plain that the ordinary form of the county court, the *plenus comitatus* which heard cases and delivered judgments, was not an assembly of all freeholders, but an assembly of those persons who by means of proprietary arrange-

[1] ***Leg. Hen. Prim.*** **c. 7.**

ments between lords and tenants had become bound to do that fixed quantum of suit to which the county court was entitled. It was not an assembly of the king's tenants in chief, though probably the persons primarily liable were in many or most cases the tenants in chief. On the contrary, the person who does the suit, and who is bound by tenure to do the suit, is sometimes a small socager holding a single virgate. But though it was not an assembly of tenants in chief, it was not an assembly of all freeholders.

It is impossible to speak of this matter without perceiving that there is a big question as to "the county franchise" in the near background. That question we need not now attack; but before it is solved we ought to have a clear opinion as to who were the persons bound to do suit at the county court, and it is here humbly submitted that the received opinion as to this obligation does not harmonise with the evidence. Of course, it is conceivable by us that though all freeholders were not bound to attend the court, still all had a right to attend. But would such a right have been conceivable by a man of the thirteenth century? If we asked him as to the existence of such a right, might he not reply by asking us whether those modern Englishmen who are not bound to pay income tax, enjoy the right of paying it if they please? The right to do what nobody wants to do can hardly be said to exist. It would have been very dangerous for any one to attend the county court unless he was bound to go there, for he would have been creating evidence of a duty to attend; *solebat*

THE SHALLOWS AND SILENCES OF REAL LIFE[1]

IN the above title we claim no copyright, and we freely place it at the service of any of our readers who may be on the outlook for a pretty name to give to some volume of pensive musings. "The Shallows and Silences of Real Life," by the author of "Soul Flakes," "Seaweed from the Sands of Time," "The Cosier Corners of a Quiet Pew," etc., would look well, and should command a sale in serious family circles. But it requires only a slight acquaintance with our classical literature and our current politics to understand that here we mean to speak of county government. Many mean to speak of it before long; we shall be deluged with speeches about it; there will be severe fighting, and like enough, before the end of the session, every one, by virtue of his political profession as Tory or Radical, will be bound to have or suppose that he has very definite opinions about all its pettiest details. While as yet the strife is but beginning, we have still time to cast a quiet look around us, and to inquire in a spirit of truth, what all the fuss that we anticipate is going to be about.

[1] *The Reflector*, February 1888,

To put the matter briefly, an old form of local government which has served us for five centuries and more, is breaking up, and, to say the least, must undergo a great change which cannot leave even its essential character unaltered. A vital organ of the body politic must be renewed. Hitherto such government as our counties have had, has been government by justices of the peace—government, that is, by country gentlemen, appointed by the Lord Chancellor in the Queen's name, on the recommendation of the Lord Lieutenant of the county, legally dismissible at a moment's notice ; but practically holding their offices for life. This institution has had a great past, we had almost said a splendid past; but Englishmen, unless they are taught by foreigners, seldom see its greatness, and to talk of splendour might therefore seem absurd. Our historians, even some who write what call themselves "constitutional histories," are apt to spend all their energies upon describing the flashy episodes of national life, scenes in Parliament, tragedies on Tower Hill, the strife of Whigs and Tories, wars and rumours of wars.

To deal with the vulgar affairs of commonplace counties, to show what the laws made in Parliament, the liberties asserted in Parliament, really meant to the mass of the people, this was beneath their dignity or beyond their industry. To chronicle such exiguous beer (for even of the control over ale-houses there is much to be said) would bring no fame, and would be a very laborious task. Some day it will be otherwise: a history of the eighteenth century which does not place the justice of the peace in the very foreground

of the picture, will be known for what it is—a caricature. The excuse for our historians—and of course there is an excuse—is this : that having been brought up to regard the justice of the peace as a perfectly natural phenomenon—natural as the air we breathe—they find nothing to say about this incarnation of the obvious. If there had not been justices, this indeed, as a thing contrary to nature, would have called for explanation, and perhaps regret. We say that some day it will be otherwise, for no doubt there is a great change coming. When it has come and has worked for a while, then to those reared under the new system the historian will have to explain that their fathers lived under a very different system, and one which well deserves retrospective examination, possibly retrospective praise. We think that the praise will come, that it has been deserved by centuries of honest, capable, unostentatious work. The justice is a modest man; he has no constituents, and therefore can afford to be modest; perhaps he seldom knows how important he really is. He has become accustomed also to hear small wit broken over "the great unpaid" ; and, doubtless, to be great and yet unpaid is a piece of aristocratic insolence. We ourselves will confess to having referred to two famous justices of Henry IV's reign, in the hope—a vain hope, we fear—of attracting readers by a title which should recall an excellent piece of good wit. But to have made men merry, this surely is not even yet the unpardonable sin; that from age to age people have been pleased to be pleasant over their governmental institutions is surely not a fact which damns those institutions

as unsuitable to the people. A joke is better than a curse, and local rulers have not always gone uncursed in all parts of the world.

