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LAW AND POLITICS IN THE MIDDLE AGES

FIRST EDITION . . . . . *December, 1897*
Reprinted . . . . . *November, 1905*
Reprinted . . . . . *February, 1912*
SECOND EDITION . . . . . *October, 1913*
Reprinted . . . . . *March, 1919*

LAW AND POLITICS IN THE MIDDLE AGES

WITH A SYNOPTIC TABLE OF SOURCES

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LONDON
JOHN MURRAY, ALBEMARLE STREET
1919

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PREFACE.

THE Middle Ages are Middle only in a sense. They are Middle to us, whom a long-established tradition has taught to regard History as beginning with the foundation of Rome, and the emergence into political life of the Grecian States. But in another, and important sense, they are very Early Ages indeed. They are the foundation epoch of that group of communities, so alike in essentials, so manifestly different in detail, which, for want of a better name, we call Teutonic, and which at the present day control the destinies, not only of Western Europe, but of lands beyond the great seas, of which their founders never dreamed. They have produced a civilization wholly unlike any civilization which has preceded it, a civilization which, on its political side at least, is not only the latest, but, as there is sober reason to believe, the best in the world's history. That, in the building

of this civilization, these communities borrowed, in some cases largely, in others much less freely, from an older polity, may be readily admitted. But that it was a borrowing, and not an inheritance, no serious student of the Middle Ages can well doubt. To conceive of Teutonic history as an appendage to Roman history, is not merely to ride an academic theory to death; it is to indulge in a profound misconception of the capacities of human nature. It is to assume that a community of men is capable, not merely of pretending to adopt, but of actually adopting and living the life of, any system of polity which happens to strike its fancy. It would be as reasonable to suppose that a child who amuses himself with playing at soldiers is capable of conducting, or even of taking part in, a real campaign. The Middle Ages were the nursery of the Barbarian; they were the burial-ground of the Roman. And it is just in this strange combination, with its startling inconsistencies, that their artistic value, their charm and pathos, lie. But, while the artist may content himself with results, the enquirer must look for causes, and trace the progress of vital movements.

To separate from the mass of medieval history

those institutions and ideas which were destined for the future, to distinguish them from survivals which belonged to the past, is the aim of this book. It professes to deal only with conduct, not with speculation; with action, not with thought. It employs, admittedly, but one class of evidences; and it is to be feared that to many persons, lawyers and laymen alike, the choice of materials will appear unfortunate. The man who looks upon Law as the arbitrary command of authority will, not unnaturally, regard Law as a poor guide to the historical enquirer. It has, accordingly, been the first care of the writer to show that Law, at any rate in the Middle Ages, is not the arbitrary command of authority, but something entirely different.

* * * * *

It is hoped that the List and Synoptic Table of Sources, appended to the book, will serve the double purpose of inspiring confidence in the reader; and of guiding him to the original authorities.

BALLIOL COLLEGE,
November, 1897.

PREFACE TO THE SECOND EDITION.

THE continued demand for this book has, naturally, been an unexpected pleasure to the writer; but it has occasioned him a certain amount of embarrassment. He sees no reason to alter any of the more important conclusions expressed in the original edition. But he has detected in that edition a few errors of detail; and certain phrases which it contains, suitable enough in the year 1897, have, in the course of sixteen years, acquired an archaic flavour. To correct these errors of detail, and modify these anachronisms, have been among the objects of the present edition. But the most important changes will be found in the references given in the Notes at the ends of the respective chapters, to the masterly edition of the Anglo-Saxon Laws, by Dr. Felix Liebermann, of Berlin, which has appeared since this book was first published, and which has, in effect, superseded the earlier editions of Thorpe and Schmid. The gratitude which all students of Early English history must feel towards Dr. Liebermann for his monumental work, will be tempered only by the regret that this, the latest and best edition of our priceless early codes, does not owe its existence to native enterprise and scholarship. Happily, learning knows no political boundaries; and the labours of Dr. Liebermann are a permanent endowment, not merely of his own nation, but of the world. It is proverbially dangerous to prophesy; but it is difficult to believe that any future discoveries will supersede his work.

LONDON,
September, 1913.

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LAW AND POLITICS IN THE MIDDLE AGES.

CHAPTER I.

SOURCES.

To a layman, the task of compiling a list of laws might seem the simplest of duties, demanding only the perseverance and accuracy of a good clerk and the technical knowledge of an average professional lawyer. A generation which has, consciously or unconsciously, imbibed the Austinian doctrine, that Law is a command of the State, cannot believe it possible that the State should have allowed any uncertainty to rest upon such an important act as the making of a law. Even a professed student of the Austinian theory, though he is aware of certain awkward inconsistencies in the doctrine of the great jurist,

The Austinian idea of Law.

is inclined to regard these inconsistencies as belonging more to the theory than to the facts.

Nor is he, in truth, very far wrong. When all deductions have been made for uncertainties of interpretation, and authorities of doubtful validity, it is yet possible to say with tolerable certainty what is law and what is not, in the England or the France of to-day. The contents of legal systems may be complex and voluminous, but the idea of Law is comparatively simple. Despite all criticism, Austin's main position is unassailable, regarded as a summary of existing facts. What the State wills, that, and that alone, can the individual be compelled to obey.

Its inadequacy to explain past conditions.

But this fact, suggestive as it is, loses half its value, unless it is regarded in its true historical perspective, as the final outcome of a long unconscious process, fraught with infinite moment to the human race. For, as we go back upon the history of Law, we very soon reach a point at which the Austinian theory is helpless to explain the facts. Here is a "source" of law, an authority which, for some reason or another, great masses of men feel themselves bound to follow, not because they choose, but because they must. And yet it certainly is not a command of

the State, direct or indirect. Upon critical examination, it may turn out to be the work of a mere private composer. Why do men obey it? Further back again, we find a purely impersonal document, compiled, no one exactly knows how, or by whom; and yet it is the controlling force which shapes the daily conduct of men. They do not even consider the possibility of disregarding it. It is not the work of the State, it may not even be recognized by the State, there may be no State to recognize it. Yet the essential ideas of Law, the evident ancestors of our modern juristic notions, are clearly there.

What is Law?

It is manifest, then, that, to the fundamental question—What is Law?, no dogmatic or comprehensive answer can safely be given. Not only do systems of law change their contents, but the conception of Law itself changes with the progress of mankind. Before we look at the history of laws, we must glance at the history of Law. And this glance will show us something of the secret places of human thought. For Man, in his earlier stages at least, is a very material creature; and Law concerns his material interests. He is, likewise, a creature of strong and ill-regulated passions; and Law is the force which will

control them. Therefore man's ideas of Law are very genuine; they are the expression of his inmost feelings, the truest possible index to his character. The study of Law as a mass of arbitrary rules is, surely, one of the most repulsive pursuits in which a man of intelligence can engage. The study of a legal system, as a deliberate attempt to cover and regulate the sum of existing material activities, appeals, after all, only to the logical faculties of the student, and creates but a limited horizon. But the study of Law as the record of human progress, as the golden deposit of the stream of Time, is worthy of the highest intellect, and stimulating to the most gifted imagination.

Two methods of studying the question.

The deductive.

There are two roads by which we might attempt to arrive at a solution of the question—What have men thought of Law in times gone by? In all ages which have had any literary expression, men have written and spoken of Law. Plato and Aristotle, Ulpian and Gaius, Vico and Montesquieu, Hobbes and Locke, have speculated on Law, and contributed to the formation of human thought upon the subject. By a careful comparison of their writings, we might trace the literary history of the idea of Law; and

no thinking man could deny that these writings have profoundly, if indirectly, influenced human conduct. But there is grave danger in such a course. The great thinker is, by his very nature, apart from his fellow men. His ideas are not the common thought of his time; they are far more likely to be the common thought of a future time. And yet Law is essentially a thing for common men; it is the rule of the camp, the market-place, the shop, and the field. If we want to know what Law was, not what it ought to have been, we must take another road, and look, not at the books of the philosophers, but at the codes of the practitioners, at the rules which (to return to our former point) men felt themselves bound to obey, not because they thought them wise, or good, or pleasant, but because they could not help themselves.

The inductive.

But here a caution is necessary. A writer, with a theory to prove, may glance quickly from system to system of law, in search of examples. By ignoring dates and distances, by disregarding important considerations which destroy the whole value of the argument, it is possible to find illustrations from the history of Law for almost any conceivable proposition. But inferences

Dangers of the inductive method.

drawn from such a system of proceeding, even by a student of encyclopædic knowledge, are in the highest degree untrustworthy, and wholly unscientific. For a student of limited knowledge, the only safe plan is to take a single system, or group of kindred systems, to trace their progress through successive stages, to compare one stage with another, and one local variation with another. That is a truly scientific process. Even here, external influences may detract from the value of inferences apparently irresistible; but at least the chances of truth will be greater. An illustration from other sources may occasionally be helpful. But it will *prove* nothing.

Teutonic Law.

The epoch in which the states of Western Europe are now living, has a history and a unity of its own, and is peculiarly suitable as material for the study we are about to undertake. It is our own epoch, we know more about it than we know of any other, it appeals more powerfully to us than any other, we have inherited its traditions, we breathe its ideas. Dispute as we may about the details, we know that the Roman Empire fell as a political power, that the sceptre of Western Europe passed from the Roman to the Teuton. That the influence of Rome long overshadowed

the new forces which took her place, may be readily admitted; the Teuton did not begin to write history on a clean sheet. But the child who starts by copying his letters, in time proceeds to make letters of his own; and if Clovis and his successors were fond of wearing the cast off clothes of the Cæsars, they none the less set a new fashion of wearing them. Nowhere is this truth more abundantly clear than in the history of Teutonic law. Alongside of the elaborate system which generations of Roman jurists had expounded, and Imperial legislators fashioned into shape, there grew up, under totally different circumstances, a group of kindred Teutonic laws, at first utterly incoherent, gradually assuming order and system. It is in these that we trace the growth of the idea of Law.

The *Leges Barbarorum*.

The oldest monuments of Teutonic legal history have received the name of *Leges Barbarorum*. But the title is apt to be misleading. Even in the Frank kingdoms, where the conscious imitation of Rome was strongest, there is at first no attempt at legislation in the modern sense. Beyond doubt the *Leges* were, in most cases, the work of kings, to the extent that they were drawn up by royal direction, and published under royal auspices.

Not legislation,

Quite possibly, too, the kings who collected them took the opportunity of modifying certain details during the process. But the notion of the king, *i.e.* the State, as the source of legislation, is yet far distant. Several of these codes profess to give their own account of the way in which they were drawn up; and, in spite of all the criticism which has been directed against the more extravagant pretensions of the so-called historical school, there can be little doubt that these accounts contain a but *record.* large element of truth. The famous *Lex Salica*, the custumal of the race which became overlords of half Western Europe, contains a prologue which, though doubtless of later date than the first redaction of the custumal itself, is yet of great antiquity, and which describes the collection of the *origines causarum* by four chosen men (whose names and districts are given) after lengthy discussions with the *judices*, or presidents of the local assemblies. The first Burgundian code (early sixth century), known as the *Lex Gundobada*, describes itself as a "definition," and is confirmed by the seals of thirty-one counts. The oldest code of the Alamanni, no longer extant in a complete form, is known by the suggestive title of *Pactus* or Agreement; while the extant edition, dating from

the early years of the eighth century, professes to have been drawn up by the king, with the aid of thirty-three bishops, thirty-four dukes, seventy-two counts, and a great multitude of people. The Anglo-Saxon kings describe themselves as "setting" (*âsettan*), "fastening" (*gefæstnode*), or "securing" (*getrymede*) their laws.[1] Owing to the scantiness of external evidence, it is impossible to assert with confidence the precise character of the process adopted in the earliest times. But a curious story preserved by the Saxon annalist Widukind[2] shows that, even in the tenth century, and under so powerful a monarch as Otto the Great, Law was regarded as a truth to be discovered, not as a command to be imposed. The question was, whether the children of a deceased person ought to share in the inheritance of their grandfather, along with their uncles. It was proposed that the matter should be examined by a general assembly convoked for the purpose. But the king was unwilling that a question concerning the difference of laws should be settled by an appeal to numbers. So he ordered a battle by champions; and, victory declaring itself for the party which represented the claims of the grandchildren, the law was solemnly declared in that

sense. The original proposal would have been an appeal to custom; but the plan actually adopted reveals the thought, that even custom is not conclusive proof, that Law is a thing which exists independently of human agency, and is discoverable only in the last resort by an appeal to supernatural authority.

Migration and conquest.

There is one circumstance connected with the compilation of the Laws of the Barbarians which is specially suggestive of influences leading to the developement of rudimentary ideas of Law. By far the most important of these codes are directly connected with migrations and conquests. The Teutonic settlements west of the Rhine were the first to produce compilations of Teutonic law, and it may be, and indeed is, often asserted, that this fact is due to the example of the Code of Theodosius, the great monument of Roman jurisprudence which confronted the invaders of the Empire. But the real epoch of law-producing activity coincides closely with the conquering careers of Charles Martel, Pepin the Short, and Charles the Great. During this period are produced the Laws of the Alamanni, the Bavarians, the Frisians, the Thuringians, and the Saxons. In England, the Anglo-Saxon

migrations give rise to a scanty crop of laws; but the real activity comes with the conquests by the Danes. On the other hand, in Scandinavia, of all Teutonic countries the most isolated, the oldest extant code dates from the end of the twelfth century or the beginning of the thirteenth. The fact is an illustration of the great principle, that mixture or, at least, contact of races is essential to progress. The discovery of differences is needed to stimulate thought and produce coherence. Resistance and attack are alike provocative of definition. The conqueror wishes to enforce his customs upon his new subjects. He must needs explain what they are. The conquered demand the retention of their ancient practices. They are compelled to formulate their claims. So it is when Charles the Great conquers Western Europe. So it is again when William conquers the English, when the English conquer India, when Napoleon conquers Germany.

The aim of the *Leges Barbarorum.*

This fact will, perhaps, help to account for one feature of the *Leges Barbarorum* which has often puzzled readers of them. They omit so many things that we should consider important; and they relate in minute detail matters which seem to us trivial. But, if we remember that the

process which produced them was probably a very troublesome one, we shall be inclined to think that their compilers only recorded what was absolutely necessary. And this comprised just those points which the processes of migration and conquest had rendered doubtful. The ancient custom had received a shock; men doubted how far some of its terms would apply to new conditions. Even very modern systems of law frequently omit all mention of rules which are really fundamental. No statute, no recorded decision of an English law court, says that a man may destroy a chattel which belongs to him. Why should it? No one doubts the fact. Much less does a primitive code trouble itself about theoretical completeness. Law is the expression of order and settled rule; but it is none the less true that the law came because of offences, that is, because of variations from existing rule. And it is to law-breakers, paradox as it may sound, that the progress of law is due; for what we call Progress is simply the attempt of the individual to extend his freedom of action beyond those bounds which have hitherto been deemed inexorable. The criminal and the reformer are alike law-breakers. The criminal is the man who endeavours to

return to a state of things which society has once practised, but has condemned as the result of experience. The murderer, the thief, the bigamist, are unfortunate survivals from a bygone age. The reformer is the man who advocates what society has hitherto deemed unlawful, because it has not been tried. And so, when we read our Barbarian Codes, and find that they say a good deal about summoning to courts, about rules of inheritance, about foul language, and a very great deal about money compensation for acts of violence, we shall begin dimly to picture to ourselves an older state of things, in which differences of opinion were settled by clubs and spears, in which (whatever the reason) a dead man's belongings did not pass to his relatives, in which the most virulent abuse was common pleasantry, and in which the blood feud, itself, doubtless, a step towards better things, was treated as a fine art.

The personality of the *Leges Barbarorum*.

Many other features of the *Leges Barbarorum* deserve to be noticed; but space forbids the mention of more than one. They are laws of peoples, not of places. Even during the later Middle Ages, even in our own day, the principle, that all persons living in a certain place are subject to the law of that place, has to submit

to substantial exceptions. In the days which followed the downfall of the Roman Empire, the principle was not recognized at all. The provincials of Gaul, at the time of the Teutonic invasions, lived under a great and uniform system, devised by the jurists and officials of the Roman empire, and embodied in the Theodosian Code and other monuments. The invaders had no thought of depriving them of this privilege. They did indeed, in some cases, publish special codes for their Roman subjects; and so we get a *Lex Romana Wisigothorum*, a *Lex Romana Burgundionum* and (possibly) a *Lex Romana Curiensis*. But it seems again probable, that these compilations are merely attempts to settle inevitable conflicts of legal principles; and, in any case, it is worthy of notice that they are full of references to the Theodosian Code, the Sentences of Paulus, the *Lex Aquilia*, and other purely Roman sources.[3] Amongst the Teutonic populations of the north and east, the question of the provincials would, for obvious reasons, be less important; but the curious reference in the *Lex Salica* to the man *qui legem salicam vivit*,[4] seems to indicate a similar principle. For slightly later days, the matter is set at rest by the decree

of Chlothar II.—"We have ordained that the conduct of cases between Romans shall be decided by the Roman Laws." A.D. 584-628.

It is not to be supposed, that the invaders accorded to the provincials a principle which they denied to themselves. In truth, it is somewhat difficult to see how migratory groups could arrive at the notion of a *lex terræ*, unless they were prepared to change their customs with each migration. A great and luminous critic, the late M. Fustel de Coulanges, has, indeed, attempted to deny the occurrence of a migratory epoch, or *Völkerwanderung*, as well as the recognition of racial differences by the barbarians.[5] But, as the same learned historian gives an excellent account of at least a score of new German settlements, hostile or friendly, within the Empire,[6] the first question resolves itself into one of figures; while his elaborate attempt to prove that the terms *Franci* and *Romani* are names of ranks rather than of races,[7] would seem, if successful, to point to the fact that the Teutons settled down as an aristocracy upon the enslaved provincials—a doctrine which is M. Fustel's pet aversion. Certain it is, that the barbarians themselves clearly recognized the principle of the personality of laws. The

oldest part of the *Lex Ribuaria* (Tit. 31) contains the following conclusive passage:—"This also we determine, that a Frank, a Burgundian, an Alamann, or in whatever nation he shall have dwelt, when accused in court in the Ribuarian country, shall answer according to the law of the place where he was born. And if he be condemned, he shall bear the loss, not according to Ribuarian law, but according to his own law." Doubtless, even here, we may see foreshadowings of those influences which are soon to localize law. Doubtless, the mixing of races is rendering genealogical questions difficult, and we seem almost to discover a period in which a man may claim to live according to any law, may make any *professio juris*, that he likes, provided he does it in the proper way. But this is only a concession to practical difficulties. Law is at first as much personal as is religion; and a profession of law is much like a profession of faith.

The *Capitula*.

The second stage in the history of Teutonic Law is, apparently, very modern in character. It looks like positive political legislation, as we understand it at the present day. The Capitularies of the Karolingian House, and of the Beneventine Princes, the statutes and edicts

of the Lombard kings and dukes, and even some of the Dooms of the Anglo-Saxon kings, are alleged to be examples of this kind. But here we come upon one of the great sources of error in medieval history. The Frank Empire, in both its stages, was, in a very important sense, a sham Empire. It aimed at reproducing the elaborate and highly organized machinery of the Roman State. Just as a party of savages will disport themselves in the garments of a shipwrecked crew, so the Merowingian and Karolingian kings and officials decked themselves with the titles, the prerogatives, the documents, of the Imperial State. No doubt the wisest of them, such as Charles the Great, had a deliberate policy in so doing. But the majority seem to have been swayed simply by vanity, or ambition, or admiration. Their punishment was the downfall of the Frank Empire; but they might have been consoled for their failure, could they have looked forward a thousand years, and seen their pretensions gravely accepted by learned historians on the faith of documents pillaged from the Imperial chancery, which they scattered abroad without understanding their contents. The Frank Empire

Their origin.

was, from first to last, a great anachronism. With a genuine civilization equal in degree to that of their kindred in Britain and Scandinavia, the Germans of continental Europe found themselves called upon to live up to the elaborate civilization of the Roman Empire. They broke down under the strain; and their breakdown is the first great tragedy in modern history, the parent of many tragedies to follow. Those who doubt the possibility of such an explanation, may be referred to the "Parliaments" and "Cabinets" of Samoa, and to the "Polynesian Empire."