Certainly, to any one who has an eye for historic greatness it is a very marvellous institution, this Commission of the Peace, growing so steadily, elaborating itself into ever new forms, providing for ever new wants, expressing ever new ideas, and yet never losing its identity, carrying back our thoughts now to a Yorkist, now to a Lancastrian king, stamped with the sign manual of the Tudor monarchy, telling us of rebellion, restoration, revolution, of peaceful Georgian times, of the days of Bentham and the great reforms. Look where we may, we shall hardly find any other political entity which has had so eventful and yet so perfectly continuous a life. And then it is so purely English, perhaps the most distinctively English part of all our governmental organisation. The small group of country gentlemen appointed to keep the peace, to arrest malefactors, and lead the hue and cry, acquires slowly and by almost insensible degrees the most miscellaneous, multitudinous duties, judicial and administrative, duties which no theorist will classify, for their rich variety is not the outcome of theory, but of experience. And all the while this group shows the most certain sign of healthy life; it can assimilate fresh elements of the most different kinds, and yet never cease to be what it has been. Aristocratic it has been from the first, but never oligarchic; always ready to receive into itself new members who would have the time, the means, the will to do the work, without inquiring into the purity of their pedigrees or

their right to coat armour. Our justices have never been a caste, nor the representatives of a caste ; there has been nothing feudal, nothing patrimonial in their title; they have represented the State, and yet no one would call them officials. They have adapted themselves to many changes in their environment; they may do so yet once more.

Now, no one doubts that a great change is at hand, that the justices are going to lose some of their most important functions. But that this should be so is not a little strange. Generally, when some great change is at hand in the domain of politics, very strong language is used about the "abuse"—for such it is called—that is to be destroyed. The vials are outpoured, the trumpets are blown, doomsday has at last overtaken the wicked. A terrible indictment is sworn, in which the weakest words are incompetence and corruption, oppression and extravagance. In the present case there has been nothing of the sort; the most zealous advocates of reform have hardly gone beyond a more or less graceful pleasantry.

Shallow, as they call him, is at worst an anomaly, and Silence is obviously an anachronism in this eloquent nineteenth century. It is not asserted that the justices, in administering the affairs of the county, have been corrupt or extravagant. Notoriously the fact is otherwise. For the last half-century we have been trying many experiments in local government: we have had municipal corporations, poor-law boards, boards of health, school boards, all constituted on different principles. The result of these experiments is simply this : that of all known forms of local govern-

ment, government by justices of the peace is the purest and the cheapest More than this can be said ; it is the form which requires least control on the part of the central Government; this is no slight merit in these days when all are complaining of over- centralisation. The average justice of the peace is a far more capable man than the average alderman, or the average guardian of the poor; consequently he requires much less official supervision. As a governor he is doomed ; but there has been no accusation. He is cheap, he is pure, he is capable, but he is doomed ; he is to be sacrificed to a theory, on the altar of the spirit of the age.

Let it well be understood that a great change is absolutely necessary. Taken as a whole, our local government is a weltering chaos out of which some decent order has to be got. During the last fifty years boards of ever so many different kinds have been created all over the country; their districts overlap, their powers conflict; they are not much respected, they are not much trusted ; their duties are too humble to attract competent men ; they have to be bound hand and foot by the orders of a central bureau. Rearrangement and consolidation there must certainly be, and the sooner the better. This work cannot possibly be done without interfering with the powers of the justices ; and to increase the powers of the justices no one proposes. If we ask why not, the answer must be that the spirit of the age forbids it Rightly or wrongly, we have determined to carry the principle of popular election into every department of Government. To regret this would be vain, and

the control of the central Government having already been placed in the hands of the great mass of the people, it seems to us distinctly desirable that the control over the local government should be in the same hands.