Imitation of Roman ideas.

Now one of the most splendid prerogatives of the Roman Emperor was his power of legislation. Quite naturally, his imitators, the Frankish kings and emperors, strove to exercise it. Hence the *Capitula*, or royal and imperial edicts, which, at any rate for some time, no doubt played a great part in the history of Teutonic law. The difficult questions connected with them have been acutely discussed by competent critics, who are not by any means unanimous.[8] But one or two results seem clear.

Character of the *Capitula*.

The *Capitula* are distinguishable from the *Leges*. They emanate directly from royal authority, they

deal with less important matters, they have, probably, a less permanent effect. In the pure type of Capitulary, the *Capitula per se scribenda*, there is no pretence of collecting the law from the mouth of the people. Many of them are mere directions to royal officials. The great *Capitulare de Villis*, the equally important *Capitulare de Justitiis Faciendis*, of Charles the Great, are of this character. It is very doubtful if the *Capitula* of one king bound his successors; for we frequently find almost verbatim repetitions by successive monarchs. On the other hand, some of the *Capitula* are *legibus addita*—incorporated by general consent with, and treated thenceforward as part of, a *Lex*, or custumal. Many of these are now so embedded in the texts of the *Leges*, that it requires a trained eye to detect them. Others, like the great *Capitulare Saxonicum* of the year 797, declare openly their origin, and testify to the premature appearance of an idea which is, ultimately, to revolutionize law, the idea that the king proposes new laws, and the people accept them. A large number of Saxons, gathered together from divers *pagi*, Westphalian and Eastphalian, unanimously consent to the adoption of the Frankish *Capitula*, with certain modifications.

Moreover, the *Capitula* are of great importance in stimulating the new idea that Law is territorial, for the *Capitula* of a monarch bound all within his realm, or such part of it as the *Capitula* might specify. We are obliged to suppose, also, that they secured practical obedience, at least during the better days of the Frank monarchy; for they were twice collected in a convenient form, once by the Abbot Ansegis in the year 827, again, with daring interpolations, by the so-called Benedict, some twenty years later.

But, it must be repeated, the Capitularies are hothouse plants, due to the stimulus of Roman ideals. The monuments of the purely German countries which resemble them in name, *e.g.* the Decrees of the Bavarian Tassilo, turn out, on inspection, to be true *Leges*, produced or, at least, accepted by a popular assembly under Frankish influence. The Anglo-Saxon Dooms are really declarations of folk-law by Clan chiefs, acting as mouthpieces of their clans, at least until Ecgberht has brought back imperial notions from the court of Charles the Great. In isolated Scandinavia, there is no trace of royal legislation at this period. And when the Frank empire falls to pieces in the ninth century, it will be

long before the kings who rise up out of its ruins claim the power to make laws. If we leave England out of sight, there is an almost unbroken silence in the history of Teutonic law during the tenth and eleventh centuries. The Roman Empire, real and fictitious, is dead, and, with it, the idea of legislation, if not of Law. When the idea revives again, in the prospering France of the thirteenth century, we find the legists asserting the royal power of legislation in maxims which are simply translations of the texts of Roman Law. "That which pleases him" (the king) "to do, must be held for law," says Beaumanoir. A century later, Boutillier is careful to explain that the king may make laws, *qui est empereur en son royaume.*

Feudal Law.

And now, if we are asked the question—Did men during those tenth and eleventh centuries live without Law?—the answer we must give is, that they mostly did, and that evil were the results. In the far south-west, where the Visigothic settlers had been crushed out of existence between the Saracens and the provincials, in Acquitaine, Gascony, Navarre, and Provence, the old Roman Law had remained the every-day law of the people. This is the

country of the Langue d'Oc, the later *pays de droit écrit.* But, elsewhere, the old Empire of Charles the Great had become a country of what the Germans call *Sonderrecht;* each little district had its own special law. For this was just the epoch of feudalism, and the political unit was no longer the clan, or the people, but the fief, the district under the control of a *seigneur*, or lord. Of the place of feudalism in political history, we shall have to speak when we deal with the State; here we are concerned only with its influence on notions of Law.

Its origin. The feudal *seigneur* derived his powers from two sources. On the one hand, he represented a little bit of the imperial authority of Charles the Great, which had, so to speak, set up for itself. This is the true *droit seigneurial.* On the other hand, he had become, not merely lord, but proprietor of his district, and, in this character, he exercised *droit foncier.* He might claim seigneurial rights over land in which he had ceased to have property; and he might be merely proprietor of land of which another was *seigneur*, although in this case he was hardly a feudal lord. Again, his claims as *seigneur* might be more or less extensive; he might be duke, count, baron, or

simply *seigneur justicier*. He might claim High, Middle, or Low Justice. But the principle in any case was, that he administered the law of the fief, not the law of the land, or the king, or the people. If there is a dispute as to what this law is, we must go, as Boutillier tells us, to the *greffe*, or register of the court of the fief. If this is silent on the point, we must call the men of the fief together, and hold an *enquête par tourbe*, an enquiry by the multitude.[9]

Its results

This state of things, the result of the total breakdown of the Frankish scheme of government, had certain well-marked effects on the history of Law. In the first place, it stamps Law definitely as a local institution. Agriculture is almost the sole industry of the period. To pursue agriculture, one must occupy land; to rule agriculturists, one must rule them through their land. Feudalism expressed itself through land-holding; it was a military system with land as the reward of service.

Law becomes local.

It is administered by "peers."

So, too, the peculiar character of the Fief led up to the famous, but much misunderstood doctrine, of *judicium per pares*, "judgement by peers." The personal nature of the tie between lord and man forbade the hypothesis that any general rules

would cover the terms of relationship. Therefore, the vassal demanded to be tried by the special law of his fief. The contractual character of the feudal bond enabled him to refuse to leave himself entirely at the mercy of the lord as sole judge. Besides, the question might be between a vassal and the lord himself; and the lord could hardly be judge in his own cause. So the principle was firmly established, that the feudal court, at least in the case of freemen, is a court in which the lord is merely president, and the *pares*, or *homage*, *i.e.* the men of the same fief, are judges. These are totally different in character from the modern jury, with which they are often confused. The modern jury takes its law from the judge, and finds the truth of the facts. The *pares* declared the law, *i.e.* the rule of the fief; and left the facts to be settled by some formal process. Trial by jury gives, in fact, where it is successful, the death blow to trial by peers.

It belongs to a court.

Once more, the law of the Fief is the law of a court. The power of holding a court was not the only privilege which the feudal *seigneur* inherited from the days of Charles the Great. But it was the one he valued most, because it brought him in a steady revenue, in fees and fines, and

enabled him to keep an eye on what was happening among his vassals. Moreover, long after the military, the fiscal, and the administrative powers of the *seigneur* had disappeared or become unimportant, his judiciary powers remained almost intact. So feudal law is essentially a law of courts. No doubt, certain general principles run through it all, and, later on, we shall see attempts, such as the *Libri Feudorum*, to state these in a universal form. No doubt, the right of appeal from lord to overlord tended to produce a certain uniformity in wide areas. But these appearances are apt to be delusive. The ideal type of feudal law is that so graphically depicted in the works which pass under the title of the *Assises de Jérusalem*, and which profess to describe the usages of that curious product of the Crusades, the Latin kingdoms of Palestine. These are divided into the Assises of the High and of the Low or Burgess Court respectively. Each court has its own law.

The results of this fact are not very easy to describe; but very important to understand. The law of a court, as opposed to the law declared by a king or a popular assembly, will be hesitating, very deferential to precedent,

not always very consistent, delighting in small shades of difference, difficult to discover. These are the special characteristics of true feudal law. Where we find bold principles, simplicity, uniformity, in so-called feudal law—for example, in English law of the thirteenth century—we may be very sure that some alien influence has been at work.

It is incomplete.

Finally, the feudalism of law is responsible for one more result of great importance. Feudal law is for men of fiefs; but all men, even in the palmy days of feudalism, are not men of fiefs. Priests are not, the rising class of merchants is not, the Jews are not. Yet they must have Law. Leaving the Jews for the present, let us look at the priests and the merchants.

Canon Law.

In the early days of the Frank dominion, the churches lived under Roman Law. For one thing, the Christian Emperors had legislated freely on ecclesiastical matters, long before the Teutons were converted to Christianity; and the Merowingians could hardly venture to meddle with the organization of that mighty power which had destroyed their ancient gods, and done so much to give them the victory over their enemies. For another, the churches were corporations,

juristic persons; and it took the Teutonic mind a long time to grasp the highly complex notion of a corporation.[10] No doubt, the individual mass priest of Frankish times lived under his folk-law; but the great foundations of regular clergy, which sprang up so thickly under the fostering care of the orthodox Franks, could find little in the *Leges Barbarorum* to meet their case.

As time went on, however, new influences manifested themselves. The disappearance of the Emperors from Rome, the schism between Eastern and Western Christianity, left the Popes in a commanding position with regard to the Western Church. They stepped into the place of the Roman Emperor, and issued Decretals which the clergy considered as binding in ecclesiastical matters. From the earliest times, also, General Councils of the Church had met, and had legislated on matters of faith and discipline. Towards the end of the fifth century, a collection of these decrees and resolutions was made by Dionysius Exiguus, and was regarded as of great authority in Church matters. Neither did the Church disdain the help of the secular arm, especially in such delicate matters as tithes and

patronage, in which the lay mind might require the use of carnal weapons. The alliance between the earlier Karolingians and the Papal See is marked by the appearance of ecclesiastical Capitula, many of them founded on Conciliar resolutions, in which, although the Frank emperor maintains the royal claims, the Church gets it pretty much her own way.[11] Similar documents are found amongst the Anglo-Saxon laws;[12] and even the Scandinavian codes have their *kirkiubolkær*, or Church Books.[13] But ecclesiastical legislation becomes more and more independent as time goes on. A great stimulus is given by the work of the forger who calls himself Isidorus Mercator, which appears in the ninth century; and which incorporates with the work of Dionysius Exiguus some sixty so-called Decretals of more than doubtful authenticity. Three centuries later, the great work of Gratian of Bologna, the *Decretum Gratiani*, though obviously the work of a private expounder, was received as an authoritative statement of ecclesiastical law. Later still, in the year 1234, come the Five Books of Gregory IX., in 1298 the "Sext," or sixth book, of Boniface VIII., in 1317 the Decretals of Clement V., the "Clementines."

By this time, the Church has grown strong enough to repudiate the system which was its foster mother. Roman Law, after all, is the work of laymen; and by this time the Church has become a sacred caste, and will acknowledge no secular authority. Alexander III. forbids the regular clergy to leave their cloisters to hear lectures on "the laws" and physic. In 1219 comes the Bull *Super Speculam*, in which Honorius extends the prohibition to all beneficed clerks.[14] This is not the place in which to discuss the difficult question of the border line between the provinces of Canon and secular law. It is sufficient to say that, from the ninth century to the close of the Middle Ages, not the most autocratic monarch of Western Europe, not the most secular of lawyers, would have dreamed of denying the binding force, within its proper sphere, of the Canon Law. It had its own tribunals, its own practitioners, its own procedure; it was a very real and active force in men's lives. And yet, it would puzzle an Austinian jurist to bring it within his definition of Law. The State did not make it; the State did not enforce it.

The Law Merchant.

The case of the Law Merchant is equally

instructive. Trade and commerce, almost extinct in the Dark Ages which followed the downfall of the Karolingian Empire, revived with the better conditions of the eleventh century, and were stimulated into sudden activity by the Crusades. The new transactions to which they gave rise were beyond the horizon of the law of the Fief and the old folk-law of the market. Gradually, the usages of merchants hardened into a cosmopolitan law, often at positive variance with the principles of local law, but none the less acquiesced in for mercantile transactions, and enforced by tribunals of commanding eminence and world-wide reputation, such as the courts of the Hanseatic League, and the *Parloir aux Bourgeois* at Paris. Occasionally, some special rule of the Law Merchant receives official sanction from king or *seigneur*. But, for the most part, the Law Merchant is obeyed, no one knows why. It is simply one of several authorities of different origin, which may, and in fact do, come into conflict at many points. The need of a reconciling influence is obvious. In the thirteenth century the Teutonic world is still awaiting the solution of the all-important question—What is Law? It is the

glory of England that she, of all the countries of Teutonic Europe, was the first to furnish that solution.

NOTES TO CHAPTER I.

[1] Schmid, *Gesetze der Angelsachsen*, ed. 2. Æthelbirt, p. 2, Ine, p. 20. Liebermann, *Gesetze der Angelsachsen*. Æthelberht, p. 3; Ine, p. 89.

[2] Widukind, *Annales* (Mon. Germ., SS. fo. iii. p. 440).

[3] *Lex Romana Burgundionum*, Titt. I. (3), IV. (3), V. (2), XJX. (2), etc.

[4] *Lex Salica*, Tit. XLI. (1).

[5] Fustel de Coulanges, *L'invasion Germanique*, pp. 340 and 543.

[6] *Ibid.*, Bk. II. capp. iv.–x.

[7] Fustel de Coulanges, *De l'inegalité du wergild dans les lois franques* (Nouvelles Recherches, pp. 561, *sqq.*).

[8] Cf. Boretius, *Beiträge zur Capitularienkritik*. F. de Coulanges, *De la confection des lois au temps des Carolingiens* (Nouvelles Recherches). M. Thévenin, *Lex et Capitula* (Bibliothèque de l'École des Hautes Études, 1878, fasc. 35, p. 137, *sqq.*).

[9] *La Somme Rurale* (ed. Le Caron), Bk. I. Tit. 2.

[10] On this interesting point, see Gierke, *Deutsches Genossenschaftsrecht*, and Pollock and Maitland, *History of English Law*, vol. i. pp. 469–495.

[11] Cf. the Capitularies of 802 (*a sacerdotibus proposita*), of 803–4 (*ad Salz*), of 813 (*e Canonibus excerpta*), all in Boretius, vol. i. (M. G., 4to) pp. 105, 119, 173.

[12] Cf. Edgar's Ecclesiastical Laws and Knut's Ecclesiastical Laws, in Schmid, *op. cit.*, pp. 184 and 250.

[13] Cf. *Westgötalagen*, ed. Beauchet, pp. 131, *sqq.*

[14] Decretals of Gregory IX. (ed. Friedberg), Bk. III. Tit. 50, c. 10.

CHAPTER II.

SOURCES—*(continued)*.

The place of England.

AT the time of the Norman Conquest, England is, from a legal standpoint, the most backward of all Teutonic countries, save only Scandinavia. While France and Germany have their feudal laws, which, fatal as they are to unity and good government, are yet elaborate and complete within their own sphere; while Spain, after long harrying by the Moslem, is awaking once more to brilliant life and precocious political developement under Sancho the Strong and Cid Campeador; England is still in the twilight of the folk-laws, and, seemingly, without hope of progress. England had never been part of the Frank Empire; and such rudiments of a feudal system as she possessed before the Conquest cannot be compared with the highly organized feudalism of the Continent. To revert again to the admirable French distinction, there might be in England

a *justice foncière*, there was little or no *justice seigneuriale*. In later times, this fact was of infinite benefit; in the days before the Conquest it was one of the chief reasons why English law lagged behind in the race. The feeble Imperialism of Eadgar and Eadward, even the rude vigour of Knut, seem to have left little permanent impress on English law. When, at the beginning of the twelfth century, an English writer is trying to describe English law, in the so-called *Leges Henrici*, he ventures to quote as authorities the antiquated Lex Salica and Lex Ribuaria.[1] About the same time the author of the book known as the Laws of Edward the Confessor resorts, for his explanation of the title of "king," to the old story of the correspondence between Pepin the Short and Pope "John."[2] Evidently, English law was, even then, in a very rudimentary state.

Effects of the Norman Conquest.

But the Norman Conquest soon changed all this. The Normans were the most brilliant men of their age; and their star was then at its zenith. As soldiers, as ecclesiastics, as administrators, above all, as jurists, they had no equals, at least north of the Alps. The vigour which they had brought with them from

their Scandinavian home had become infused, during the century which followed the treaty of St. Clair sur Epte, with the subtlety and the clerkly skill of the Gaul. The combination produced a superb political animal. The law and the administration of Normandy in the eleventh and twelfth centuries are models for the rest of France.[3] Wherever the Norman goes, to England, to Sicily, to Jerusalem, he is the foremost man of his time. We cannot leave these facts out of account in explaining the place of England in the history of Law.

But the greatest genius will do little unless he is favoured by circumstances; and circumstances favoured the Normans in England. The more rudimentary the English law, the more plastic to the hand of the reformer. While Philip Augustus and St. Louis found themselves hampered at every turn by the network of feudalism, while even the great Barbarossa was compelled to temporize with his vassals, and to respect the privileges of the Lombard League, Henry Beauclerk and Henry of Anjou found it no impossible task to build up a new and uniform system of law for their subjects, and to pave the way for still greater changes in the future. We have now

to note the effect of the Norman Conquest on the history of Law.

In the first place, it converted the law of England into a *lex terræ*, a true local law. There is to be no longer a law of the Mercians, another of the West Saxons, and another of the Danes, not even a law for the English and a law for the Normans, but a law of the land. It took about a century to accomplish this result, which we doubtless owe to feudal principles. England was one great fief in the hands of the king, and it was to have but one law. Writing in the reign of Henry II., Glanville can speak of the "law and custom of the realm." Such a phrase would then have been meaningless in the mouth of a French or German jurist. About this time a celebrated expression makes its appearance in England. Men begin to speak of the "Common Law." The phrase is not new; but its application is suggestive. Canonists have used it in speaking of the general law of the Church, as distinguished from the local customs of particular churches. We may trace it back even to the Theodosian Code.[4] In the wording of a Scottish statute of the sixteenth century, (and this is very suggestive), it will mean the Roman Law.[5] But, in the mouth of an English

Law is made *local*,

and *common*.

jurist of the thirteenth century, it means one thing very specially, viz. the law of the royal court. And because the royal court is very powerful in England, because it has very little seigneurial justice to fight against, because the old popular courts are already antiquated, the law of the royal court rapidly becomes the one law *common* to all the realm, the law which swallows up all, or nearly all, the petty local and tribal peculiarities of which English law, at the time of the Conquest, is full. The Common Law is the *jus et consuetudo regni* with a fuller developement of meaning. It is not only territorial; it is supreme and universal. This is the first great result of the Conquest.

Law is judicial.

Again, the Common Law is the law of a court. When the Normans first settled in England, they endeavoured to collect law, somewhat in the old way of the *Leges Barbarorum*, through the wise men of the shires and the inquests of the king's officials. At least, that was long the tradition; and whether or no the *Leges Eadwardi* which have come down to us are the result of such a process, we may be pretty sure that the Norman kings made some effort to ascertain what really were the provisions of those laws and customs of the English, which they more

than once promised to observe.[6] But these were too formless and too antiquated to suffice for the needs of an expanding generation. The whole work of legal administration had to be put on a different footing.

Reforms of the twelfth century.