The wisest advocates of representative government—those who have based their case, not upon natural rights, but upon considerations of national welfare—have laid much stress upon the educational influence of the electoral franchise. Now, if ever the multitude of the newly-enfranchised is to be educated by having votes, it must be by having votes which they can exercise about matters fairly within the range of their intellect and their interests. It is possible, and we hope not treasonable, very seriously to doubt whether the issues of national politics are at the present day within that range. About local affairs the judgment of the average elector is already better worth having, and it would become still more valuable if local affairs were to gain new dignity and importance. As it is, we have begun at the wrong end ; we have asked men to have opinions about extremely difficult questions, when they have never had a chance of forming effective opinions about simpler questions. Any way, the education of the electoral body will be a very long affair; but there is no school for it but that which is kept by experience. Perhaps the lesson of the parish should have been learned before the study of the county was begun, and the county should have been mastered before the kingdom was touched. Things have fallen out otherwise. This could hardly have been helped, and the mistake may not yet be

irretrievable. By the commission of copious blunders in local business, the governing class may be taught to avoid more disastrous blunders in national business. A highly-privileged governing class we have raised up—a class with ample political rights and few political duties. Duties should be provided for it. In vain we think of old times, when the voter was one who, in countless ways, had to serve his township, his county, his king. We cannot invite our rulers even to take their turn at jury service; they would refuse the invitation; and if they accepted it, there would soon be an end of trial by jury. We trust men to decide the question of Home Rule whom we would not trust to try an action for slander. There seems nothing for it but to give them a sphere of action in which the consequences of their errors should be very obviously manifest. At present there is no such sphere. The various local boards which exist are too obscure ; governmental powers have been too much macadamised; responsibility has been scattered about in fragments; not one man in a thousand knows under how many "authorities" he lives.

The situation is critical; it should be faced boldly. If it is so faced there is a chance that out of a great deal of immediate evil some permanent good may come. There will be jobbery and corruption, incompetence and extravagance, very possibly there will be gross injustice. Then will come the cry for ever fresh interferences on the part of the central Government, for more State-appointed inspectors, accountants, auditors; but if the lesson of the past fifty years has really been of any good to us, the cry should be reso-

lutely resisted. The local bodies should be left to flounder and blunder towards better things. A local board under the present pressure of central government is a sorry thing; a body, which, if it is unwise, is futile; which, if it is wise, is governed by its clerk. That pressure should be lightened; there is no good in half trusting men; they should be trusted fully or not at all. The fullest trust, however, does not necessarily imply that the person trusted is wise; it may well mean only that he ought to have an opportunity of showing himself how unwise he is. Give the local "authorities" a large room in which, if they can do no better, they can at least make fools of themselves upon a very considerable and striking scale. Such is the counsel that we are inclined to give, and it is one which should be acceptable to all parties in the State.

For a similar reason it may be hoped that no elaborate attempt will be made at a compromise between the old and the new. If the principle of government by elected representatives is to be extended, it should be extended frankly and courageously, otherwise there will only be fresh irritation and discontent. The hope of securing able and just administrators must now lie, not in the creation of fancy franchises, which at best are fleeting, rickety things, but in the character of the work. It must be made dignified and attractive. If possible, men of the same stamp as those who have hitherto been active at Quarter Sessions should be obtained; but no tinkering of the electoral machinery can assure this result. The old spirit, the spirit which century

after century has moved the squires of England to work hard in their counties, doing justice and keeping order, is not yet extinct Capable men there are, and it will be possible to attract them if the work to which they are called is interesting, important work, and not the mere registering of the orders of the central bureau. If they have patience they will be elected, if elected they will be heard ; for even the most ignorant and careless electorate will at times be convinced that the foolishness of fools is folly.

The outlook is certainly gloomy ; the darkest cloud has not yet been mentioned. If the justices are deprived of their governmental work, will they care to be justices any longer? This is a momentous question; on the answer to it depends a great deal of the future history of England. Suppose that they abandon the judgment seat; in place of the collegiate body of unpaid justices we shall have the paid professional magistrate, the inevitable "barrister of seven years' standing." This will mean more patronage for the Minister, more promotion for politically useful lawyers, and, of course, more expense. But it is not of expense that we would speak. It is indeed very difficult to tell how much of the English respect for law, which (though recent ebullitions may look to the contrary) is still deep-seated, is centred in the amateur justice of the peace. If we have to name the institution which has had most to do with its growth, we should long hesitate between the Commission of the Peace and Trial by Jury. Englishmen have trusted the law; it were hardly too much to say that they have loved the law; but they have not loved and do not

love lawyers, and the law that they have loved they did not think of as lawyers' law. The most learned "barrister of seven years' standing" will find it hard to get so high a reputation among country folk for speaking%with the voice of the law, as that which has been enjoyed by many a country squire whose only juristic attainment was the possession of a clerk who could find the appropriate page in Burn's *Justice.*

This reputation depended in part on the fact that the squire was the squire, and respect for the squire as such is certainly disappearing; but it depended also on the fact that the squire was no trained lawyer, that his law was very simple, that his words were few and plain, and went straight to the point. Of course we can all, when occasion serves, make merry over justices' justice ; but if we look at the history of this justice as a whole, we see that it has been marvellously, paradoxically successful. Even at the present day, if the honest people who come in contact with magistrates (the votes of the criminal class we are not at pains to collect) had their choice between lawyers' law and justices' justice, we should find that the coarser article had many humble admirers. At any rate, it should be understood that the future of the amateur magistracy is very doubtful. Hitherto the dreary task of hearing petty charges has been varied and enlivened by very miscellaneous business of a more or less governmental kind. Whether many men will care to be mere police magistrates, and get no pay for the work, is certainly open to question. Time after time the country gentlemen have risen to the occasion ; they may do so yet once more.

But the severance of administrative from judicial

work must have very serious consequences. It is curious that some political theorists should have seen their favourite ideal, a complete separation of administration from judicature, realised in England; in England of all places in the world, where the two have for ages been inextricably blended. The mistake comes of looking just at the surface and the showy parts of the constitution. The work of separating what have never been conceived as separate will be hard enough; but suppose it done, shall we be the gainers? Hitherto all the business of granting licenses, and the like, has been transacted by men trained in judicial work, men seated on a bench, men holding sessions, men who on the same day would like enough have to try a vagabond, or to consider whether there was sufficient reason for sending a prisoner to trial for murder. We puzzle foreigners by our lax use of the word "jurisdiction," and it is remarkable enough. Whatever the justice has had to do has soon become the exercise of a jurisdiction; whether he was refusing a license or sentencing a thief, this was an exercise of jurisdiction, an application of the law to a particular case. Even if a discretionary power was allowed him, it was none the less to be exercised with "a judicial discretion"; it was not expected of him that he should have any "policy"; rather it was expected of him that he should not have any "policy." And now all this is likely to be otherwise. A board will take the place of the bench; a policy voted about by constituents will take the place of law. All will be very neat and pretty, and explicable by first principles; the administrative work will

be performed by the elected representatives of those whose interests are concerned; for the judicial work there will be the barrister of seven years' standing. The amphibious old justice who did administrative work under judicial forms, will be regarded as inadequately differentiated to meet the wants of a highly evolved society. But unless our reformers go very wisely to work, they will sacrifice the substance of just government to mere theoretic elegance. Much is at stake, no less than the general trust of the people in law and government. What first and foremost is wanted in local government, is not administrative ability, but plain justice ; whether we shall get this out of boards elected to echo party cries, to represent policies, remains to be seen. Our best hope must be that such men as those who have hitherto done work of every kind under the name of justices, will still do that work, and more also, partly under the name of justices, partly under some other name. Unless the services of such men can be obtained, the present year will be a mournful year in English history. On the other hand, if the present Ministry and the present Parliament can meet and conquer the very serious difficulties of the case, we shall place to their credit one of the greatest legislative exploits of the century.

WHY THE HISTORY OF ENGLISH LAW IS NOT WRITTEN[1]

THOUGH **I am speaking for the first time in a new character, though I have before me the difficult task of trying to fill the place of one who was honoured by all who knew him and loved by all who knew him well, I yet have not the disadvantage—or should I say advantage?—of coming as a stranger to the Cambridge Law School. At any rate I mean to excuse myself on this occasion from any survey of the whole of the vast subject that has been committed to my care; rather I will make a few remarks about one particular branch of study, a branch that is very interesting to me, though I hope that I shall never overrate its importance. And if I have to say that it is not flourishing quite as it ought to flourish, believe me that this is said very modestly.**

Our patience of centennial celebrations has been somewhat severely tasked this year, nevertheless it may be allowed me to remind you that next year will see the seven-hundredth birthday of English legal memory. The doctrine that our memory goes back to the coronation of Richard I and no further is of course a highly technical doctrine, the outcome of a statute of limitation, capricious as all such statutes