This result is achieved in the twelfth century by the two Henries. Henry Beauclerk begins the practice of sending his ministers round the country to hear cases in the local courts. This is a momentous fact in the history of English law; but it will be observed that it is not legislation at all, merely an administrative act. Neither is it quite original; for the tradition of the Karolingian *missi*, or perambulating officials, may have floated down to the twelfth century, and the French kings are holding *Échiquiers* in Normandy, and *Grands Jours* in Champagne. But these are irregular and unsystematic; in the fourteenth century we find Philip the Fair promising to hold two Exchequers and two Great Days a year, which implies that Exchequers and Great Days have been rare of late.[7] By that time the English circuit system has been long a fixed institution, working with regularity and despatch. It has stood the shock of Stephen's reign; under the great king who is both Norman and Angevin,

it has struck its roots deep into the soil. Before the end of the twelfth century, the king's court has become the most powerful institution in the kingdom, a highly organized body of trained officials, who make regular visitations of the counties, but who have a headquarters by the side of the king himself. This court is at first financial, administrative, judicial. In course of time the judicial element consolidates itself; it becomes professional. It devises regular forms of proceeding; the first extant Register of Writs dates from 1227, but, doubtless, earlier registers have existed for some time in the archives of the Court. Above all, it keeps a strict and unassailable record of all the cases which come before it. Any doubt as to precedent can be set at rest by a reference to the Plea Rolls, which certainly begin before the close of the twelfth century. Later on, it publishes its proceedings in a popular form; the first Year Book comes from 1292. Between the accession of Henry I. and the death of Henry III., this Court has declared the Common Law of England. That law is to be found, not in custumals, nor in statutes, nor even in text-books; but in the forms of writs, and in the rolls

of the King's Court. It is judiciary law; the men who declared it were judges, not legislators, nor wise men of the shires. No one empowered them to declare law; but it will go hard with the men who break the law which they have declared.

Law is royal.

Still, we have not reached the end of the effects of the Norman Conquest. If the English king had his court at Westminster, the French king had his *Parlement* at Paris, the German Kaiser his *Hofgericht* at Mainz or Frankfort, the kings of Leon and Castile their *Audiencia Real* at Leon or Valladolid. Though the Parlement of Paris and the Imperial Hofgericht had infinitely less power in the thirteenth century than the King's Court in England; yet the Exchequer Records of Normandy and the *Olim* or judgement rolls of the Parlement of Paris may be compared with the Plea Rolls of England; and the *Style de du Breuil* and the *Grant Stille de la Chancellerie de France* may rank beside the Register of Writs, for the work of Breuil at least was regarded as official.[3] But the Norman Conquest had strengthened the position of the Crown in England in more ways than one. Not only was the king of England in the thirteenth century infinitely more powerful

within his realm than the king of the English in the tenth; he was more powerful than the French king in France, far more powerful than the German Kaiser in Germany. Without insisting on the military side of the Norman Conquest, we may notice the fact that the kingship of England was, in the hands of William and his successors, emphatically a "conquest," not a heritage or an elective office. And, when we come to look at the ideas which have gone to make up our notion of property, we shall find that the *nouveau acquêt*, the "conquest," is much more at the disposal of its master than the heritage or the office. The Norman Duke who acquired England made good use of that idea. He maintained an elaborate pretence of heirship to Edward the Confessor; but all men must have seen that it was a solemn farce. As Duke of Normandy, he owed at least nominal allegiance to the King of the French; as king of England he was "absolute." All was his to give away; what he had not expressly given away, belonged without question to him. Among the documents of the Anglo-Norman period, the *charter* plays a prominent part; and a learned jurist has explained that the essential feature of a charter is that it

is a "dispositive" document, a document which transfers to B some right or interest which at present belongs to A.[9] So we get the long and important series of English charters, which culminates in the Great Charter of John and the Merchant Charter of Edward I. When the English Justinian is making his great enquiry into the franchises which his barons claim to exercise, he insists, and nearly succeeds in maintaining, that, for every assertion of seigneurial privilege, the claimant shall show a royal charter.[10] It would have been absurd for Philip the Fair or Rudolf of Habsburg to make such a demand; for their feudatories held franchises by older titles than their own, unless indeed the German Kaiser had founded himself on the authority of Charles the Great. The charter is not a peculiarly English institution; the town charters of Germany and France go back at least to the twelfth century.[11] But the charter as a monument of general law is peculiar to, or at least specially characteristic of England; and it is one of the many signs that the English monarchy of the twelfth and thirteenth centuries was the most powerful and centralized monarchy of the Teutonic world. England was a royal domain.

The Domain.

But the lord of a domain may make rules for its management, at least with the concurrence of his managing officials. If any precedent were required for this assertion, we have it in the *Capitulare de Villis* of Charles the Great. But it is one of the earliest ideas of proprietorship. Long before the descendants of Hugues Capet ventured to legislate as Kings of France, they issued ordinances for their domains. The great feudatories of the French Crown, the Dukes of Normandy and Brittany, the Counts of Champagne and Poitou, did the like. The legislation of the smaller States of Germany, the feudal domains of the Princes of the Empire, begins in a similar way. And so it is quite natural to find, in the England of Anglo-Norman times, Assises and Ordinances which come nearer to modern ideas of law than anything we have seen yet in our search. The Assises of Clarendon and Northampton, the Assise of Arms, the Woodstock Assise of the Forest, the Assise of Measures in 1197, the Assise of Money in 1205, all these look as though royal legislation is going to take the place of all other law. If Henry of Anjou had been succeeded by one as able as himself, with the magnificent machinery of the royal court to back

him, and with no great feudatories to hold him in check, England might very well have come to take her law from the mouth of the king alone. But, fortunately for England, Henry's three successors were not men of his stamp. Richard was able, but frivolous; John, able, but so untrustworthy, that his servants turned against him; Henry, weak and incapable. The danger of royal absolutism passed away. There was even danger that the power of legislation would pass away too. For not only had the royal authority fallen into weak hands. The king's judges seemed to have lost their inventive power; and the list of writs was almost closed when the third Henry died. Henceforth judicial legislation would proceed only by the slow steps of decision and precedent. But there arises a king who, consciously or unconsciously, by genius or good luck, is destined to be famous for all time as the propounder of the great idea which is to crown the work of England in the history of Law. Law has been declared by kings, by landowners, by folks, by judges, by merchants, by ecclesiastics. If we put all these forces together, we shall get a law which will be infinitely stronger, better, juster, above all, more comprehensive, than the separate laws which have

Law is national.

preceded it. "That which touches all, shall be discussed by all." How far Edward foresaw this result, how far he desired it, how far he borrowed the ideas of others, how far he acted willingly, must be left for specialists to decide. But the broad fact remains, that he created the most effective law-declaring machine in the Teutonic world of his day, that he gave to England her unique place in the history of Law. One part only of the scheme was a temporary failure. Though Edward succeeded, after a sharp struggle, in compelling the nominal adhesion of the clergy to the new system, the Canon Law continued, for two centuries and a half, to be a real rival of the national law. But its day came at last; and, after the Reformation, the clergy found themselves legislated for by a Parliament in which they had ceased to have any effective share. Though a just judgement upon an unpatriotic policy, it was a blot on the system, which has never yet been quite removed. But, with the Reformation, the modern idea of Law was at last realized; and Hobbes could truly say, in words which became the text of Austin's teaching—"Civil Law is, to every subject, those Rules which the Commonwealth hath commanded him." But

this was the result of a thousand years of history; and, as yet, it was true of England alone.[12]

In this important matter, we are apt to be deceived. For, if we look to the continent of Europe, we see that there are *États Généraux* in France, *Cortes* in Castile and Aragon, a *Reichstag* or Diet of the Holy Roman Empire in Germany. And these bodies do, undoubtedly, declare a certain amount of law. But the great mass of the collection of French *Ordonnances* which has been edited by M. Laurière and his successors, was never submitted to the États Généraux; it is the work of the king and his Council. The scanty legislation of the Cortes does not suffice for the needs of Spain, which have to be met by such compilations as *El fuero viejo de Castilla*, *El fuero Juzgo*, and *Las Siete Partidas*, which are not legislation at all, but merely new editions of the old *Leges Wisigothorum*, collections of judicial decisions, and adaptations of the Pandects. In Germany, the Diet ceases to be an effective body from the death of Frederick II.; and, though Frederick III. and Maximilian make a gallant attempt to restore its prestige, it never becomes the normal law-declaring organ for Germany. Only in Scandinavia does the success

Differences elsewhere.

of the *Riksdaag* at all bear comparison with the work of the English Parliament. In Scandinavia there is a rapid and brilliant display of legal activity in the thirteenth century. The folk-laws of Norway, Sweden, Denmark, and Iceland are collected, and are rapidly followed by true national laws, the Landslög of King Magnus Lagabötir for Norway, and King Magnus Eriksson's Landslag (the so-called "MELL") for Sweden. Thenceforward, through the Union of Calmar, the modern idea of Parliamentary law seems to be making its triumphant way, until it is checked by the political troubles of the sixteenth and seventeeth centuries. But, unhappily, the history of Scandinavia is too obscure a subject to be handled safely by any but a specialist.

The state of things in France and Germany.

It is from France and Germany that we learn most clearly and unmistakeably the results which followed from a failure to grasp the Edwardian idea of Law. In France and Germany, the law which prevailed from the thirteenth to the sixteenth centuries was feudal, local, municipal, royal; but not national. The feudal and local laws begin to appear in the thirteenth century in the form of text-books, evidently the work of private compilers, though in some cases in an

The text-books.

impersonal guise. Thus we get the *Trés Ancien Coutumier* of Normandy and its successors, the *Conseil* of Pierre de Fontaines for the Vermandois, the *Livre de Jostice et Plet* and the *Établissemens le Roy* for the Orléanais, the customs of Clermont in Beauvoisis by Philippe Beaumanoir. Thus also we get the *Saxon Mirror* of Eike von Repgowe, the *German Mirror*, the *Suabian Mirror*, and the *Little Kaiser's Law* for Germany. But there is a curious difference between the fates of the two groups. For while, in France, the purely expository character of the text-books is rarely lost sight of, while Boutillier, as previously pointed out, expressly tells us that the authoritative law must be searched for in the *greffe* of the court or the *enquête par tourbe*, in Germany the *Rechtsbücher* seem to have been accepted, in all good faith, as actual law. The reason for this curious difference is not easy to find. We may suspect it to lie in the clerkly qualities of the French court officials. We know that some at least of the French courts kept careful records, and used the regular forms; the German *Weisthümer* and the German form-books, the decisions of the Court at Ingelheim and the *Oordelboek* of Drenthe, the *Summa prosarum*

Difference between French and German text-books.

The German text-books are treated as law;

dictaminis and the *Summa curiæ regis*, seem to have been poor by comparison. At a certain stage of its history, the life of an institution depends on its using stereotyped forms. So the text-books of Eike von Repgowe and others came to be accepted in Germany as Law, although men must have known them to be the work of private jurists. Documents of the fifteenth century quote the *Suabian Mirror* (under its later name of *Kaiserrecht*) as a textual authority ;[13] and all kinds of legends grow up, which attribute the authorship of the *Saxon Mirror* to kings and emperors.[14]

The French, only as expositions of law.

On the other hand, the French mind clung to the idea that the text-books were not themselves Law ; and, in the fifteenth century, we find a most interesting process going on. The uncertainty and obscurity of the local customs had at last aroused the hostility of the kings who were building up a great centralizing monarchy in France ; and, though they did not venture to alter those local customs which were so fatal an obstacle to their policy, they determined that at least they should be known and recorded. Perhaps they had a presentiment that greater things might happen as a result of the step.

Perhaps they thought that a custom once formulated might be altered; at least there would be something to attack. Perhaps they dreamed of a unified France, living under one law. If so, they must have had a rude awakening. For when, as the results of the labours of Charles VII., Louis XI., Charles VIII., and Louis XII., the official *Coutumiers* are finally before the world, it is a startling picture that they reveal to us. Each district lives under its own law, and is judged by its feudal *seigneurs*. Not merely great feudal princes, but petty *barons* and *seigneurs* claim the right of pit and gallows, of toll, of forfeiture in their fiefs. One is inclined to wonder where the State, as we understand it, finds any place at all. Nowhere can we find a more instructive contrast between the England of Elizabeth and the France of that same day, than in a comparison of Coke's First Institute with one of the official *Coutumiers* of the sixteenth century. The English law-book describes, in crabbed language no doubt, a system which is uniform, simple, and intelligible; the *Coutumier* depicts a state of anarchy and disintegration, of anomalies and inconsistencies. And yet it speaks only of a

The "redaction" of the *Coutumes*.

single district; there are dozens of other *Coutumiers*, and the whole *pays de droit écrit*, to be taken into account. And the mischief is not to be cured by ordinary remedies. Splendid as was the work of the great French jurists of the seventeenth and eighteenth centuries, of Moulin, Guy Coquille, Loisel, Domat, Pothier, it needed the red arm of the Revolution to make a Common Law for France.

Process of the redaction.

A word must be said as to the process by which these official *Coutumiers* were compiled; for it is illuminative of the history of Law. There is no thought of imposing new rules. The custom is, indeed, "projected" by the royal officials, and examined by commissaries of the Parlement of Paris; but, before it can be declared to be law, it must be submitted to an assembly containing representatives of all orders and ranks in the district, and solemnly discussed and accepted by them.[15] This is no mere form. In the great collection of Bourdot de Richebourg,[16] published in the eighteenth century, we find the very names of those who were present, in person or by deputy, at the reading of the various *projets*; we know the very points upon which they raised objections. The object of the

redaction is to render the use of the *enquête par tourbe* unnecessary for the future; it declares the custom once and for all. But to do this it holds a great and final *enquête par tourbe*; it collects, but it does not make, the law.

The *Landrechte* of Germany.

Turning to Germany, we find that there have been attempts at a similar process. The *Landrechte* which appear in the fourteenth and fifteenth centuries, the Austrian Landrecht (dating so far back as 1292), the Bavarian Landrecht of 1346, the almost contemporary Silesian Landrecht, are little more than official editions of the *Suabian Mirror* and the *Saxon Mirror*. But the inherent weakness of German legal developement gives rise at this point to the greatest tragedy in the history of Teutonic Law. Overcome by the evils of *Partikularismus*, dazzled by the false glare of the semi-Roman Kaisership, drugged by the fatal influence of the Italian connection, German Law ceases to develope on its own lines, and submits to the invasion of the Roman Law. This time it is not the Code of Theodosius which wins the victory; but that masterpiece of Roman statecraft, the Corpus Juris Civilis of Justinian, which the Glossators and Commentators of Italy have expanded into a marvellous system of scholastic

The "reception of the foreign law;" in Germany,

law. Through the universities, through the writers and teachers, through the learned Doctors who fill the courts of Germany, the Roman Law becomes the Common Law of the German Empire. Even feudal law, for which, of course, there is no provision in the work of Justinian, catches the impulse; and the "Feud Books" of Milan are received in Germany proper as the *Decima Collatio Novellarum*, that is, as the legislation of Roman Emperors. The process is going on during the whole of the fifteenth and sixteenth centuries; but the crowning point is the establishment, in the year 1495, of the *Reichs-kammergericht*, or supreme court of the German Empire, of whose judges at first half, afterwards all, are to be Doctors of the Civil Law. That Roman Law should revive in southern France, in Italy, in Spain, where the provincials had once stood thick as the standing corn, seems natural, and, perhaps, inevitable; that it should invade the very home of Teutonism is nothing less than a tragedy. Thus did Rome conquer Germany, a thousand years after the Roman Empire had ceased to be.[17] We must also remember that

and in Scotland.

Roman Law effected a similar triumph in distant Scotland.

But it is possible to exaggerate the triumph. Neither in Germany nor in Scotland did the "reception of the foreign law" wipe out the other laws. At the end of the Middle Ages, the Germans have a maxim: "Town's law breaks land's law, land's law breaks common law." It is only when other sources fail, that we resort to Roman Law. The laws of the towns play a great part in the history of Law. The privileges granted by the town-charters of the thirteenth century have borne fruit, and developed into great bodies of municipal law, which kings and emperors have to respect. Upon the scanty materials of charter privileges and local customs, the *Schöffengerichte* of Germany, the *cours d'échevins* of France, the bailies' courts of Scotland, have built up elaborate systems of local law, which strive to maintain exclusive control within the limits of their jurisdiction. The town laws of Lübeck, Hamburg, Goslar, Vienna, and Magdeburg, the *statuts* of Avignon and Arles, the *plaids de l'échevinage de Reims*, the *Bjarkoarätten* of Scandinavia, are among the most important monuments of law in the Middle Ages. But it is very significant to notice that none of these come from England. Chartered boroughs there were, of course, in the

Other laws.

The town laws.

land of the Common Law, and some of them had custumals of their own. But they were of small importance; and they stood much in fear of the law of the land. It is very doubtful whether any royal judge in England would have accepted the maxim: "Town's law breaks land's law." Had he done so, it would have been with great reservations and modifications. The victory of the Common Law put very narrow bounds to the growth of municipal custom in England.

Royal laws.

Finally, it must not be forgotten, that royal legislation forms an important factor in the law of the later Middle Ages. We have seen what became of it in England; how it was virtually swallowed up in the national law which dates from the end of the thirteenth century. The failure of the Diets and *États Généraux* of the Continent left the new idea to work out its own developement. The success of the feudal monarchy in France gave it prominence there. As each new province is added, by diplomacy or annexation, to the domain of the Crown, the royal *Ordonnances*, fettered only by the curious right of registration claimed by the Parlements, grow in number and importance. As new spheres of legislation—aliens, marine, literature—

make their appearance, they fall into the royal hands. In Germany, the elevation of the great feudatories into independent potentates inspires them with similar ambition; whilst the failure of the Empire reduces the importance of Imperial legislation. But neither in France nor in Germany can the royal legislation compare with the Parliamentary legislation of England. The absolutism of the *ancien régime* is often misunderstood. To suppose that the subjects even of Louis XIV. or Frederick the Great were helpless in the hands of their kings, is grotesque and absurd. Within their own spheres of action, these monarchs were, in a sense, absolute. But those spheres had their limits. For France and Prussia were not countries of one law, but of many laws. And if the king made royal law without let or hindrance, there were other laws which he could not touch. Despite certain faint theoretical doubts, the law which issued from the Parliament at Westminster was supreme over all customs and all privileges; it covered the whole area of human conduct in England, at least after the Reformation. No such assertion could be made of the legislation which came from the Council Chambers of Paris and Berlin.

Differences between these and national law.

Summary of the history of Law.

We are now in a position to sum up the results of our long inquiry into the history of Law. And if, for a moment, we seem to trespass beyond the domain of Law, upon the domain of anthropology, we need only trespass upon paths which the labours of trustworthy guides have made clear for us.

The age before law.

One of the strongest characteristics of primitive man is his fear of the Unknown. He is for ever dreading that some act of his may bring down upon him the anger of the gods. He may not fear his fellow man, nor the beasts of the forest; but he lives in perpetual awe of those unseen powers which, from time to time, seem bent on his destruction. He sows his corn at the wrong season; he reaps no harvest, the offended gods have destroyed it all. He ventures up into a mountain, and is caught in a snow-drift. He trusts himself to a raft, and is wrecked by a storm. He endeavours to propitiate these terrible powers with sacrifices and ceremonies; but they will not always be appeased. There are terrors above him and around him.

Appearance of custom.

From this state of fear, custom is his first great deliverer. To speculate on the origin of custom is beyond our province; we note only its effects.

And these are manifest. What has been done once in safety, may possibly be done again. What has been done many times, is fairly sure to be safe. A new departure is full of dangers; not only to the man who takes it, but to those with whom he lives, for the gods are apt to be indiscriminate in their anger. Custom is the one sure guide to Law; custom is that part of Law which has been discovered. Hence the reverence of primitive societies for custom; hence their terror of the innovator. Custom is the earliest known stage of Law; it is not enacted, nor even declared: it establishes itself as the result of experience.

Alterations of custom.