[1] **An Inauguial Lecture delivered in the Arts School at Cambridge on 13 October, 1888.**

must be; still in a certain sense it is curiously true. If we must fix a date at which English law becomes articulate, begins to speak to us clearly and continuously! the 3rd of September 1189 is perhaps the best date that we can choose. The writer whom we call Glanvill had just finished the first text-book that would become a permanent classic for English lawyers; some clerk was just going to write the earliest plea-roll that would come to our hands; in a superb series of such rolls law was beginning to have a continuous written memory, a memory that we can still take in our hands and handle. I would not for one moment speak slightingly of the memorials of an earlier time, only I would lay stress on the fact that before the end of the twelfth century our law is becoming very clear and well attested. When another century has gone by and we are in Edward I's reign the materials for legal history, materials of the most authoritative and authentic kind, are already an overwhelming mass; perhaps no one man will ever read them all. We might know the law of Edward's time in very minute detail; the more we know the less ready shall we be to say that there is anything unknowable. The practical limit set to our knowledge is not set by any lack of evidence, it is the limit of our leisure, our strength, our studiousness, our curiosity. Seven hundred years of judicial records, six hundred years of law reports; think how long a time seven centuries would be in the history of Roman Law.

Our neighbours on the continent are not so fortunate as we are. True that for some very early ages they have fuller memorials than we can show; but

already in the eleventh century Domesday Book stands out in its unique grandeur, and when our rolls of the King's Court begin in Richard's day, when our manorial rolls begin in Henry III's or John's, and our Year Books in Edward I's, then we berome the nation whose law may be intimately known. Owing to the very early centralization of justice in this conquered country we acquired, owing to our subsequent good fortune we have preserved, a series of records which for continuity, catholicity,, minute detail and authoritative value has—I believe that we may safely say it—no equal, no rival, in the world. And let those who think the twelfth century too late an age to be interesting, who wish for the law of more primitive times, consider how sound a base for their studies these records are. If once we were certain of our twelfth century we might understand Domesday, if once we understood the state of England on the day when the Confessor was alive and dead, then we might turn with new hopes of success to the Anglo-Saxon dooms and land-books.

I have said that our neighbours are less fortunate than we are; but perhaps that is not so, for hoarded wealth yields no interest. Of what has been done for the history of Roman law it is needless to speak; every shred of evidence seems to have been crushed and thrashed and forced to give up its meaning and perhaps somewhat more than its meaning. But look at the history of French law or of German law; it has been written many times on many different scales from that of the popular handbook to that of the erudite treatise, while the modern literature of mono-

graphs on themes of legal history is enormous, a literature the like of which is almost unknown in England. For our backwardness it is some excuse, though hardly a sufficient excuse, that we are overburdened by our materials, are becoming always better aware at once of their great value and of their unmanageable bulk. A Romanist may be able to say about some historical problem—I know all the first-hand evidence that there is, nay, I know it by heart; the truthful English historian will have to confess that he has but flitted over the surface. On the other hand, if we compare the task of writing English legal history with that which French and German historians have before them, there is a fact which goes far to outbalance any disadvantage occasioned by the heavy weight of our materials. The early centralization of justice gives to our history a wonderful unity; we have not to compare the customs of divers provinces, or the jurisprudences of rival schools; our system is a single system and revolves round Westminster Hall.

Well, I am afraid that it must be allowed that Englishmen have not done all that might have been expected of them by those who do not know them well. I believe that no attempt has ever been made to write the history of English law as a whole. The praiseworthy work of Reeves on the law of the later middle ages was done at a dark time and is long out of date. In some particular departments very excellent work has been done; the constitutional law of the middle ages has been fully explored; the same may be said of the constitutional law of later days if w/e give to "constitutional" a narrow meaning, and

much has been done for criminal law and real property law. But there are vast provinces which lie unreclaimed, not outlying provinces but the very heart of the country. For instance, take the forms of action, the core of English law; a history of them ought to be a most interesting book, dealing as it would have to deal with the evolution of the great elementary conceptions, ownership, possession, contract, tort and the like. Perhaps there are countries in which the writing of historical monographs has become a nuisance; but surely it is better to have too many than none at all. And then again, look at the state of the raw material, look at the hopeless mass of corruption that passes as a text of the Year Books, then look at Mr Pike's volumes and see what might be done. Then think of the tons of unprinted plea rolls. It is impossible to print them all; but think what ten men might do in ten years, by selecting, copying, indexing, digesting; the gain would be enormou?, not merely for the history of English law, but for the history of law in general. There is so much to be done that one hardly knows where to begin. He who would write a general history thinks perhaps that his path should be smoothed by monographs; he who would write a monograph has not the leisure to win his raw material from manuscripts; but then only by efforts at writing a general history will men be persuaded that monographs are wanted, or be brought to spend their time in working at the rolls. And so we go round in a vicious circle.