But, in all those societies which, for want of a better term, we call "progressive," there are two forces at work which tend to alter custom. As man's powers of reasoning and observation develope, he begins to doubt whether some of the usages which custom has established are, after all, quite so safe as he has thought. The custom of indiscriminate revenge is perceived to lead to the destruction of the community which practises it. The custom of indiscriminate slaughter of game is seen to lead to hunger and starvation. These results are, by man's growing intelligence,

apprehended to be the judgement of the gods upon evil practices, no less than the thunderstorm and the earthquake. So the custom of indiscriminate revenge is modified into the blood feud, and, later, into the rule of compensation for injuries. The horde of hunters, living from hand to mouth, becomes the tribe of pastoralists, breeding and preserving their cattle and sheep; and the notion of a permanent connection between the tribe and its cattle becomes slowly recognized. The rudimentary ideas of peace and property make their appearance.

The other force at work is the correlative of this. If old customs are laid aside, new customs must be adopted. As the terror of innovation gradually subsides, as it is found that a new departure does not always call down the anger of the gods, new practices are introduced, and are gradually accepted. Thus new custom takes the place of old.

Here we have what may be called the negative and the positive sides of Law. Old customs, proved by experience to be bad, are discarded; new customs, likewise proved by experience to be good, are adopted. But it is not to be expected that all should work smoothly. In

every community there will be men who cling to the old bad customs, and refuse to accept the new. There will likewise be men who rashly desire to innovate beyond the limits which the general sense of the community considers safe. Some means must be found for keeping these exceptional persons in check. And so we get the appearance of those assemblies which are neither, according to modern notions, legislative, nor executive, nor judiciary, but simply *declaratory*. They declare the folk-right. It would be an anachronism to say that they made Law. We may be quite sure that they do not argue questions of expediency. Not until an old custom has been definitely condemned by the consciousness of the community, do they declare it to be bad—because, in effect, it has ceased to be a custom. Not until a new practice has definitely established itself as the rule of the community, do they declare it to be good. So little do they claim the power of making new law, that when they do, in fact, sanction a new custom, they probably declare it to be of immemorial antiquity. A great deal of existing custom they do not declare at all; just because there is no dispute about it. This accounts, as we have said, for

The custom declared.

the fragmentary character of such early records of custom as we possess. Where there are no offenders, there is no need to declare the custom. The Law came because of offences.

Custom is recorded.

At first, as we have said, there is no record of custom, in the modern sense. It lives in the consciousness of the community, and is declared, if necessary, by some assembly, more or less comprehensive. But the influences of migration and conquest introduce a new feature. Brought face to face with new circumstances, the community feels that its customs, to which it clings as part of its individuality, are in danger of being lost. It may have invented for itself some rude system of runes or other symbols; it may, and this is more probable, have come into contact with some higher civilization which possesses a superior art of recording. Such is the case with the earliest monuments of Teutonic Law. They are not even written in Teutonic speech; and this fact has misled some critics into supposing that the *Leges Barbarorum* are really new sets of rules imposed by an alien conqueror. But, below the curious Latin of the Roman scribe, it is easy to read the still ruder language of the Teutonic folk. The famous "Malberg glosses" of the Lex Salica are

only the clearest example of a truth which may be traced in all the *Leges Barbarorum*. One has but to turn to the glossaries which accompany the classical editions, to see how the scribes were puzzled by hosts of strange Teutonic phrases for which they could find no Latin equivalents. The Anglo-Saxon and the Scandinavian Laws are transcribed in their native tongues. The *Leges Barbarorum* are not enactments, but records.

Custom is consciously altered;

For all this, their "redaction" was an epoch in the history of Law. It threatened to make permanent what before was transitory, to stereotype a passing phase. It remained no longer possible to deny the existence of a custom which was recorded in black and white; it was difficult to say that a new custom was old, when no trace of it appeared on the official record. And yet, customs must be altered if communities are to progress; and the Teutonic communities were progressive in no small degree. So there was a chance for a new kind of Law; a Law which should be declared by the conqueror. But the limited character and short duration of the law of such a conqueror even as Charles the Great, shows that the new idea at first met with little

but to a very slight extent.

success. The Law of the Church, the Law of the Merchants, the Law of the Fief, and the Roman Law, are the real innovating forces which transform the folk-laws into the law of medieval Europe.

Law is revealed.

Not one of these was Law in the Austinian sense. The Canon Law posed as a revelation, and, as such, was thoroughly in harmony with primitive ideas of Law. That which the folk discovered, through the painful process of experience, to be the will of the unseen Powers, was discovered by Popes and Councils, through the speedier process of revelation. The Canon Law did not profess to be the command of men; it professed to be the will of God. The Law Merchant and the Feudal Law were, in appearance, the terms of many agreements which merchants and which feudal lords and vassals had implicitly bound themselves to observe. But, at bottom, they were not very different from customs which, as the result of experience, had proved to be those under which, so men thought, the business of trade or of landowning could be best carried on. The Roman Law was the deliberate expression, by the wisdom of ages, of that right reason which men were coming to look

upon, more and more, as the true index to the will of the Unseen Powers. Its origin as the command of the Roman Emperor was well-nigh forgotten; and we may be very sure that, in Western Europe at least, it was not enforced by the will of those successors of Justinian who sat upon the trembling throne of Byzantium. Had it been so, the Roman Law would have disappeared for ever when Mahomet II. overthrew the Eastern Empire. But it was just at that time that the Roman Law was "received" in Germany.

Law as the command of the State.

We have travelled far, and as yet have seen no justification for the Austinian theory, that Law is the command of the State. As we said before, the first time that this theory becomes approximately true, is when the English Parliament is established at the close of the thirteenth century. This is the crowning work of England in the history of Law. But it is possible to overrate its effect. The great virtue of the English Parliamentary scheme was, that it enabled the exponents of all the customs of the realm to meet together and explain their grievances. If we glance at the Rolls of the English Parliament, we shall find that the great bulk of the petitions which are presented

during the first two hundred years of its existence, are complaints of the breach of old customs, or requests for the confirmation of new customs which evil-disposed persons will not observe. These petitions, as we know, were the basis of the Parliamentary legislation of that period. What is this but to say that the Parliament was a law-declaring, rather than a law-making body? Sometimes, indeed, the Parliament did make very new law. It made the Statute of Uses, in defiance of a long-established custom. We happen to know the ostensible objects of the statute; for its framers were careful to record them in the preamble to their work. They were, first, to prohibit secret conveyances of land, second, to put an end to bequests of land by will. The formal recognition of secret conveyances and the formal recognition of the validity of bequests of land, were the direct results of the passing of the statute. The lesson is obvious. The English Parliament was a splendid machine for the declaration of Law; when it tried to make Law it ran the risk of ignominious failure.

27 Hen. VIII. c. 10.

The truth must not be pressed too far, but a truth it is, that, even now, Law is rather a thing to be discovered than a thing to be made. To

think of a legislator, or even a body of legislators, as sitting down, in the plenitude of absolutism, to impose a law upon millions of human beings, is to conceive an absurdity. How shall such a law be enforced? By a single ruler? By a group of elderly legislators? By a few hundred officials? By an army? We know the power of discipline; and we may grant that a comparatively small but well-disciplined army can control an immense mass of unorganized humanity. But the army must have laws too, and how are these to be enforced? Perhaps by another army?

Law-making and Law-declaring

The simple truth of the matter appears to be this. The making of Law is a supremely important thing; the declaring of Law is an important, but a very different thing. Law is made unconsciously, by the men whom it most concerns; it is the deliberate result of human experience working from the known to the unknown, a little piece of knowledge won from ignorance, of order from chaos. It is begun by the superior man, it is accepted by the average man. But it will not do for the inferior man to spoil the work of his betters, by refusing to conform to it. So Law must be declared, and, after that, enforced. This declaration and enforcement are the work of the official

few, of the authorities who legislate and execute. There was plenty of Law in the Middle Ages; but it was, for the most part, ill-declared and badly enforced. The great problem which lay before the statesmen of the Middle Ages was to devise a machine which should declare and enforce Law, uniformly and steadily. The supreme triumph of English statesmanship is, that it solved this problem some five hundred years before the rest of the Teutonic world. By bringing together into one body representatives of those who made her laws, by confronting them with those who could declare and enforce them, England was able to know what her law was, to declare it with certain voice, and to enforce it thoroughly and completely.

NOTES TO CHAPTER II.

[1] See Schmid, *Gesetze der Angelsachsen*, ed. 2, pp. 482, 485. Liebermann, pp. 602, 605.

[2] Schmid, p. 500. Liebermann, p. 643.

[3] Luchaire, *Manuel des Institutions Françaises*, p. 257, n. See the interesting excursus on the history of Norman Law by Brunner, *Entstehung der Schwurgerichte*, cap. vii., and by the same author in Holtzendorff's *Encyklopädie der Rechtswissenschaft*, Part I., 5th ed., pp. 303–348.

[4] Pollock and Maitland, *History*, vol. i. pp. 155, 156.

[5] Acts of the Parliament of Scotland, 1540, cap. i. vol. ii. p. 356.

[6] Stubbs, *Select Charters*, ed. 5, pp. 84 (William I.), 96 (Henry I.), 119 (Stephen).

[7] Laurière, *Ordonnances des rois de France*, ann. 1312, vol. xii. p. 354.

[8] Viollet, *Précis de l'Histoire du Droit Français*, p. 160.

[9] Brunner, *Zur Rechtsgeschichte der römischen und germanischen Urkunde*, p. 211.

[10] Pollock and Maitland, *History*, vol. i. p. 559.

[11] Stobbe, *Geschichte der deutschen Rechtsquellen*, Pt. I. p. 485. Esmein, *Histoire du Droit Français*, 2nd ed., p. 312. It is noteworthy that one of the oldest and most important of French town-charters, the so-called *Établissemens de Rouen*, was granted by an English king.

[12] Hobbes, *Leviathan*, cap. xxvi.

[13] See, for example, the document given in Loersch and Schröder, *Urkunden zur Geschichte des deutschen Privatrechtes*, ed. 2, Part I. No. 339.

[14] Stobbe, *op. cit.*, p. 318.

[15] Esmein, *op. cit.*, p. 749.

[16] Bourdot de Richebourg, *Coutumier général*. Paris, 1724.

[17] See the process described by Brunner, in Holtzendorff's *Encyklopädie*, Part I. pp. 291–294, and Schröder, *Deutsche Rechtsgeschichte*, pp. 722–731.

CHAPTER III.

THE STATE.

The modern idea of a State.

By a State, or political society, we understand, at the present day, a community (1) of considerable size, (2) occupying a clearly defined territory, (3) owning direct and complete allegiance to a common authority, and (4) invested with a personality which enables it to act more or less as an individual. These characteristics have been so thoroughly discussed by eminent writers of the nineteenth century, from Bentham to Bluntschli, that it is hardly necessary to dwell upon them. Briefly, it may be said that the first and second, though always to be found in those organisms which, at the present day, we admit to be States, are perhaps not absolutely essential; while the third and fourth are vital to every conception of a State. It is difficult to fix the minimum number of persons capable of constituting a political community; instances of very small

States are at present to be found. It is just conceivable that a migratory community might be allowed to take rank as a State, if it fulfilled the other conditions of State existence. But a community which did not recognize the right of a common authority to control its affairs and to speak in its name, could not be treated as a political unit, for there would be no means of dealing with it. It might be a nation, it could not be a State. And a community which did not act as a personality with a perpetual existence could not be recognized as a State; for as its members changed, by deaths and births, by emigration and immigration, they might decline to be bound by the engagements of their predecessors, on the ground that those engagements were not of their own making. Such a contention would be fatal to the existence of State life.

An abstraction.

This last condition may be said to be the product of the other three, and to constitute the final result of a long historical process, which has culminated in modern times. That the State should act as an individual, should maintain good faith, clemency, and moderation, should endeavour to further the world's progress—these are some

of the most advanced political ideas of the age in which we live. But it will be seen that they involve an intellectual effort of no mean quality. A human being is a concrete fact, familiar to the meanest intelligence. A corporate personality is an abstraction, which is only arrived at by a process of reasoning. And that particular corporate personality, which we now understand as the State, is an abstraction unusually difficult to grasp, as may be seen by the commonest of tests. A man of merely average morality will hesitate at defrauding an individual, even if he can do so with safety. He will hesitate less at defrauding a railway company or a club, though these are very simple abstractions. He will not hesitate at all about cheating the State, if he can do so with impunity. He cannot see that he is doing any wrong at all.

A borrowed notion.

It is evident, then, that we make a very violent assumption, if we assume that primitive Teutonic Law has any conception of the State, as we understand it. Though it will probably be found to be suggestively modern, the precise date at which the word "State" makes its appearance in Teutonic countries is of little importance; for it is a word which conveys no special meaning,

and is used to cover all sorts of ideas. Perhaps the only point worth noticing about it is, that it is evidently borrowed from Latin; and we may possibly be safe in drawing the conclusion that the Teutonic languages had no native equivalent for it. But, even to a Roman, the word *status* alone had no such meaning as that which we now attribute to the term "State." The phrase *status rei publicæ* would indeed have conveyed to a Roman of the fifth century after Christ a meaning very similar to our modern notion of a State; and the fact that the Teuton borrowed only a fragment of the phrase may seem to show that, even when he borrowed from it, he had no very clear understanding of its meaning. But we must not seek in philological speculation the rudiments of the Teutonic State.

The political stage of society not the oldest.

It is one of the best established conclusions of anthropology, that the political stage is not the earliest stage in the history of society. Before men are held together by obedience to a common leader or ruler, they are held together by the tie of blood and worship of a common ancestor. Before the State comes the Clan. But the relations between the two stages are often misunderstood. There is much vague talk about the

State being an enlarged family, as though a mere increase of numbers would inevitably substitute the State for the Clan; just as, according to another, but equally doubtful theory, it substituted the Clan for the Family or Household. But whereas there is in the latter theory just this amount of truth, that Household and Clan are organized on the same principles of common ancestor worship and real or fictitious blood relationship; there is no such identity of principles between the State and the Clan. The success of the State means the destruction of the Clan.

State and Clan.

The reason will be clear if we consider for a moment the relationship of the two organisms. It comes through the art of war, one of the chief factors in early civilization. The qualities of the warrior are so all-important in early stages of man's history, that his best intellectual endeavours are directed to improve them. Now one of the essentials of success in war is the power of combination. More and more are we coming to the conclusion that Providence is on the side of the big battalions. Given equally good organization, the largest army will win. No doubt the gradual discovery of this truth had much to do with the substitution of the blood

feud for indiscriminate revenge, with the substitution of wergilds for the blood feud. The warrior was needed to fight his clan's battles; he must not be sacrificed in the private feud.

But this principle, carried a little further, results in leagues or combinations of clans for the purposes of warfare. As the Clan is a better fighting machine than the single warrior; so the league of clans is more powerful than the single clan. The clans which combine are the successful clans; the clans which remain isolated are destroyed.[1]

Leagues of clans.

This is just the point at which we can take up the thread of Teutonic history. The armies which swarm into the Roman Empire, the armies which invade Britain, are leagues of clans. The admirable study of the German invasion of Gaul, undertaken by M. Fustel de Coulanges, reveals clearly the two results which the progress of the art of war has produced among the Germans in the three centuries which have succeeded the era of Tacitus. The most famous of the old Tacitean clans, the Chatti, the Chauci, the Cherusci, have disappeared, or been swallowed up in greater organizations. Their places are taken by new groups—Franks, Saxons, Alamanni

—which are not ethnical names at all, but (and this is especially significant) names which inevitably suggest military organization.[2] The "Frank" is a warrior, or, perhaps, a wanderer. The "Saxon" is a swordsman (*sahsman*); the "Alamann" a stranger, that is, an invader. On the other hand, it is discoverable that these new bodies are not homogeneous. The Franks comprise Salians, Sicambrians, Ampsivarians, Chamavians, Ribuarians. The Saxons include fragments of the Chauci and the Cherusci; the Alamanni are formed out of the Quadi, the Hermonduri, and other clans. A new organism has swallowed up the old.

The war band.

But the new organism is not a mere enlargement of the old; it is based on entirely different principles. The Clan has a natural leader; the league of clans has none—it is an artificial body, though, doubtless, nearness of blood and similarity of worship have something to do with its formation. The leader of the Clan is the man who, on the principles of heredity, represents the eponymous ancestor of the clan. The natural authority of a league of clans would appear to be the chiefs of the component clans. And such a body does, apparently, tend to form itself.

But it is one of the least disputed conclusions of human experience, that an army controlled by a group of leaders has no chance against an equal army controlled by a single leader. And so the league of clans produces the war chief, who may, perhaps, borrow the old Clan title of king, but whose proper designation among Teutonic peoples is "heretoch," or host leader. This is the true character of the leaders of the Teutonic invasions. Childeric and Clovis, Alaric and Ataulph, Gundioc and Gondobad, Hengst and Horsa, are war chiefs. How they or their predecessors were originally chosen, it is impossible to say; by the time at which we find the war chief in history, he has become hereditary, doubtless in imitation of the Clan king, whose name he has borrowed. Perhaps there was a formal selection —later events in the history of the State seem to render the fact probable; perhaps he came unconsciously to the front by his superior military abilities. In any case, his position is unmistakeable. He is, first and foremost, a leader of warriors. When Saint Remi writes his letter of congratulation to Clovis, he addresses him in the following significant words—"Rumour has reached us that thou hast taken into thy hands

the conduct of war matters (*administrationem rei bellicæ*). It is not surprising that thou beginnest to be what thy ancestors have always been."[3] When the Teutonic peoples are converted to Christianity, it is as bands of warriors that they are baptized.

Organized on different principles from the clan.

But a military leader will naturally organize his army on other than Clan principles. In the Clan it is age and birth, the nearness to the common ancestor, which are the titles to consideration. In the army, military skill and strength are the qualities which command respect. Another of the valuable services rendered by M. Fustel de Coulanges to the study of this question, is the establishment by him of the disappearance of the old Teutonic blood nobility, in the face of the new military organization. The old Clan families, the Amali and Balthi among the Goths, the Asdings among the Vandals, the Agilolfinger among the Bavarians, die out before an aristocracy founded on a totally different principle. Only in a few of the *Leges Barbarorum* is there any mention of a nobility by blood. But there is much to be said of a new class, the persons *in truste dominica*, the *antrustions*, whose importance is marked

by the fact that for injury to them the offender must pay the triple wergild.[4] As we shall see, when we come to deal with the organization of society in ranks, these privileged persons are simply royal officials, chosen for their military or administrative qualities. Many of them are of servile birth; it is impossible that they should claim ancestral honours. The nobility of blood has been replaced by the nobility of the sword and the office. Among the Franks, there is no trace of the former class when the *Leges* are compiled. Clovis and his successors go by the Clan title of Merowings. But this is a polite fiction; the relationship of Clovis to Meroveus, if Meroveus ever existed, is unproved and unprovable.

The principle of selection for personal merit has wider results than the overthrow of a Clan nobility. It is responsible for what is, perhaps, the most vital difference between the Clan and the State.

The Clan is a community of groups; the State is a community of individuals. All that we know of Clan organization leads us to believe that it stopped short at the Household. With the individual members of the Household, it

dealt only through their natural head, the House-Father. They were in his *mund;* his voice spoke for them at the Clan assemblies, he led them to fight in the Clan battles. The Germans of whom Tacitus writes conducted their warfare by *familiæ et propinquitates.*[5] But the King in the time of the *Leges Barbarorum* dealt directly with the individual. The man who failed to attend the host at the king's summons paid a heavy fine, not to the clan, but to the king.[6] The one unmistakeable resolve of the invading chiefs is, that every freeman shall be liable to direct military service. So deeply rooted is this idea, that the successors of Clovis enforce it, not only on their Teutonic followers, but on their provincial subjects, who, as Roman citizens, have long been exempted from duties in the host.[7] The *trinoda necessitas,* the war-duties of service in the field, manning the walls, and bridge building, are incumbent on every freeman in the Anglo-Saxon kingdoms. The Clan is an exclusive organization, founded on rigorous principles of religion and kinship, and reverencing birth and age as the symbols of dignity. The State is a community of casual units, bound together by the tie of military allegiance, acting directly upon its

individual members, valuing only personal ability, and willing to take personal ability wherever it can find it.

Such seems to have been the rudimentary idea of the State which the Teutonic peoples had projected at the epoch of the *Leges Barbarorum*. But now we have to remember that the most enterprising of these peoples were brought face to face with a much more advanced conception of the State, perhaps the most advanced which has ever been realized in practice. The organization of the Roman provincial empire dazzled the eyes of Clovis and his successors; and they made a gallant attempt to live up to the brilliant example set before them. It is not necessary to suppose that, in so doing, they were actuated by any lofty principles. The instinct of such a warrior as Clovis is for plunder; and Clovis saw in the organization of the Roman Empire an admirable machinery for the extortion of large and constant supplies of plunder. At first, he and his successors contented themselves with the position of Roman officials, though we may be sure that they did not account very strictly for their doings to the Imperial authorities. They are the *magistri militum* and *consules* of the Empire.

The influence of the Empire.

Ultimately, they declare their independence But, in their own minds, they do not destroy the Empire; they succeed to it. The old organization is kept up, at least in language; the officials of the Merowingian palace are strictly modelled on the hierarchy of Byzantium, the Frankish *graf* is the successor of the Roman *comes*. In the end, the Frankish king assumes the sacred title of Imperator, and is crowned at Rome.

The Frank Empire a fiction.

But, of course, the whole thing is a mimicry and a sham. Another of M. Fustel's admirable services to the study of the period, is the discovery that the word *respublica*, so common among the writers of the Roman Empire, disappears from the Frankish documents, otherwise closely framed on Roman models.[8] The word disappeared, because its meaning was no longer understood. The Frank understood a war chief at the head of an army; and he knew what plunder was. A State and its revenues, to be used for the common weal, he did not understand. To the Merowingian king, the kingdom which he or his ancestors had won was a piece of property, to be treated as other pieces of property. The language in which the definite assertion of independent authority by

the Frankish kings is described by the chronicler who writes the *Life of St. Trivier*, is well worthy of notice. He speaks of them as removing the law (*jus*) of the Empire, and putting aside the government of the State (*respublica*), to enjoy their own power (*propria potestas*).[9] The deliberate way in which the Frank kingdom was parcelled out again and again in family settlements, points in the same direction.

But such an idea is, of course, absolutely inconsistent with the Roman conception of a State as it then existed, and we need not wonder that the Frank Empire, even after the brilliant reign of Charles the Great, fell rapidly to pieces. It had been a sham Empire from beginning to end, making pretensions which it could not support, using forms which it did not understand, undertaking duties which it could not perform. Its real importance lies in the ideas which it contributed to the intellectual endowment of the Teutonic race. The most unimpressionable architect can hardly live for years in a city crowded with ancient buildings, without absorbing unconsciously some ideas which will influence his work when he goes to distant lands. And the Franks were by no means unimpressionable people; their first fault was,

that they were too impressionable. When the Teuton begins to build again the fabric of the State, after the earthquakes of the anarchic centuries, we shall find that he has ideas which he did not exhibit in the days of Clovis. But, so far as historical continuity is concerned, we leap from the days of Clovis to the days of Henry the Fowler and Rodolph of Burgundy. The interval is occupied by an artificial monstrosity, which forms no real part of the history of the Teutonic State.

The Fief. The true connecting link between the Teutonic ideas of the fifth century and those of the tenth, is that mysterious and many-sided phenomenon which we call feudalism. Feudalism had so many causes and so many aspects, that all explanations of its meaning seem inadequate. But one thing

Military. will strike us very specially about the Fief. It is a group of warriors, just as were the Franks whom Clovis had led into Gaul, and the Wisigoths whom Ataulph had led into Acquitaine. The lord of a Fief is, above all things, a war lord; at whose ban or summons all his vassals must turn out to fight. Historically, as we know, the Fief is a fragment of the Frankish empire which its official ruler has converted into something very like private property. But the disturbed years of the

ninth and tenth centuries have made it the unit for military protection against the Normans, the Wends, the Czechs, and the Moslems. It is, primarily, a group of warriors; not a wandering band like the bands of Ataulph and Clovis, but a band settled on a fixed territory.

Hierarchical.

We observe, however, another point about this system of feudalism. It has become hierarchical. This fact we can, no doubt, account for historically; by remembering that the feudal hierarchy of the tenth century represents the official hierarchy of Charles the Great, just as that, again, represents the official hierarchy of the Provincial Empire. But the readiness with which we can account for a fact should not blind us to its significance. When the lord of a fief found himself with a thousand fighting men on his domains, it did not follow that he could summon them all personally to war. He could only summon his immediate vassals, who, in their turn, summoned their under vassals, and so on. To use technical terms, the lord had the *ban*, but not the *arrière-ban*. But this feature, it will be observed, is fundamentally opposed to the principle of direct military service, as established by the Teutons of the invasions. Judged by

that standard, the later Carolingian empire had become, not one State, but an almost countless number of little States. Still, as the shadowy sense of unity was never quite lost, even in those years of terror, as feeble and doubtful descendants of Charles the Great went on calling themselves kings and emperors, until the extinction of the line, it seems more properly to be regarded as a reversion to an older type of organization, the system of federated clans. Just as the tribal army had been a collection of clans or families, so the imperial army of Charles the Simple or Louis d' Outremer was a collection of fiefs. As the leaders of the tribal army could act only through the chiefs of clans and heads of households, just as no one but a member of a clan could be a member of the tribal army: so the emperor or the king could act only through his great vassals and under vassals, and no one but a feudal vassal of the empire could serve in the host. In the years of anarchy, the Clan had gained on the State.

The resurrection of the State.

But the inherent military weakness of the Clan organization showed itself in the successes which attended the attacks of the heathen on the feeble empire of the heirs of Charles the Great, and the

impending ruin is only averted by the revival of the State. In the last years of the ninth and during the tenth centuries, we see the feudal chiefs of Western Europe striving to rid themselves of the ghost of the Roman Empire, and to set up something more practical in its place. In what we now call Germany, they never, of course, entirely succeeded; sentiment, as still in Germany, was stronger than common sense. But, even in Germany, the kingship was always, in theory, distinct from the Empire; and, among the Western Franks, we get at this time the creation of the first typical modern State, the kingdom of France. The three successive elections of Hugues of Paris (888), Rodolph of Burgundy (923), and Hugues Capet (987), mark the definite rupture with the old traditional idea of the Frankish Empire. As the Chronicle of Saint Medard, speaking of the last event, is careful to inform us—"So the kingdom of the Franks was disjoined from the line of Charles the Great, Emperor and King of the Franks."[10] There can be no mistake as to the character of the new authorities, or the reason for their creation. They are to be leaders in war against the invading heathen. "At that time" (says Ordericus

Vitalis), "the unbelieving nation of the Huns, drunk with slaughter, rapine, and all kinds of cruelty, poured itself over the Gauls. The Frank, Burgundian, and Acquitanian princes, gathering together, chose Prince Hugh as their king."[11] "He was elected by the prelates and magnates of the whole of the Gallic kingdom," says Walter of Dery, telling of the choice of Rodolph of Burgundy, "to expel thence the rage of the heathen madness."[12] It is the same with Conrad the Franconian and Henry the Fowler in Germany, though, as we have said, the traditions of the Empire are stronger there, and men never quite seem to know whether they are electing a German king or a Roman emperor. "Then, when the princes and elders were assembled, the army of the Franks, in the place which is called Fritzlar, appointed him" (Henry the Fowler) "to be king, in the presence of the whole peoples of the Franks and Saxons."[13] The Teutonic king of the Middle Ages, like his predecessor of the fifth century, is, first and foremost, a war chief; and the State is a band of warriors.

New features.

But, if we begin to look closely at the position of the new kings, after the first disturbances have

passed away, we find that they are claiming something more than mere leadership in war. It is, perhaps, but a slight variation from their original function that, when they have driven back the enemy from without, they turn to put down the anarchy within. This developement is a marked feature of the twelfth century; to the Peace of God succeeds the Peace of the King. The Truce of Henry IV. in Germany, and the A.D. 1103. Soissons Peace of Louis the Young in France, A.D. 1155. are landmarks in the history of the State. The king is no longer merely a war chief; he is the maintainer of order within his realm.

The royal domain.

But this is not all the change. It is important to remember that the medieval king was not a landless knight errant, like his predecessor of the fifth century. He was, practically without exception, always a great feudal chief, with broad domains of his own. Henry the Fowler held the magnificent fief of Saxony, long before he became king. Hugh the Great was Count of Paris, and had great possessions in the Valley of the Seine and the Orléanais. Hugues Capet was one of the greatest landowners (if we may call them so) of the north of France.[14] We shall never understand medieval history, unless we distinguish

between the *domain* of the king, which he held before his election, as feudal proprietor, and the royal rights which, in theory at least, were conferred on him only by election.

Its effect on the kingship.

The feudal domain soon began to react on the kingship. It is hard for any man, very hard for an unlettered warrior, to live constantly up to the artificial doctrine that he is two persons in one. And, as the idea of property is simpler than the idea of kingship, it is not surprising to find that the kings manifested a strong tendency to look upon their kingdoms *as domains*. It is to this tendency, undoubtedly, that we owe the hereditary character of the medieval kingship. We have seen that it was, at first, clearly elective. But the elective king had hereditary domains; and when these went to his heir, it was natural that the kingship should go with them. In this way the Crown of France and, ultimately, even the kingship of Germany, become hereditary. We cannot be sorry for the result. Of all political institutions, elective monarchy is that which stands most conclusively condemned by the verdict of history. But it is worth while to note the chief cause of its downfall.

Heredity.

Judiciary character.

Moreover, to the feudal position of the

medieval king the State owes a still greater accession of strength than the hereditary character of its rulers. When we come to deal with the Administration of Justice, we shall see that, next to its military character, the most important feature of feudalism is its judicial aspect. The Fief is a judicial as well as a military unit; the lord of the fief has jurisdictional rights over every one of his vassals, and, probably, over many persons who are not, in strictness, his vassals. He may not pronounce judgement; but judgement must be pronounced in his court. What more natural than that the feudal chief who has become a king should claim similar rights over the men who have become his subjects? Of course, there is a fierce and bitter struggle; for the king's claims of Justice are opposed to the claims of those who elected him, with no thought, certainly, of diminishing their own jurisdictional privileges. But, in the end, the king wins, as we shall hereafter see. In England, the victory is early and complete; because England is one fief, an acquired fief, and the royal domain is coextensive with the kingdom. The English kings of the twelfth century have to promise, in their charters, "equity and

mercy in all judgements"; they have become judges, as well as leaders in war and preservers of the peace.[15] The struggle is longer and harder elsewhere; in France, Scotland, and Germany, the king is never wholly successful. And the fact is one of the chief causes of that superior solidity which the State in England manifested, all through the Middle Ages.

Administration.

Lastly, to its feudal elements the State probably owes that general power of management of the affairs of its members which we call Administration, and about the proper limits of which we are apt to differ so strongly. The medieval king was a feudal chief, the feudal chief was a landowner. Besides his *territory*, as we should consider it, on which his free vassals were settled, he had his domain in the strictest sense, his *inland*, which he cultivated by forced labour, under the management of his bailiffs. For the control of his bailiffs and serfs he often prescribed regulations or ordinances;[16] and, in any case, the policy of management was entirely in his hands. With his accession to the kingship, he saw this power widen in possibilities, till it covered the whole of his kingdom. Of course he found himself opposed at every turn by rival

claims. But his officials were prompt to seize opportunities; and soon the theory became established, that, where no positive rival claims could be substantiated, the king, as general guardian and administrator of the realm, was entitled to the business. So we get such special subjects of royal management as widows and orphans, aliens, Jews, lunatics, and, later on, the printing-press. Nature is so fertile in novelties, that the gleanings are often worth more than the harvest.

Thus we have traced the growth of the State, from its origin as a military institution of the simplest type, to its compound developement of defender against attack, keeper of internal peace, dispenser of Justice, administrator of the affairs of the land. How it acquired legislative power, we have previously seen.[16] To complete our sketch, we have but to face one important question. The State, yes. But who constitute the State? To answer this question, we must again go back on our history.

The members of the State.

The State begins, as we have seen, with a band of warriors, owning allegiance to a war chief. It has been the subject of keen dispute whether the Teutons of the *Völkerwanderung* brought with

them their wives and children, their slaves and their herds; or whether they were simply armies in marching array. The question is not very important for our purpose; for we may be quite sure that such women and children as may have accompanied the hosts were considered as being each in the *mund* of the warrior whose tent or waggon he or she shared. It is more important to notice, that the step by which the Frank marked his definite attitude of comradeship with the provincial was by forcing him to military service.[17] This is not the rule of the later Roman Empire; the soldier there is a volunteer and a professional, and this fact may have been one of the great causes of the dissolution of the Roman State. But the Frank idea of the State is a body of warriors.

At first only warriors.

The feudal principle.

The same idea re-appears with the resurrection of the Teutonic State in the tenth century. The State consists of the king, and those who have sworn fealty to him; and the kingdom is the territory comprising their fiefs, and, of course, the domain lands of the king. But the direct action of the King is limited to the latter; in the former, he deals only with the chiefs, the men who have sworn fealty to him. Indirectly,

perhaps, he can demand the levy of all the freemen, or, at least, all the fief-holders in his kingdom. But, except in the case of his direct *lieges*, he can only do it circuitously.

This is why the oath at Sarum is so momentous an event, not only in English history, but in Teutonic history. When King William in the Lammas of 1086 summoned the knights of all his followers, or, as the Anglo-Saxon chronicle puts it, "all the landowning men of property there were over all England, *whosesoever men they were*," and made them swear oaths of fealty to him against all other men, he was enlarging the boundaries of the State, and marking an epoch in its history.[18] Henceforward, when he summoned his array, he would have a direct claim, not only on his tenants-in-chief, but on their under vassals. Any vassal who took up arms against him, even at his own lord's command, would be guilty of the crime of treason. It is long before the kings in France win such a victory. In the France of 1358, the king can barely obtain from the Estates of the Langue d'Oil an acknowledgement of his right to levy the *arrière-ban*.[19] In Germany, the old tradition of Karolingian times, that the king can

The oath at Sarum.

call upon every armed man for service, dies away before the new feudal idea of fief duty; and the army of the Empire, which had once assembled in its glory at the ban of Charles the Great, becomes less and less of a reality, till it dwindles into that shadowy state of existence, so graphi-
A D. 1648. cally described by Carlyle. After the Treaty of Westphalia, it becomes practically impossible to enrol it. But this is because the German State has itself ceased to exist.

Taxation. The results are the same, if we trace the growth of the State through that duty which became the substitute for military service and the basis of political organization, viz. the duty of paying taxes. Changed conditions of warfare brought about in Western Europe generally, at the close of the eleventh century, the practice of commuting military service for the payment of money. The astute move made by Flambard in 1094, when he took from the ten thousand men-at-arms assembled at Hastings their ten shillings apiece of victual money, soon found its successor in the scutages of the twelfth century. The "host tax" in France, and the "common penny" in Germany, are similar developements; the last is formally recognized as the basis of the Imperial

army and its roll call by the Nurnberg Diet of 1422.

But the limitation of military service, or its equivalent, to the immediate vassals of the king, even to the landowning men of the kingdom, left the State still but a narrow institution, an institution surrounded by rivals which maintained a steady resistance to its claims. The decisive step was taken when the State began to assert its right to tax, not only its immediate vassals, but all persons living within its territory. This attempt dates definitely from the end of the twelfth century; and it is again worthy of note that the event which prompts it is a military event—the wars of the Crusades. The Ordinance of the Saladin Tithe in England, the *aide pour le cas de croisade* in France, are the signals of the new movement; and the State is resolutely bent upon establishing as a regular practice a doctrine so vital to its increase and prosperity. The general fall in the value of money, the increase of State activity, with its increase of expenses, combine to render the old feudal aids and scutages, and the revenues of the royal domains, insufficient for the purposes of government; and the King is thus furnished

Its extension,

with a plausible excuse for enlarging his claims.

In England, But the struggle is long and bitter; and it is only the generous policy of 1295 which enables the State to win an early and complete victory

Germany, in England. In Germany, the Imperial tax never establishes itself in the Middle Ages as a regular institution.[20] The Holy Roman Empire

France. remains to the end a feudal body. In France, the State does indeed make good its claim, after long struggle, and subject to many unjust exceptions, to direct and universal taxation. But the struggle is fought on wrong lines; and the results are disastrous. The failure of the scheme of *États* in 1314 throws the kings back on their rights as feudal lords; and as, by the successful policy of the monarchs of the Capetian line, province after province is added to the royal domains, it is treated as an estate to be exploited, rather than as a kingdom to be governed. Thus the taxes in France become the property of the king, not of the State; and the system of taxation begins to assume that complexion of anomaly, confusion, and privilege, which Necker exposed with such terrible force in 1784.

It is, in fact, only in England, and, possibly, in

Scandinavia, that the State, even at the close of the Middle Ages, at all approaches that condition of sovereign omnipotence described by Hobbes, and elaborated by Bentham and Austin. In England, at the close of the sixteenth century, the union of all the elements of society has produced a State which is, for practical purposes, over all persons and in all causes supreme. But neither in Germany, nor in Scotland, nor in France, would Hobbes' doctrine have applied. In Germany, the Holy Roman Empire was dying of inanition, and its powers were strictly limited; it was barely real enough to prevent the culmination of territorial sovereignty among its members. In Scotland, the State was still confronted with an older and more powerful enemy than even the great feudal vassal. On the Scottish Parliament Rolls of the year 1587, there is an instructive list of "the clans that has captains, chiefs, and chieftains, on whom they depend oftimes against the will of their landlords, as well on the borders as highlands, and of some special persons of branches of the said clans." Immediately preceding this entry, is a list of the landlords and bailies "dwelland on the borders and in the highlands where broken men has dwelt

Sovereignty of the State.

and presently dwells."[21] It is a perfect picture; the Clan *versus* the State. France is often spoken of as the supreme example of a compact and united State from the days of Louis XI. But it is one thing to be centralized, another to be united. Whoever studies carefully the constitutional history of the *ançien régime*, will not fail to see, under the centralizing machinery of the royal policy, deep and irreconcileable differences of organization. Many systems of law; *pays de droit écrit* and *pays coutumiers*. Many systems of taxation; *pays de généralité, pays d'États, pays d'élection, pays de la grande gabelle, pays de la petite gabelle*. Many systems of finance; *provinces de l'imposition foraine, provinces d'étranger effectif, provinces des cinq grosses fermes*. Many kinds of courts; royal, feudal, municipal, ecclesiastical. So far from being a united country, France is, at the close of the Middle Ages, even at the fall of the *ançien régime*, one of the most disunited countries of Europe. There is no sovereign State; the Austinian doctrine will not apply. When Louis XIV. made his famous boast—*L'État, c'est moi*—he was not revealing his own power, he was exposing the weakness of his State.

Notes to Chapter III.

[1] See this idea excellently worked out by Morgan, *Ancient Society*, Part II. cap. v. (*The Iroquois Confederacy*).

[2] F. de Coulanges, *L'Invasion Germanique*, pp. 297–299.

[3] Duchesne, *Historiæ Francorum Scriptores*, i. p. 849.

[4] *Lex Salica*, xli. 3, xlii. 1, lxxviii. 1 (*optimatibus vel antrustionibus*), *Lex Alamannorum*, xxix., Wihtræd's Laws, 20, Alfred's and Guthrum's Peace, 3, etc.

[5] Tacitus, *Germania*, 7.

[6] *Lex Ribuaria*, lxv. 1.

[7] F. de Coulanges, *La Monarchie Franque*, pp. 291–295.

[8] *Ibid.*, pp. 118–120.

[9] Dom. Bouquet, vol. iii. p. 412.

[10] *Ibid.*, vol. ix. p. 56. So also Ordericus Vitalis, Bk. I. p. 369.

[11] *Ibid.*, p. 16.