There is I think some danger lest the history of English law should be better known and better taught

in other countries than in England. As regards the very oldest periods, "the time beyond memory," this is no longer a danger but an accomplished fact. It gives us no surprise when we hear that a new edition of our oldest laws will be published by the Bavarian Academy; who else should publish the stupid things ? And the process of annexation is being pushed further and further. Foreigners know that the history of our law has a peculiar interest. I am not speaking merely of political matters, but of our private law, law of pro* cedure, criminal law; a great part of the best work that has been done has not been done by Englishmen. Of what has been done in America we will say nothing, for in this context we cannot treat the Americans as foreigners; our law is their law ; at times we can even be cosmopolitan enough to regret an arrangement of the universe which has placed our records in one hemisphere and those who would make the best use of them in another. And all foreigners are welcome, Frenchmen and Germans and Russians; there is room enough and to spare; still we are the children of the kingdom and I do not see why we should cast ourselves out. But we are such a humble nation, we are. It is easy to persuade us that the early history of Roman law is interesting. To know all about the Roman formulary system, that is juristic science; to know anything about our own formulary system, which we only abolished the other day, that would be barbarian pedantry. But foreigners do not take this view.

A good deal, as it seems to me, depends upon our asserting our right, though it be no exclusive right. Think *for a moment what lies concealed within the

hard rind of legal history. Legal documents, documents of the most technical kind, are the best, often the only evidence that we have for social and economic history, for the history of morality, for the history of practical religion. Take a broad subject—the condition of the great mass of Englishmen in the later middle ages, the condition of the villagers. That might be pictured for us in all truthful detail; its political, social, economic, moral aspects might all be brought out; every tendency of progress or degradation might be traced; our supply of evidence is inexhaustible: but no one will extract its meaning who has not the patience to master an extremely formal system of pleading and procedure, who is not familiar with a whole scheme of actions with repulsive names. There are large and fertile tracts of history which the historian as a rule has to avoid because they are too legal.

It need hardly be added that the science of comparative jurisprudence "if it ever exists" will involve the most elaborate study of particular systems of law, and among others assuredly of that system which has the most unbroken record. "If it ever exists":—I have used the cautious phrase used thirteen years ago by our Rede Lecturer, Sir Henry Maine. Of the great man who when that science exists will be honoured as its prophet, and its herald, of the great man whom we have lost, may I say this?—His wonderful modesty, his dislike of all that looked like parade or pedantry, the fascination of his beautiful style are apt to conceal the width and depth of his reading. He was much more than learned, but then

he was learned, very learned in law of all sorts and kinds. : *it* is only through learning wide and deep, tough and technical, that we can safely approach those world-wide questions that he raised or criticize the answers that he found for them. What is got more cheaply will be guess-work or a merely curious collection of odds and ends, of precarious odds and questionable ends.

And now why is our history unwritten? In the first place, I think we may say, because of the traditional isolation of the study of English law from every other study, an isolation which is illustrated by the fact that it is only of late years, late years to us who have been dealing in centuries, that English law has had a home in the Universities. In 1850 when my predecessor Professor Amos came to the chair, the class of English law in this University consisted of one M.A., one B.A. and two undergraduates. At another time it may be interesting to account for this, to observe the formation of law schools in London while the Universities are teaching to ever fewer students a kind of law, Roman and Canon Law, which is not the law of the King's Courts, and becomes of ever less and less importance to the bulk of Englishmen. This process had momentous results and, all things considered, we cannot regret them. If the Universities had taught English law, English law would sooner or later have ceased to be English. But as it was, the education of the English lawyer—I speak of the later middle ages and of the Tudor time —was not academic; it was scholastic. It would be a great mistake to suppose that the lawyers of that age

got their law in the haphazard hand-to-moutji fashion tt&t is familiar to us under the name of "reading in chambers/' They went through an elaborate scholastic course which if not severe was at least prolonged—ten or twelve years of "readings," "mootings' and "boltings," of hearing and giving lectures, and the path of scholastic success was the path to profit and to place. The law which this school evolved stood us in good stead : it was the bridge which carried us safely from medieval to modern times and we will speak well of it. But one thing it could not do, it could not possibly produce its own historian. History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history. And when the old scholastic plan of education broke down no other plan took its place. It is hardly too much to say that nobody taught law or attempted to teach it, and that no one studied law save with the most purely practical intentions. Whatever may be the advantages of such a mode of study it will never issue in a written history of English law.