[12] *Ibid.*, p. 7.

[13] Widukindi *Chronicon*, Lib. i. cap. 26 (M. G., ss. iii. p. 429).

[14] Esmein, *Histoire du Droit Français*, pp. 324, 325. On the history and claims of the royal domain, cf. Choppin, *De Domanio Franciæ*, 1588.

[15] Stubbs, *Select Charters*, 5th ed., p. 99 (Henry I.), p. 121 (Stephen), p. 251 (Richard), p. 271 (John).

[16] This appears to be the true character of the English royal Assises of the 12th century, and the early *Ordonnances* of the French kings.

[17] Cf. F. de Coulanges, *La Monarchie Franque*, pp. 289–295, above cited. See also on this point Boretius, *Die Wehrpflicht unter den Karolingern*. (Beiträge zur Capitularienkritik.)

[18] Stubbs, *op. cit.*, pp. 81, 82.

[19] Laurière, *Ordonnance of* 1355, vol. iii. p. 134.

[20] Schröder, *Deutsche Rechtsgeschichte*, p. 527.

[21] Acts of the Parliament of Scotland, vol. iii. pp. 465 and 466.

CHAPTER IV.

THE ADMINISTRATION OF JUSTICE.

THE administration of justice, which is now looked upon as one of the peculiar and inevitable functions of the State, comprises, in modern times, several very distinct processes. The State, at least in some cases, apprehends and prosecutes the offender, investigates the facts, declares the law, pronounces the award, and carries it into effect. The first truth which the student has to grasp is, that these different processes have different histories, that they were acquired by the State in different ways, and at different times. The convenient doctrine of modern writers, that the administration of justice, as we understand it, was always the special function of the king or State, is quite unwarranted by the facts of Teutonic history.

The blood feud.

The earliest notion of justice, as distinct from mere indiscriminate revenge, that we find among

the Teutonic peoples is, undoubtedly, the blood feud. Barbarous as such an institution appears to us, we have but to think for a moment, to realize its immense importance, as a step in human progress. A man receives a wound from another, is perhaps killed. Instantly the passion for slaughter awakes. All who are in any way interested in the dead man—those who worshipped his gods or fought by his side, are eager to avenge his death on any person who may be supposed to be connected with his murderer. General carnage is the result; no man's life is safe. But, if it can once be established, that the right of vengeance belongs only to a limited circle of the dead man's relatives, and may be exercised only against the immediate relatives of the offender, the area of vengeance is substantially narrowed, the evil of the deed proportionately decreased. This is the work of the blood feud. How the momentous change is made, we have no knowledge, at least from Teutonic sources. In all probability it was connected with the increasing definiteness of marriage relationships, and that tendency towards monogamy, which we find in every progressive society. But, when we first turn the search-light of history on the

Disappearing when

Teutonic history begins.

Teuton, he is found to be passing through and beyond the blood feud. Only indirect traces of the feud remain, for the most part, to mark its vital influence on early society. The Lombard king Rothar insists that the new custom of compounding for wounds shall prevail among his subjects, *cessante faida hoc est inimicitia.*[1] "If a stranger slave slay an Englishman," say the Wessex customs which Ine confirmed, "his master ought to give him up to the (dead man's) lord or kin, or to pay sixty shillings for his life. If the master will not make this bargain for him, then let him set the slave free, and let his kin pay the dead man's *wer*, if he has free kin; if he has not, then let his foes deal with him."[2] Charles the Great, in a Capitulary of 802, sternly forbids the kin of a slain man to increase the evil already committed, by denying the peace to the man-slayer who craves it.[3]

The *wer*.

To the blood feud, then, succeeds the *wer* or money payment as compensation for the injury inflicted. Here again we are in the dark as to the origin of the change, which may, possibly, have taken place before the introduction of coined money into the Teutonic world, but was probably almost contemporary with that

event. It is, of course, highly probable that Christianity, with its hatred of bloodshedding, may have had much to do with the substitution of payment for corporal revenge. But upon these obscure points we can only conjecture. One thing is tolerably clear, that the change was not very old when the *Leges Barbarorum* began to be compiled. For the earliest of these codes, the Lex Salica and the Lex Ribuaria, the Edict of Rothar and the Dooms of Æthelbirht, are chiefly concerned with minute and careful regulations on the subject. And, as we have said, a matter with which primitive codes concern themselves is pretty sure to be a disputed novelty. The connection between the blood feud and the new system of compositions is abundantly clear from the texts recently quoted. If any further proof were necessary, we have but to point to the Low Latin word *faidus*, which is used indiscriminately in the *Leges*, to signify either the feud itself, or a payment by which it is bought off.

No means of enforcing payment.

But two points in connection with the system of pecuniary compositions require careful attention. To begin with, it seems to have been a purely voluntary system. It is difficult, in fact, to see how the Clan, an organ destitute

of anything like an executive machinery, could have enforced the acceptance of the *wer*, without bringing down upon itself that state of general disturbance which the *wer* was designed to avoid. Its elders (*rachimburgi*) could pronounce the amount of the *wer* which the precise nature of the offence merited; but it is extremely improbable that they possessed any means of securing its payment.[4] The manner in which the early texts speak of the money composition seems to show that acceptance and payment are alike voluntary. If the avenger succeeds in bringing the evil-doer before the elders, he must take care that the accused gives security to abide by the pronouncement. For this security modern Germans have coined the appalling word *Urteilserfüllungsgelöbnis;* the Roman scribes express it by the simpler term *fides facta.*[5] On the other hand we see, even in Charles the Great's day, signs of the man who will not accept the money payment, who prefers to carry on his feud.[6]

Bootless crimes.

In the second place, it was always admitted that there were some offences for which the money payment could not atone. Even in the time of Tacitus, the Germans drew a distinction

between the crimes which were made the subject of accusation before the *consilium*, and the offences which were left to the blood feud or the *wer*.[7] Whatever the *consilium* of which Tacitus speaks may precisely have been, it is clear that it was a thing different from the avenging kin. The *Westgötalag* contains, in both its stages, an instructive chapter on *Orbotœmal*, or bootless offences, which it also describes by the significant name of *nithingsværk*. For these, no pecuniary payment will atone; the offender is banished, and his goods forfeited.[8]

Position of the king.

These are our two starting points for the history of State justice. The king comes to the help of the Clan by compelling the avenger to accept the *wer*, and by compelling the offender to pay it. He likewise takes upon himself the punishment of bootless crimes.

Enforces acceptance,

The king compels the acceptance of the *wer*. To this point we have already alluded, in speaking of the existence of the feud. Another passage or two may be quoted from the legislation of Charles the Great. "If a feud arise, let him be seized who is opposed to a peace; and let them be compelled to peace, even if they are unwilling."[9] "If any one on the spur of necessity

has committed homicide, let the count in whose jurisdiction the deed was done compel the payment of the composition and the swearing of the peace; and, if either party refuse to consent to that, . . . let him (the count) cause the contumacious party to come into our presence, that we may send him into exile for such term as we may think good, till he be chastised." [10]

and the payment of the *wer*.

But it would have been difficult for the king to have deprived the avenger of his right of vengeance, unless he could have assured to him the payment of the composition or fine. The part played by the royal officer in the enforcement of the *wer* is admirably explained by Dr. Sohm in his monograph, entitled *Der Process der Lex Salica*.[11] When the offender has made default, the claimant proceeds to the *graf* or count, a royal official, and demands execution against the goods of the offender, to the amount specified by the *rachimburgi* as the equivalent of the fine. The newness of this procedure at the time when the Lex Salica was drawn up, is shown by the almost savage rules which govern its exercise. "But if the *graf* when summoned shall dare to take more than is lawful or right, let him redeem himself or compound for his life." [12] And if, after

all efforts to secure payment have failed, the avenger insists upon his original right of blood, he cannot be denied. The *wer* is only a substitute if paid. If the guilty person cannot find a friend to redeem him, he must pay with his life. He is given into the hand of the avenger, who does with him what he will.[13] But this final remedy is thrust more and more into the background. Charles the Great gives it another blow when he undertakes to levy *wer*, not only on the offender's movables, but on his land. "If the quantity of movables there found shall not suffice for the composition, then let it be made up from his immovables."[14] Still, however, the idea of revenge as the final remedy dies hard. It awakes to new life with the feudal Appeal of Battle; it remains to our own day as the private duel.

The king's share.

But the co-operation of the king in the enforcement of the *wer* brings about one very important by-result. The king's officer does not work for nothing. The Lex Salica tells us that two parts of the sum raised by the *graf* go to the injured party; while the third remains to the *graf* himself as *fretus* or *fredus*.[15] The word is suggestive. The *fredus* is the fine paid to the king for the

breach of *Friede,* the peace. By refusing to compound for his offence, the offender has been guilty, not only of a private injury, but of an offence against the king.[16] This idea gives the king a direct and extremely practical interest in the punishment of offences. The royal commission for enforcement of the *wer* is $33\frac{1}{3}$ per cent. We can now understand why the ancient Peace of Hildebert and Chlothar declares that the man who compounds for a theft privily is a thief himself.[17] He has stolen the king's *fredus.* And so we get the beginning of that double element in legal proceedings—the claim of the Party and the claim of the State—which has had so much influence on legal developement. The Lex Salica knows it as *faidus et fredus.* The Anglo-Saxon Laws express it as *wer and wite.*

The bootless crimes are offences against the king.

The attitude of the king towards the *orbotæmal,* the bootless offences, is equally clear. We have seen that the proper consequence of these is banishment and forfeiture. The community will have nothing more to do with a man who kills another in a church or at the Thing, who slays a sleeping man, or a woman. He may go out into the wilderness; the community will no longer tolerate him.

But this penalty has a double aspect. The goods of the offender may be shared between the Clan and the State;[18] but in the outlawed man the State loses a warrior. Accordingly, we soon find that the *orbotæmal* are reckoned as offences specially directed against the king. The change seems to have taken place, amongst the West Goths of Sweden, between the compiling of the older and the newer editions of the *Westgötalag*. In the latter we note the significant statement, which follows the enumeration of the *orbotæmal:* "All these cases are breaches of the king's peace *(ethsöre)*. Each offender redeems himself from the wilderness with forty marks when the injured party has interceded for him."[19] So we get the rule that the king's ban entails a heavy fine, a *punishment*, as distinct from a composition. The State is willing to waive its extreme rights, and to keep its warrior, on payment of a fine. As ideas of justice become stricter, the alternative changes into corporal punishment; but the theory is the same. The "eight ban cases" of Frankish law, the "pleas of the crown" in England and Scotland, are the beginning of true criminal law. If the offender will not submit to the punishment ordered by the

Criminal Law.

State, if he flees for it, the alternative is always the same, banishment and confiscation of goods. This is the "outlawry" of England, the "horning" of the Scottish courts. It is a terrible and very effectual remedy, and is always at the disposal of the State. In England, so late as the eighteenth century, to recover a debt in the king's courts, the first step is outlawry of the debtor.

State Justice and Clan Justice.

For some time, the provinces of the Clan and the State are kept distinct. As the old German maxim puts it, the ordinary case is decided "by Richter's ban, by Asega's judgement, by Bauer's will." The *Richter* is the royal official, who executes the sentence. The *Asega* is the ruling elder, who formulates the decision of the assembly, the *Urteil* or Doom. The *Bauern* are the assembly of elders, who declare the law. But the royal element gains fast. The *Bauern* are replaced by the official *Schöffen* or *scabini* of the Karolingian organization. The *Asega* disappears, except in Frisia and the Rhineland, where Teutonic conservatism is strong; his functions are absorbed by the *Richter*. In England, the royal sheriff ousts the ealdorman. The *echte Ding*, or popular assembly, meeting by ancient custom at the

change of moon, gives way before the *gebotene Ding*, summoned by the royal official when need arises. The court of the *harath*, or Hundred, in Sweden becomes an appendage to the *ræfsingathing* or royal court; and may not be held more than twice a year without the permission of the *landshærra* or royal official, or at least of the *laghman*, who is by this time falling under royal influence.[20] Not only has the king the strong hand, which can enforce justice; he has more than one improvement to offer which we must call scientific. The ancient methods of proof are clumsy. If the accused can get his neighbours to swear that he did not commit the offence charged, he will get off. The oath-helpers are easy to procure; only in Scandinavia does the *tylft* seem to have maintained its genuineness. Elsewhere it is replaced by the ordeal or the judicial combat, later by the production of writings, all of these being peculiarly royal methods. The old cumbrous process of *nam*, or distress levied upon the offender's goods, to make him appear before the moot, is forbidden, as leading to disturbances; the accused is summoned by the royal ban. If he will not come, he is outlawed, and, before he can appear and

The royal reforms.

defend himself, must pay the king's *oferhyrnes*,[21] or contempt-fine. The justice of the State proves itself superior to the justice of the Clan.

Feudal Justice.

But, in continental Europe, the rise of feudalism deals a severe blow at royal justice. The king's official, throwing off the allegiance which he owes to the king, treats his judicial powers as private property. Perhaps he revives the ancient tradition of the Roman Empire; for we must always remember that the Karolingian *graf* has in him, so to speak, a background of the Roman *comes*. Towards his non-military subjects, his *roturiers* and *Bauern*, he is, probably, a real judge, just as was the *comes*. Towards his feudal vassals, he is much more like the Karolingian *Richter*. He summons the court and executes the sentence. But it is doubtful if he may even preside in person; the *seigneur* always appoints a *bailli*, in Scotland the hereditary sheriff must have a sheriff-depute. The lord may be a party to the case, and "no one can be judge in his own cause." Certainly he does not, nor does his representative, declare the law. That is, as of old, the function of the assembly; and here, again, the Fief will remind us of the Clan. But there is small room left for the State. The *Établissemens*

le Roy, a well-reputed French law book of the late thirteenth century, will not allow any ban but the lord's within the limits of the fief. "Neither can the King put his ban in the Baron's land, nor the Baron his ban in the land of the Vavassor."[22] The *coutumier* or non-feudal tenant pays sixty shillings for various offences against his lord.[23] But sixty shillings is the old Karolingian royal fine. The *seigneur* has acquired for himself the royal right. In Germany, the great feudatories will not hear of the royal claims, and wring from the Kaiser the Privileges in favour of the Princes, which definitely renounce the royal right of interference. Only in one respect does feudalism contribute anything to the justice of the State. The feudal system is a hierarchy, at its head stands the king. But a hierarchy begets the notion of appeal from lord to overlord, a notion entirely foreign to Clan justice, and probably borrowed from ecclesiastical sources. In later times, the skilful jurists who surround the French throne will make good use of this notion; the German princes nip it in the bud by procuring Privileges against Appeals. But in the palmy days of feudalism it is worth very little. Even the bootless offences have ceased

to be the province of the State. The *seigneurs* (and they are legion) who exercise High Justice, have their eight-pillared gallows, and dispose of the greatest offences. In the year 1363, the king of France claims for the Parlement at Paris, his supreme law court, only four classes of cases —(1) matters affecting Peers of France, (2) matters affecting "certain" prelates, chapters, religious persons, barons, consuls, *scabini*, and *communes*, (3) matters affecting the royal domain, (4) appeals from royal officials.[24] Nor must it be supposed that, under this last head, the Parlement was really obtaining appellate jurisdiction of a sweeping character. The royal provosts and bailiffs were long restricted in the exercise of their offices to the area of the royal domain. In the year 1315, Louis le Hutin expressly recognizes the absolute right of the feudal *seigneur* to criminal jurisdiction in all cases.[25] So powerless, indeed, do the kings and Kaisers of the twelfth and thirteenth centuries feel themselves, in the face of feudal claims, that they encourage the creation of municipal courts, whose jurisdiction is yet another blow to the justice of the State. The Church, also, has her independent courts, which are full of business.

At the close of the thirteenth century, State justice is almost dead in continental Europe. Men are judged by their lords, by their fellow-burghers, by their priests; they are not judged by the State.

Resurrection of royal justice.

It is very suggestive to notice, that the medieval king makes head against the claims of feudalism in precisely the same way as his ancestor, in the early days of the Teutonic State, made head against the Clan. The parallel is another strong point of resemblance between the Fief and the Clan; it is also a confirmation of the view which regards the Frank Empire (as distinguished from the kingdom) as a pretentious unreality. We have seen that the primitive king gained his judicial position by guarding the peace, by assisting the imperfectly developed moot of the Clan, and by offering superior methods of procedure. The story repeats itself.

The king's peace.

One of the most prominent features in the rise of the medieval monarchy is the importance attached to the keeping of the peace. It is true that the kings did not take the initiative. The peace of the Church and the peace of the gild are older than the peace of the king.[26] But the king's peace is the best, because it is the strongest.

So long as it is well kept, there is a chance for industry to flourish. When the English Lion of Justice, who in his time "made peace for man and beast," gave up the ghost in Normandy, "then," says the Chronicler, "there was tribulation soon in the land, for every man that could forthwith robbed another."[27] At first the king's peace is purely personal; when he dies, there is no royal peace till his successor has proclaimed his own. When the guardians of the realm, on the death of Henry III., proclaimed the peace of the absent Edward, they took a step of immense importance, which was fitting to mark the accession of the English Justinian. Peace is to be henceforth perpetual; hitherto it has been the peace of the king, now it is to be the peace of the kingdom. Edward's contemporaries are not all so fortunate. St. Louis has to content himself with the *quarentena*; not till forty days are over may disputants engage in private war.[28] Only on the royal domain are private wars absolutely prohibited.[29] In 1315 the nobles of Amiens deny that the prohibition applies to them; the king covers his retreat by promising to search the registers.[30] The old idea of the blood feud dies hard after its feudal invigoration. The kings sometimes even use it for

their own purposes. Frederick II. sanctions it for the defence of the Empire.[31] Charles VI. of France, in his great Ordonnance of 1410, directs his royal officials, if they cannot find the actual disturbers of the peace, to seize and imprison their nearest relations and friends.[32] In the seventeenth century, the *Oranboth*, or murder-fine, is still shared amongst the relatives of the deceased in Sweden and Denmark; and until the changes introduced by Knut and Waldemar in the twelfth and thirteenth centuries, is enforceable against the kin of the malefactor.[33] But such methods are unworthy of State justice, and are only resorted to in bad times. The great rule is established, that he who acts "against the peace of our lord the king" is an outlaw, and has forfeited his land and goods. He is "in the mercy of the king"; and any punishment short of death and confiscation is a merciful indulgence. Moralists have often commented on the severity and monotony of the medieval criminal law, which seems to have but one penalty for every offence. No doubt this is a grave defect in later times; but historical justice does not allow us to forget the immense difficulty in setting up a criminal law at all, and the necessity for supporting it by

the most terrible engine known to man's invention. A severe criminal law is probably better than no law.

Extension of the idea.