The one great law book of the last century may serve to illustrate two points, though I have some hesitation about mentioning the first of them. Blackstone's work was the firstfruits of a professorship of law; in the presence of that book every professor of law will always feel very small, but there it stands the imperishable monument of what may be done by obliging a lawyer to teach law. But in the second place let us take one of Blackstone's greatest exploits, his statement of our land-law and of its history. Every one

now-a-days can pick holes in " the feudal system " and some great writers can hardly mention it without loss of temper. But the theory of a feudal system it was that enabled Blackstone to paint his great picture, a picture incomplete and with many faults in it, but the first picture ever painted. Whence did he get the theory which made this possible ? From Coke ? Coke had no such theory and because he had none was utterly unable to give any connected account of the law that he knew so well. No, the feudal system was a very early essay in comparative jurisprudence, and the man who had the chief part in introducing the feudal system into England was Henry Spelman. It was the idea of a law common to all the countries of Western Europe that enabled Blackstone to achieve the task of stating English law in a rational fashion. And so it will be found during the length of our national life; an isolated system cannot explain itself, still less explain its history. When great work has been done some fertilizing germ has been wafted from abroad; now it may be the influence of Azo and now of the Lombard feudists, now of Savigny and now of Brunner. Let me not be misunderstood:—there is not much "comparative jurisprudence" for those who do not know thoroughly well the things to be compared, not much "comparative jurisprudence" for Englishmen who will not slave at their law reports; but still there is nothing that sets a man thinking and writing to such good effect about a system of law and its history as an acquaintance however slight with other systems and their history. One of the causes why so little has been done for our medieval law is I feel sure our very

truth is hidden from us by current phrases about "historical methods of legal study," that is another reason why the history of our law is unwritt,n. If we try to make history the handmaid of d o g a she will soon cease to be history.

Macaulay in an amusing passage, amusing because it comes from him, has told us how "the historical literature of England has suffered grievously from a circumstance which has not a little contributed to her prosperity....A Frenchman," he says, "is not now compelled by any strong interest either to exaggerate or to underrate the power of the kings of the house of Valois....The gulph of a great revolution completely separates the new from the old system. No such chasm divides the existence of the English nation into two distinct parts....With us the precedents of the middle ages are still valid precedents and are still cited on the gravest occasions by the most eminent statesmen....In our country the dearest interests of parties have frequently been staked on the researches of antiquaries. The inevitable consequence was that our antiquaries conducted their researches in the spirit of partisans." Well, that reproach has passed away; but the manipulation which was required to make the political precedents of the middle ages serve the turn of Whig or Tory was a coarse and obvious distortion when compared with the subtle process against which the historian of our law will have to be on his guard,- the subtle process whereby our common law has gradually accommodated itself to changed circumstances. I make no doubt that it is easier for a Frenchman or a German to study medieval law that

it is for an Englishman; he has not before his mind the fear that he is saying what is not "practically sound," th\t he may seem to be unsettling the law or usurping the functions of a judge. There are many good reasons for wishing that some parts of our law, notably our land-law, were thoroughly purged of their archaisms; of these reasons it is needless to say anything; but I am sure that the study of legal history would not suffer thereby. I do not ask for "the gulph of a great revolution"; but it is to the interest of the middle ages themselves that they be not brought into court any more.

Are we to say then that the study of modern law and the study of legal history have nothing to do with each other? That would be an exaggeration; but it is true and happily true that a man may be an excellent lawyer and know little of the remoter parts of history. We can not even say that every sound lawyer will find an interest in them; many will; some will not. But we can say this, that a thorough training in modern law is almost indispensable for any one who wishes to do good work on legal history. In whatever form the historian of law may give his results to the world—and the prejudice against beginning at the end is strong if unreasonable—he will often have to work from the modern to the ancient, from the clear to the vague, from the known to the unknown. Of course he must work forwards as well as backwards; the stream must be traced downwards as well as upwards; but the lower reaches are already mapped and by studying the best maps of them he will learn where to look for the .sources. Again I do not think that an English-

man will often have the patience to study medieval procedure and conveyancing unless he has had to study modern procedure and modern conveyancing and to study them professionally.

This brings us to the heart of the matter. The only persons in this country who possess very fully one of the great requisites for the work are as a rule very unlikely to attempt it. They are lawyers with abundant practice or hopes of abundant practice; if they have the taste they have not the time, the ample leisure, that is necessary for historical research.

What then can the Universities do? Pardon me if I say that I do not answer this question very cheerfully. In the first place, the object of a law school must be to teach law, and this is not quite the same thing as teaching the history of law. We should not wish to see a professor of law breaking and entering the close of the professor of history, though the result of our scheme of Triposes may be that legal history falls to the ground between two schools. Secondly, I believe that any one who aspires to study legal history should begin by studying modern law. Could we dispose of the time and energies of the young man who is destined—surely he is born by this time—to tell the story of English law, we should advise him to pursue some such course of reading as that prescribed for our Tripos, to go into chambers and into court, even to do what in him lies to acquire some small practice; many other things he should do, but these should not be left undone. Thirdly, the time that we have at our command is exceedingly short. We can not reckon that an undergraduate will give so much as

two yeqrs to English law, and what he can learn in two years is not very much, regard being had to the enormou. scope of our modern law. Fourthly, our students are many and teachers are few. Thus I have come to the conclusion, reluctantly for I have had my dreams, that in the ordinary teaching of our law school there is very little room for history, hardly any for remote history. At the same time every effort should be made which can possibly have the result of inducing a few students, those who will have taste and leisure for the work, to turn their thoughts towards the great neglected subject. They might at least learn to know where the evidence lies. May I mention my own case? I had not the advantage of studying law at Cambridge, otherwise perhaps I should not have been a barrister of seven years' standing before 1 had any idea of the whereabouts of the first-hand evidence for the law of the middle ages. It were to be wished that we had more prizes like the Yorke prize; already it has done more for the cause than any Tripos could do. It were to be wished that our doctor's degree had all along been reserved for those who had done some considerable thing for law or legal history:—but then what could we have done for potentates and politicians and such ? Impossible to convict them of divinity or medicine, it was convenient to fall back on the legal principle that every one must be taken to know the law sufficiently well to be a doctor thereof.

Where then lies our trust ? Perhaps in failure. Failure is not a pleasant word to use in the presence of youth and hope ; it would be pleasanter to wish all our lav/ students success in their chosen profession. But

let us look facts in the face. Only a few of the men who choose that profession succeed in it: the'qualities which make a man a great lawyer are rare and the space on the wool-sack is strictly limited. '."he Cambridge law student should be prepared for either fortune. The day may come when in the bitterness of his soul he will confess that he is not going to succeed, when he is weary of waiting for that solicitor who never comes, when the prolonged and costly education seems thrown away. That is the hopeful moment; that is the moment when something that has been said here may bear its fruit. Far be it from us to suggest that there is but one outgo from the dismal situation; there are many things that a man can do the better because he knows some law. But in that day of tribulation may it be remembered that the history of English law has not been written. Perhaps our imaginary student is not he that should come, not the great man for the great book. To be frank with him, this is probable; great historians are at least as rare as great lawyers. But short of the very greatest work, there is good work to be done of many sorts and kinds, large provinces to be reclaimed from the waste, to be settled and cultivated for the use of man. Let him at least know that within a quarter of a mile of the chambers in which he sits lies the most glorious store of material for legal history that has ever been collected in one place, and it is free to all like the air and the sunlight. At least he can copy, at least he can arrange, digest, make serviceable. Not a very splendid occupation and we can not promise him much money or much fame—though let it be confessed that such humble

work has before now been extravagantly rewarded. He may find his reward in the work itself:—one can not prom/se him even that; but the work ought to be done and the great man when he comes may fling a foot-note of gratitude to those who have smoothed his way, who have saved his eyes and his time.

At the end of this long and dismal discourse let me tell a story. It is said that long ago a certain professor of English law was also the chief justice of an ancient episcopal franchise. It is said that one of his rulings was cited in the court presided over by a chief justice of a more august kind, the Lord Chief Justice of England. "Did he rule that?" said my lord, "why he is only fit to rule a copy-book." Well, I will not say that this pedagogic function is all that should be expected of a professor of law; but still copy-books there ought to be and I would gladly spend much time in ruling them, if I thought that they were to be filled to the greater glory of the history of English law.

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