But, the doctrine once established, that breach of the peace is an offence against the king, it is soon seen to be capable of almost unlimited application. Originally, no doubt, a breach of the king's peace meant a flagrant act of violence. But it is difficult to draw the line. Strictly speaking, any act which, however slightly, disturbs the physical personality of an individual, is a breach of the peace. But where does his personality cease? Not, certainly, at his corporal integument; for, in that case, his money might be stolen from his pocket without a breach of the peace. Nor even at his clothes; for then the theft of a horse from his stable would not be a breach of the peace. In fine, the doctrine of "the peace" is extended to cover everything in a man's *possession*: everything over which he has and claims to exercise physical control. The doctrine of Possession is a mystery concerning which many volumes have been written; and to dwell on the subtle questions to which it gives rise would be out of place. But this is its simplest element. That which a man physically

Possession.

controls, with title or without, is in his possession. Every physical interference with such a thing is a breach of possession. Every breach of possession is a breach of the peace. This is a marvellously fruitful idea for the extension of royal justice. It seems to have sprung into life in the twelfth century, probably with the publication of the *Decretum Gratiani*, in which the Canonist's *actio spolii*, harking back by a long series of steps to the Roman Interdict *Unde vi*, is made the basis of an action for breach of possession. Our own Henry II. made noble use of his opportunity; the "possessory assizes" of his day, the assises of *novel disseisin*, *mort d'ancestor*, *d'arrein presentment*, which brought so much business to the royal courts, are direct applications of the Canonist doctrine. However good a man's claim, he is not justified in taking possession by force. If he does so, the State will restore the ejected person before the question of right is discussed. In France, the doctrine meets with furious opposition from the feudatories, and is only saved by the subtlety of Simon de Bucy, President of the Paris Parlement, who distinguishes between the *Saisine*, which is an affair of the feudal court, and the mere *possession*, which is

Breach of the peace.

matter for the king.[34] Any breach of possession, however slight, is a breach of the king's peace. And so we get the *Nouvelle disseisine* and the *Trouble et empêchment* in France, and, later and still more fruitful than the possessory Assises, the Writ of Trespass in England, which is to bring so many cases into the king's Courts, that the word "trespass" becomes almost an equivalent for "offence" in general. In Scotland the brieve of *spuilzie* still more directly reproduces the canonical process. In Germany, the Kaiser seems to have lost his chance. Only in case of denial of justice by a lord (*Rechtsverweigerung*) does the State claim direct jurisdiction.[35] In Scandinavia, on the other hand, where feudalism has scarcely existed, the right of the king to punish breaches of the peace is clearly laid down by Birger Jarl in the thirteenth century, and becomes part of Christopher's Landslag in the fifteenth.[36]

Indirect jurisdiction.

But the king also gains much jurisdiction by indirect interference with rival jurisdictions. The hierarchical character of the feudal system comes in here very usefully; for if the vassal cannot get justice in the court of his immediate lord, what so natural as that he should appeal to that lord's

superior, "for defect of justice"? And, though the overlord, even if he be the king, will hesitate about accepting the appellant's statement at once, he will not refuse him an order to his lord, bidding the latter do good and hasty justice according to the custom of the country. If the *seigneur* neglect to obey this command, the king may then avocate the cause to his own court. Sometimes, the remission to the feudal tribunal is avoided by a glaring fiction — the "because the lord has therein renounced his court," of the English writs. Sometimes, the royal lawyers assert that if the king is once "seised" of a cause, no matter in what capacity, the power of the inferior tribunal is gone. This is the *prévention absolue* of French law.[37] The English king took a still bolder step when he laid it down, in a lost Assise, that no man need answer for his freehold without a royal writ. This was in the reign of Henry II.; perhaps the royal jurist had in his mind the oath taken at Sarum some century before. Of a like character is the purely feudal jurisdiction of the king himself, who, as we have previously seen, is always a great feudal lord with domains of his own. Alongside of the provosts and bailiffs of the feudatories, are the

provosts and bailiffs of the royal domains, including especially, as time goes on, the great privileged towns to which the king has granted charters, and which, despite their privileges, are, on strictly feudal principles, "in the hand of the king." And it is the king's aim to make his courts as good as possible; in order that they may attract business from their rivals, and pave the way for the hoped-for consummation, when, on the annexation of the fief to the royal domain, the men of the fief shall "resort" to the tribunal of the royal bailiff.

Superior methods of the royal courts.

Thus we come to the third means by which the State extends its jurisdiction. For we may take it as granted that State justice would not succeed in defeating its rivals unless it had something better to offer than they. We have seen before how the Frankish king gained on the courts of the Clan by the use of the royal ban and the new methods of proof. The same story is repeated by the royal courts of later times.

The Writ.

One of the most powerful instruments of royal aggression in the Middle Ages is the Writ or *Breve*, which, as its name implies, is a short written document, emanating from the royal chancery. At first it has no special significance;

any royal document is a Writ. But the term soon becomes specially appropriated to those royal commands which are issued in the ordinary course of administration—the writ to summon the host, the writ for levy of a feudal aid, the writ for election of knights of the shire. Especially is it used for those royal commands which are, in form, merely assisting, but, in reality, undermining the courts of the Fief and the Clan. The writ is, in fact, the later representative of the old royal Ban, not now proclaimed by sound of trumpet, but inscribed on parchment and sealed with the royal seal. It has many advantages over its rivals. In the first place, it is written, its delivery to the addressee can be easily proved, much more easily than the old verbal or symbolic message of the Clan courts, the summons of English law, the *semonce* of Normandy, the *mannung* of ancient Germany, which are clumsy oral proclamations, requiring the presence of numerous witnesses, and only available at certain hours of the day. Again, it proves itself. If a letter comes from a baron or a viscount, its authenticity may be doubted. But no one can doubt the royal seal, or dispute the contents of a royal document. All through

the Middle Ages, the unimpeachable character of the royal writ is one of its magic powers.[38] Again, the man who disobeys the royal writ, does so at his peril. He is setting himself in opposition to the power which, if not greater than all other powers in the land combined, is probably greater than any one of them taken singly. What precisely will happen to the contumacious recipient, no one, perhaps, knows. He will be fined; in the background there lies the original penalty of the royal ban, exile and confiscation of goods. Fourthly, the king keeps a register of his writs; when his officials have once issued a writ, they are likely to issue others of the like form. But a writ judiciously worded, expressing a principle which men have begun to adopt, is likely to become a precedent; and a precedent frequently acted on becomes a law. It is no good for a man to take forcible possession of land to which he believes himself to have a right, if he knows that the royal chancery will issue a well-known writ to the sheriff compelling him to give up his forcibly-acquired possession at once. Lastly, though the writ is, originally, doubtless, the actual expression of the royal will, and issued solely in royal business; as time goes on, it is

found a profitable practice to issue writs to private suitors who are willing to pay for them. And private suitors are very willing to pay for them; they "purchase" writs, so great are their advantages, at a high price. When they have bought them, they produce them in the court of a fief, and either put an end to or modify the feudal proceedings. It is useless for Magna Carta to prohibit the selling of justice; the writs continue to be sold none the less, because they are useful.

The Jury.

Again, another powerful weapon is the use of that process of proof by Inquest which, in later times, becomes the familiar Trial by Jury. The notion of the older lawyers was, that this celebrated institution was always popular in character. But they were misled by superficial resemblances in ancient popular institutions which, upon closer examination, are found to be radically different in character. The *Næmth* of Scandinavian Law is the nearest popular analogue; the Anglo-Saxon Oath Helpers and the German *Gemeindezeugniss* are very different things. But the Inquest which is the historical origin of our Trial by Jury is an essentially royal privilege, not exerciseable by the courts of the Clan or the Fief. It

A royal privilege

is used by Charles the Great and his successors, as a special means of discovering property belonging to the Fisc; perhaps they borrowed it from Roman Law. In the last days of the Merowingian kingdom, the royal domain had been plundered right and left. The plunderers were, naturally, bent on concealing the plunder.

Charles the Great.

Charles the Great bade his *missi* hold local enquiries, at which the men of the neighbourhood should be compelled, whether they liked it or not, to swear upon oath as to the disputed facts. Their position was an unpleasant one; they had to be protected by special powers. But the process was so successful, that the churches borrowed it, though it is doubtful whether it could properly be used by any but royal foundations. It was eminently suited for a new king, coming to a country of the circumstances of which he was ignorant. William the Bastard used it for the compilation of Domesday; Edward I., in collecting materials for the Hundred Rolls. In Normandy it was a ducal privilege.

But the privilege could be sold. If it was convenient for the king to decide a disputed question by a reference to the sworn verdict of the men of the neighbourhood, so was it

especially convenient for the private suitor. The existing methods of proof, though perhaps, originally, royal innovations, were themselves becoming antiquated. Trial by battle was unpopular with many people; in England it was especially unpopular, as a badge of Norman tyranny. People were losing faith in Ordeals; they were abolished by the Lateran Council in 1215. The still older proof by Oath-helpers, modernized into the "wager of law," had become a farce. So there was much room for a new method of proof; and the Jury filled the gap. It is the method specially chosen for the decision of possessory questions; in the thirteenth century the royal justices of Assise are going regularly round the shires in England, holding Inquests thrice a year. In Normandy, before the end of the twelfth century, the *barones jurati* are perambulating the *Vicomtés* and holding *Inquisitiones.* The Parlement of Paris sends out its *commissaires* on all sides to hold *enquêtes;* and, by the end of the thirteenth century, has established a *Chambre des Enquêtes,* though the French Inquest is already losing its original character, and becoming infected with ecclesiastical notions. St. Louis, in his anxiety to

abolish the Battle, even makes grants of *placita spadæ*, the special pleas of the sceptre, to his feudatories, amongst them the right of holding Inquests. But, to the last, Trial by Jury remains a specially royal privilege. In a country in which, as in Germany, the Crown is weak, it hardly strikes root at all. In France, the strong opposition of the feudal officials and the Romanizing jurists succeed in destroying its simplicity and value before it has held a fair chance of showing its merit. In Scotland it takes no hold, only in England, where the royal power is strong, is the Jury a permanent and triumphant institution, the normal method of deciding questions, not only between king and subject, but between subject and subject. There, no doubt, it becomes the bulwark of liberty. What was once the privilege of the Crown has become the right of the subject. The process which, in the thirteenth century, has to be forced upon the criminal by the *peine forte et dure*, is, in the sixteenth, the national boast. But, for all that, it is in origin a royal privilege, and one of its chief functions in the history of Law has been to bring cases into the courts of the State.

Failure in Germany and France.

By means such as these, the State has, no

Partial character

doubt, acquired some share in the Administration of Justice before the close of the thirteenth century. In the main, that share has been won by a strong competitor in a keen struggle; though the dim Roman tradition which, in continental Europe at least, has never entirely died out, and which, with the revival of the study of Roman Law, has awoke to new life, has been a powerful ally of the State. But the dogmatist who asserts that the Administration of Justice is the original and exclusive function of the State, may be advised to glance for a moment at the condition of Europe in the later Middle Ages. If he looks towards the South, he will see that the royal *Siete Partidas* recognize, alongside of the royal *adelantados* and *perquisidores*, the feudal *señores*, and the elective *alcalde;* he will see, in the fourteenth century, the royal Ordinance of Alcala fully admitting the feudal jurisdiction of the Castilian *hidalgos*, and the Cortes of Zaragossa guaranteeing to the feudal nobility of Aragon their exclusive rights of judgement over their vassals, even in capital cases—they are to be *señores de horca y cuchillo.*[39] If he glances at the North, he will find Stiernhöök, well on in the seventeenth century, explaining that the position

of the State's victory.

of the king as dispenser of justice is a very modern affair, and, even in his day, subject to popular rights of a substantial character.[40] If he travels to Scotland, he will find scarcely any royal justice worth the name, until the establishment of the Court of Session in the sixteenth century. If he studies the official account of the little kingdom of Hannover, drawn up in the year 1832, he will find no less than fifty-six lay proprietary courts at work, exclusive of municipal and ecclesiastical jurisdictions. Above all, if he looks at the great collection of French custumals, drawn up by royal authority in the sixteenth century, and published by royal command, he will see such an array of feudal tribunals that there seems to be almost no room for the State courts; the volumes of Bourdot de Richebourg read like a denial of the existence of State justice. Even in England, where the State is immeasurably stronger than elsewhere, he will, perhaps, think of the long and bitter struggle over the clerical immunities, which began with Henry II., and which was not concluded till the Reformation. It is not true, of course, that the Church maintained her independence as a judicial power in those countries which did not accept the

doctrinal Reformation. We find the orthodox Philip of Spain, in the year 1581, holding a solemn enquiry on the subject of ecclesiastical jurisdiction, and, as a result, insisting that an appeal lies from the clerical to the royal tribunals. We remember also the Pragmatic Sanction of Charles VII., to which the French nation clung, even after its pretended repeal by Louis XI. But it is true to say that, until the Reformation, no single monarch of Western Europe could, with any show of plausibility, claim to be over all persons and in all causes within his dominions supreme.

Judicial organization. Two principles.

The success of the State, as the Administrator of Justice, depends, however, not more on the completeness with which it annexes the jurisdiction of its rivals, than on the method of its own judicial organization. Two leading principles have governed the action of the Teutonic State in this matter.

Royal officials in popular courts.

At first, we observe that the State is content with sending officials into the popular courts, to collect the fines which, as we have seen, belong to the State, to try the bootless crimes, and to render that assistance to local justice which is one of the most effective methods of recommending the royal

Ante, pp. 105–112.

jurisdiction. So we get the royal *graf* or *comes* sitting with the Asega, the sheriff with the ealdorman, the *sacebaro* and the *schultheiss* with the *thunginus* and the *rachimburgi*, the sheriff's *gingra* or junior along with the Hundred's *ealdor*. The moot is held under the protection of the royal shield, or of that banner which, in its crudest form, as a wisp of straw, may to this day be seen in Germany, floating over the field which is under the sentence of the Court. In Scandinavia, if we may trust the somewhat confused account given by Stiernhöök,[41] the State does not even trouble itself to appoint separate judicial officers, at least until later times. The provincial governor and the royal beneficiary do not appear to sit with the ruling elder and the president of the Hundred in the trial of cases. But the king shares the fines which the popular courts impose.[42]

Drawbacks to the principle.

The principle, however, which unites the State and the Clan in the Administration of Justice, valuable as it is to the State in many ways, has its drawbacks. The popular procedure is, as we have seen, cumbrous and ineffectual. The increase of business caused by the activity of the State renders attendance at the moot irksome. Charles the Great is obliged to ordain that no one

but the new professional *scabini* and the actual litigants and witnesses need attend the moot, except on the ancient customary days.[43] This step at once draws a sharp line between the *echte Ding*, which is still a popular moot, and the *gebotene Ding*, which has now become a royal court. In England, soon after the Conquest, we get the parallel distinction between the Sheriff's Tourn, when the tithing rolls are called over and the View of Frankpledge held, and the monthly session of the Hundred, when ordinary litigious business is done. A step further, and we find the State, no longer content with its ordinary officials, sending round special ministers, to hold sessions for the trial of very important cases, usually of great crimes, as well as to inspect and report upon the ordinary machinery of the local courts. These are the *missi* of the Karolingian Capitularies: the Justice-General and his deputies, who, in ancient Scotland, perambulate the country twice a year, "on the grass and on the corn."

Circuit judges.

But, in the later Middle Ages, we observe a rival principle at work. The king, the head of the State, has from the first been surrounded by military and household officials. As, with the progress

Curia Regis.

of war and conquest, he becomes a great land-owner, he requires many officials to manage his domain. Questions arising out of this management are constantly coming before him. As they increase in number and complexity, it becomes impossible for him to dispose of them personally. They are left to be decided by his domestic officials, who constitute his *hof* or *palatium*, his *curia*. At first this body is not a judicial body at all, in the modern sense. It is the Court at St. James', rather than the Court at Temple Bar. It is merely the household of a great potentate, in which the affairs of interest to its master are discussed. Still less is it a universal Court of Justice for the whole kingdom. Never was a wilder and less historical doctrine broached, than that the *Curia Regis* of the French and Anglo-Norman kings was a tribunal for the general disposal of disputes between any of the king's subjects. Offences against the king's peace, offences against the royal property, disputes between royal officials—these are the original business of the *Curia Regis*.

Royal judges in fixed districts.

But it is found convenient to extend the principle. The royal domain is scattered over many areas; the royal peace must be kept in

many districts. So we get the royal *baillis* and *prévôts* in France, the royal *Vögte* in Germany; and each of them holds a court for the settlement of the affairs of his office. Now these courts are totally different from the old popular courts, by the side of which they exist, but from whose jurisdiction they are carefully exempted. Some of them, it is to be feared, go the way of the popular courts, and, in the triumph of feudalism, get into proprietary hands, especially in Germany, where the State is lamentably weak. We may suspect the Burggraves of Nurnberg and Goslar to have been originally bailiffs of the royal domain.[44] But others retain their original character, and establish, alongside the feudal hierarchy, a royal hierarchy which, at any rate in France, enters into a deadly struggle with it. There is an important difference, however, between the French and the German organizations. The French kings seem to have entrusted to their bailiffs, if not to their provosts, the maintenance within their districts of that royal peace which, as we have seen, was one of the chief functions of the revived monarchy.[45] By consequence, as the power of the State grew, the power of the local State courts grew likewise. The position of the

French developement.

Ante, pp. 86, 87.

king as feudal suzerain rendered the feudal nobility of the bailiwick (for, of course, there were many fiefs on the royal domains) amenable, at least in theory, to the royal bailiff. The subtle expansion of the theory of "royal cases" by the great legists whom the Capetians retained in their pay, added enormously to the judicial powers of the bailiff. As the latter is deprived of his political functions, he becomes more exclusively a judicial officer. New courts of justice appear between him and his supreme authority, the Parlement of Paris. These are the "Presidial Seats," and, somewhat later, the provincial Parlements, of one of which the great Montesquieu was president. Thus, on the eve of the Revolution, the State has, all over France, an elaborate systems of courts, whose action is, indeed, fettered by the rival claims of feudal and municipal jurisdictions, but which are, heart and soul, in the interests of the State.

German development.

In Germany the work of royal justice has been far less thoroughly done. The Karolingian circuit system disappears as the princes win their jurisdictional privileges and exemptions. The duty of maintaining the royal peace is recognized, indeed; and the *Landfriedensbezirk*, or Peace

District, with its Captain and its Commissioners, has its court, from which an appeal will lie to the *Reichshofgericht* or Palace Court of the Emperor.[46] But the Peace Captain is too often a feudal prince, and the Peace Courts become feudal benefices.[47] Even when they are no longer given to the great feudatories, but to the royal bailiffs, the result is the same. The *Landvogt* of the thirteenth century becomes the *Landgraf* of the later Middle Ages, an independent feudal magnate, one of the destroyers of the Empire.[48]

Failure of both.

If the principle of staffing the State courts with royal officers has led to the extinction of the royal jurisdiction, as in Frankland and Scotland, where the hereditary counts and sheriffs become virtually independent of the State, the principle of special State Courts appears likewise unable, at least in some cases, to prevent a similar catastrophe. We may suspect that, even in France, it would have gone hard with the royal courts, but that a desperate remedy was found. The really startling features of the French royal courts of the later Middle Ages are their heredity and venality. By a series of steps which are well known to students of French

The *Paulette.*

legal history, and which culminated in the famous Arrêt Paulette of 1604, the judicial offices of the French Crown became transferable and heritable on payment of an annual duty. The favourite mode of filling the royal Exchequer was, at one time, the creation of a new batch of offices, useless for purposes of administration, but valuable as the means of procuring an immediate sum of money by their sale, and a steady future income by their taxation. Under this system, it is amazing that anything like justice should ever have been done, that corruption should not have choked all the wheels of judicature. But it is equally clear that no more effectual means of securing the loyalty and the obedience of the State judges could well have been devised. The royal judges are always anxious to extend the royal jurisdiction, for this will bring them a greater profit on their investments. When they resent, as, to their credit, they do often resent, the arbitrary action of the Crown, they can be brought to order by a refusal to renew the *Paulette*. But the system can hardly be deemed an entirely satisfactory basis for the Administration of Justice by the State.

English developement.

Once more, we turn to England, to see what

she has made of the difficulty. At first sight we fail to note anything special. Whatever may have been the nature of the Anglo-Saxon *Witan*, it is clear that the Anglo-Norman king has his *Curia Regis*, which, like its French analogue, is at once a body of great feudatories and a body of officials—a *Cour des Pairs* and a *Cour de Palais*. Like the French Parlement, it rapidly organizes itself into several departments—Inner Council, Exchequer, Royal Pleas, Common Pleas. But, even after the failure of the sheriffs in 1170, we do not observe that the State sets up local courts to do its work. It has its Domanial Courts, and its Peace Courts; but these are not new organs with new districts. They are the old Courts of the Shire, with new staffs. Thrice in the year the royal justices come round the shires, to take inquests, to deliver the gaols, to hear the reports of the juries, to look after the interests of the Crown generally. Four times in the year the local justices hold their Sessions of the Peace for the shire, and do the minor work of criminal justice, always in the name of the Crown. It is doubtful if the royal justices buy their places; at any rate, they are frequently changed. The man who sits

The *Curia Regis*.

The Circuits.

The Justices of the Peace.

as a judge at the end of one reign, may be pleading before the bar at the beginning of the next. Certainly the local justices do not buy their places; they are not worth buying. Moreover, the royal justices, who deal with the important cases, are constantly under the king's eye. Though not necessarily, they are in fact, the same men who sit on the Bench at Westminster, that "certain place" in which, according to the Great Charter, Common Pleas are to be held. The Exchequer and the King's Bench are still more closely in touch with the king; their members also go round the shires. If they do not finish cases there, they can reserve them for trial at Westminster. Points of law can always be argued before the full Court. Thus the royal judges are a permanent link between the State and the Clan. They know the popular mind, because they see it in the juries of the shires to which the Hundreds furnish their quotients, and in the local landowners who surround them at Assises. They know the royal mind, because, for half the year, they sit in the precincts of the royal palace. They are not steeped in local prejudice, because they can see things from a central standpoint. They are not infected with bureaucratic aloofness, because they

come frequently into contact with non-official minds. They make the country known to the Crown, and the Crown to the country. They administer a *common law*, they are not attached to the customs of a particular locality, as a permanently seated tribunal always must be. So also the local justices are State officials; but they are local residents too. Their rule may be harsh, but it is intelligible. It is not the supercilious indifference of a stranger official; it is the far less galling exercise of familiar authority. The State Administration of Justice secures a triumphant victory in England, as nowhere else, largely because of its judicial organization, which happily combines the central with the local, the professional with the popular feeling.

The Court of Chancery

But a word must be said about another equally singular feature of English judicial organization. Though not in itself a declaration of principle, the existence and influence of the English Court of Chancery make one of the most striking idiosyncracies of English Law.

Not merely a secretarial bureau.

But we must observe wherein that idiosyncracy really lies. The Chancery as a secretarial bureau, a ministerial department for the authentication of royal diplomas, is a feature of all, or almost all,

Teutonic States in the Middle Ages, from Scotland to Spain.[49] In a sense too, all the royal courts are Equity Courts; they are not bound by the formal technicalities of the popular courts, they are not *mit Gefahr*, they can hear a case over and over again,[50] while a litigant who brings a decided case before the popular court a second time is liable to a fine or a whipping.[51] These are not the peculiarities of the English Court of Chancery.

Nor a mere Court of Equity.

But an organ of law reform.

The peculiarity lies in the fact, that, after the State Courts have organized themselves into a definite scheme, with *formulæ*, officials, rules, and doctrines of their own, there gradually arises another State court which sets up a different and, in many cases, inconsistent scheme of law, or, at least, of procedure, which it maintains for centuries in the face of the authoritative courts, and which ultimately modifies the older law profoundly. There is nothing like this in other countries. The *Chambres de Requêts* of the Paris Parlement may have had a somewhat similar origin; but they become merely privileged courts, for dealing with special classes of persons and special classes of cases. They are not a Court of Equity for the realm. All the Imperial

Courts of Germany are *Billigkeitsgerichte*; but they are not engines of law reform.

Origin of the Court.

The origin of the equitable jurisdiction of the Court of Chancery is now fairly well established. The process of writ-making, previously described, came to an end about the close of the thirteenth century; either because the judges of the Common Law Courts lost their inventive energy, or because the newly-created Parliament was jealous of the process, perceiving, very rightly, that to make new writs was to declare new law. But it was urgently necessary that new law should be declared; and Parliament, which ought, according to our views, to have declared it, had not yet assumed legislative activity. A temporary remedy was provided by the Statute of Westminster the Second in 1285, which allowed the Chancery, *i.e.* the bureau, not the court, to frame new writs "in like case" to the old. But this was an inadequate provision for a progressive community; and men took the readier step of petitioning the Crown when no remedy was provided by the Common Law. Where the matter seemed one for legislative enactment, the king laid it before his Council, and, ultimately, before the Parliament. Where it

seemed to be merely a matter "of grace," he referred it to his Chancellor, who, as head of the Chancery and an ecclesiastic, had the double advantage of knowing whether the Common Law provided a suitable writ, and, if not, what would be the remedy which "conscience" would dictate. Gradually the practice assumed regular shape. To the petition or "bill" of the claimant, his opponent was allowed, nay compelled, to put in a sworn answer; the parties might interrogate each other. Successive chancellors followed the rules which had guided the practice of their predecessors, and declared new rules of their own. The Court added to its litigious business a large administrative business. It administered estates of infants, took accounts of debtors and trustees, declared priorities between rival claimants to the estate of a deceased person. Sometimes it would perform useful functions in aid of proceedings in the Common Law Courts. Sometimes it would render these proceedings nugatory, by imprisoning litigants who conducted them. In so doing it acted in the name of Equity, or "good conscience." But it preserved to the end its character as an "extraordinary" tribunal. The proceedings before it were a "suit" or humble petition, not an

"action." It adjudicated on fact as well as law, without the aid of a jury. In strict theory, no suitor had a right to any remedy, though some remedies were never denied in suitable cases; the relief given was "of grace."

Formalism and Chancery.

It will strike the reader that the existence of the English Court of Chancery is due to the excessive formalism of English Law. This is undoubtedly true. Formalism has its virtues; it stands strong against the arbitrary interference of a king, it resists the invasion of foreign law. But it has also its dangers. A community which goes on making new law, must have new law declared. It is singular, perhaps, that the one country in Teutonic Europe which, in the fourteenth century, possessed a satisfactory legislative organ, should also develope this peculiar law-declaring Court. The inference is, that England was a country in which material developement was in the later Middle Ages exceedingly strong, so strong that it could not wait for Parliament to keep pace with it. But, that the Court of Chancery performed a valuable and unique service in the expansion and reform of English Law, no student of legal history can possibly doubt.

NOTES TO CHAPTER IV.

[1] *Leges Langobardorum.* Rothar, 45.

[2] Ine's Ratifications, 74. Schmid, *Gesetze der Angelsachsen*, pp. 54, 56. Liebermann, p. 121.

[3] *Capitulare Missorum Générale* of 802, cap. 32. Boretius, vol. i. p. 97.

[4] On the functions of the *rachimburgi*, see the excellent study by M. Fustel de Coulanges, *Recherches sur Quelques Problèmes d'Histoire*, pp. 423–500.

[5] Schröder, *Deutsche Rechtsgeschichte*, p. 82. *Edictum Hilperici*, 6. Boretius, vol. i. p. 8.

[6] *Capitulare Haristallense* of 779, cap. 22. *Ibid.*, p. 51.

[7] Tacitus, *Germania*, cc. 12 and 21.

[8] *Westgötalag*, ed. Beauchet, p. 169.

[9] *Capitulare Missorum in Theodonis Villa Datum* of 805, cap. 5. Boretius, vol. i. p. 123.

[10] *Capitula* of 818–819, cap. 13. Boretius, vol. i. p. 284.

[11] Published at Weimar, 1867. Cf. especially § 24.

[12] *Lex Salica*, L. 2, ed. Hessels.

[13] *Edictum Hilperici*, c. 8. Boretius, vol. i. p. 9.

[14] *Capitula Legibus Addenda*, 818, 819, cap. 11. *Ibid.*, p. 283.

[15] *Lex Salica*, L. 3.

[16] Cf. Grimm, *Deutsche Rechtsalterthümer*, 3rd ed., p. 656.

[17] *Pactus pro tenore pacis*, cap. 5. Boretius, vol. i. p. 5.

[18] The injured party or his relatives take one part, the *hærath* a second, the king the third. *Westgötalag*, ed. Beauchet, p. 299.

[19] *Ibid.*, p. 298.

[20] *Ibid.*, C. R., *Fornœmis bolkær*, XLIII. (1), Stiernhöök, *De Jure Sveonum et Gothorum Vetusto*, p. 50.

[21] Athelstan's Dooms., II., 20. Schmid, *op. cit.*, p. 142. Liebermann, p. 161.

[22] *Établissemens de St. Louis*, Bk. I. c. 24, Laurière, vol. i. p. 126.

[23] *Ibid.*, cap. 150, p. 231

[24] *Ordinatio de Parlamento* of 1363 in Laurière; and see also *Ordonnance* of 1452, *ibid.*, vol. xiv. p. 202.

[25] *Ibid.*, vol. i. pp. 568–576.

[26] Esmein, *Histoire du Droit Français*, pp. 255–258.

[27] *Anglo-Saxon Chronicle*, ann. 1135. Laud MS., in ed. Earle, p. 261.

[28] *Ordonnance de St. Louis* (1245), Laurière, vol. i. pp. 56–58.

[29] *Ord. de St. Louis* (1260), *ibid.*, vol. i. p. 87.

[30] *Ord. de Louis le Hutin* (1315), *ibid.*, vol. i. 564.

[31] Schröder, *op. cit.*, p. 617.

[32] *Ordonnance de Charles VI.* (1413), art. 225, Laurière, vol. x. p. 138.

[33] Stiernhöök, *De Jure Sveonum et Gothorum Vetusto*, Bk. II. Part II. cap. iv.

[34] *Établissemens de St. Louis*, Bk. I., c. 65, Laurière, vol. i. p. 157 and note. *Grand Coutumier de France*, II. 21, 22.

[35] Schröder, *op. cit.*, p. 530.

[36] Stiernhöök, *op. cit.*, Bk. II. Part II. cap. iii.

[37] Esmein, *op. cit.*, pp. 432, 433.

[38] Schröder, *op. cit.*, p. 655.

[39] Brauchitsch, *Geschichte des Spanischen Rechts*, caps. vii., ix., and x.

[40] *Op. cit.*, Bk. I. caps. ii. and iii.

[41] *Ibid.*, cap. iii.

[42] *Revenues of the king in the honest and good province of Westgothia*, in Appendix to Beauchet, *Westgötalagen*, p. 449.

[43] Ludwig's *Capitulare Missorum* of 819, cap. 14. Boretius, vol. i. p. 290.

[44] Schröder, *op. cit.*, p. 394.

[45] Luchaire, *Manuel des Institutions Françaises*, p. 546.

[46] For an example of such an appeal in 1296, cf. *Confirmatio* of that date, affirming decision of Gerlacus Dominus de Bruberg, Capitaneus, and the twelve conservators of the peace for the land of Thuringia. In Mon. Germ., fo. Leges., vol. ii. pp. 464, 465,

[47] Schröder, *op. cit.*, p. 538.

[48] *Ibid.*, pp. 487, 488.

[49] See the character of each explained by Giry, *Manuel de Diplomatique*, Book V., *Les Chancelleries*.

[50] *Capitulare Saxonicum* of 797, cap. 4. Boretius, vol. i. p. 71.

[51] *Capitulare Mantuanum*, of 781, c. 4. *Ibid.*, p. 190.

CHAPTER V.

LAND SETTLEMENT AND LOCAL UNITS.

Steps in human progress.

THE men who have laid the great guiding lines of human history are, for the most part, absolutely unknown. Their works cover the earth, but their names have perished. Here and there a legend attributes the discovery of fire to a Prometheus, the invention of the galley to a Danaus. But these are desperate efforts, which betray their own futility. The unknown hunter who first made the sheep or the ox the companion of man, the unknown herdsman who first realized that the seed of the wild ears, if sown at the fit time, would bear fruit an hundredfold, were working revolutions, compared with which the most brilliant *coup d'état* is a meaningless trifle. Allow as we may for the communication of ideas by war and conquest, speak as we may of unconscious developement, the fact remains that, once

and again, there has dawned upon the consciousness of an individual a mighty secret, big with the destinies of the human race.

Intensive agriculture.

One of the greatest of these secrets has been the fact, now so commonly known as to appear self-evident, that the same piece of land, if properly treated, will go on producing, during an endless succession of seasons, a rotation of crops. The whole of modern civilization turns on this fact. But for its recognition, society, industry, politics, as we now understand them, could not exist.

But, just as it is abundantly clear that there are races which, even at the present day, have never grasped this fundamental fact, so it is almost as clear that our Teutonic ancestors once occupied a similar position. Whether they ever passed through that purely nomadic stage which is the normal antecedent of agricultural pursuits, we can only conjecture. It is dangerous to assume any universal order of progress. But it is tolerably clear that the most important races of modern Europe, the Teutons, the Kelts, and the Slavs, have passed within historical times from *extensive* agriculture, in which a patch of soil is exhausted and left to lie waste, to *intensive*

culture, in which, by an alternative succession of crops and fallow, the same land is used in perpetuity. The whole subject has recently been discussed with great learning by Dr. August Meitzen,[1] and his work, though we may not, perhaps, accept all its conclusions, is a treasure of great price to every student of history. Whether or no, as Dr. Meitzen seems to think, each race has its well-marked characteristics of land settlement—the Kelt his walled block surrounding the stead of the single household, the Slav his great Joint Mansion in which four or five score relatives live under the rule of a Family Chief, the Teuton his co-operative vill of farmers ploughing half-acre strips—something has at least been done to throw light on the erstwhile dark and debated problem of the primitive agricultural unit. One or two points seem fairly clear.

Roman surveying.

In the first place, we may with safety assume, in spite of the ingenious theories of M. Fustel de Coulanges,[2] that the Teuton of the invasions did not, at least universally, accept the highly advanced arrangements of the land surveyors of the late Roman empire.[3] The elaborate professional education in land measurements which Euclid

and his successors had bequeathed to the Roman *agrimensor* of the Imperial age, with its rigid mathematical arrangement of perches and boundary stones, barely survived the downfall of the Provincial Empire. In Italy, traces of it are frequent and unmistakeable.[4] In Spain and Southern Gaul it seems barely to have made headway against the simpler system of the Kelt; and it is possible that M. Fustel did not pay quite sufficient attention to the influence of the Kelt in the area to which his researches were specially directed. As we go further north, to northern Gaul and Britain, traces of Roman centuriation become rare curiosities. In Scandinavia they are not to be met with. On the other hand, there are abundant survivals of a totally different plan of settlement; and we are not surprised to find that the invading Teuton manifests a strong dislike to the agricultural arrangements of his new home. Much capital has been made of the severe penalties imposed by the Lex Salica upon the breakers of hedges; and it has been assumed that these penalties imply a full recognition of the modern system of sharply divided fields. But, if our view of the nature of primitive law be correct, those very

Ante, pp

passages of the Lex which, in dealing with hedge-breakers, do not (as most of them undoubtedly do)[5] refer merely to the hedge surrounding the house, actually point to a state of society which regards hedges with disfavour, as a new-fangled invention. The Pactus Alamannorum fines the man on whose hedge a horse stakes itself, in half the value of the horse.[6]

The transitional stage.

In the second place, it seems to be quite a reasonable view, and one which has the support of competent critics, that we can almost identify the time at which the Teutonic races passed from extensive to intensive tillage. As is well known, our chief evidence concerning the Germans, in the days when they had not crossed the Rhine, comes from two authorities, both of them first rate, both, unhappily, scanty. If we compare the accounts given by Cæsar with those furnished by Tacitus, we shall probably notice an important difference. Both allude to the agriculture of the Germans; but, where Cæsar speaks of an annual distribution of land by the chiefs amongst the families and clans, Tacitus describes, not a re-allotment of virgin soil, but a shifting from one ploughland (*arvum*) to another.[7] In other words, between the days of Cæsar and of Tacitus, the

Germans have discovered the secret of fallows and rotation of crops—they have discovered that a field, if cropped in due course, and left periodically to lie fallow, may be made a perpetual source of agricultural wealth. Neither the motives nor the opportunity for such a discovery are hard to find. The irksomeness of frequent changes of abode, the labour involved in reclaiming the forest, are quite sufficient to create a desire for permanent settlement. It is a common mistake to suppose that nomadic societies are nomadic from choice, and that migrations take place merely from a restless desire of change. Every study of the subject brings us nearer to the conclusion that nomadism is the direct result of hunger, and the migrations of races which have once known the advantages of fixed abode, the outcome of intense fear. Behind the Teutonic invasions we see the threatening hosts of Finns and Slavs. The invaders are themselves flying before a fiercer foe. But they have learnt, possibly from Roman captives, possibly from returned hostages, the secret of permanent homes; and they are about to put it into practice.

The Teutonic clans.

Thirdly, we must again remember that the Germans of Cæsar and Tacitus are no mere casual

hordes. Whatever may have been the precise details of those social arrangements which the Roman critics so inadequately described, we can see that they were gentile in character. Roman gentile society had broken down long before the days of Cæsar, and we may be sure that when the great commander speaks of armies arranged in groups of kinsmen, and of land allotted to clans and families, he is not importing Roman ideas into German society. It was the contrast which struck him, the contrast between the political society which Rome had become, and the gentile society which Germany was. Before the Teuton knows a land settlement, he knows a personal organization, based on kinship and, it may be, on ancestor worship. Let us bear that fact strongly in mind.

The Teutonic village.

Now we may look at the results. And if we wish to see what the Teuton's notion of land settlement was, we shall turn, naturally, to that part of Europe which is peculiarly his own, in which no other race has, within historical times, been at work, and which, therefore, bears the clearest impress of Teutonic genius. Afterwards we may look at the lands which the Teuton has invaded.

Speaking roughly, the country which lies east of the Rhine, but west of a line running from Linz along the Danube to Regensburg and then north by Bamberg and the Saale and Elbe (the *Limes Sorabicus* of Charles the Great), and extending within these limits northward from the Alps to the perpetual snows of the Arctic regions, is, and has always been, a purely Teutonic land. Here, according to our latest authorities, the typical unit of land settlement is a village of some ten to thirty houses, clustered (but not adjoining) in an irregular group, in the centre of a patch of cultivated ground broken up into large unenclosed fields. Within these fields, the arable land is divided into a great number of strips, usually of about half an acre (a *Morgen* or day's work) each, and rigidly equal amongst themselves. The farmers of the village plough these fields, not strip by strip, but with eight-oxen ploughs, to which each contributes his share of labour, oxen, yokes, and so forth. Whether sowing and harvest were ever likewise in common, is a moot point. The Teuton of historical times sows and reaps certain strips, and calls these strips his own. But there are two significant facts which seem to hint that this is an innovation. One is the

The purely Teutonic lands.

existence of the *Flurzwang*, or compulsory system of tillage; the other the rule that, before the enclosures of modern times, the holding of each farmer lay, not in a compact mass, as in present day farming, but scattered in many strips in the arable fields. Beyond these arable fields, are the meadow lands of the village, which the farmers share in proportion to their arable holdings, and which may be temporarily enclosed during hay growth. Beyond these again, are waste and woodland, which may be administered according to the mark-partnership system, or may be left to take care of themselves, according to the influence of external and internal circumstances.

Its simplest elements.

Readers in the least degree familiar with the storm of controversy which has raged around the village community, will be aware that the above account of the Teutonic village is prudently modest. Let it be observed that in several respects it falls far short of that ideal picture of communistic and free democracy in which the platform orator delights. It does not claim that, even in German Germany, the "hidated" open-field village is the universal unit; it only claims that it is a typical unit. There may be all kinds of

special cases, mark-settlements, wood and marsh communities, patrimonial domains. It lays down no dogma of communal ownership; for it may well be that the Teutons of the sixth and seventh centuries, in spite of the fact that they fling charters about with reckless profusion, have no very definite ideas on the subject of ownership. It does not propound any theories of freedom or self-government; for a village settlement such as it describes may be administered either by the officials of a great landowner or by the villagers in a common moot. It merely asserts, that the most exclusively Teutonic parts of Europe bear abundantly upon them traces of an agricultural system which depends for its very existence on the co-operative farming of intermixed lands. The numerous "terriers," or estate-maps, which have recently been brought to light by scholars, place the fact beyond dispute.[8] The Scandinavian laws show us the system in full working order. The Seeland Law of 1290, published by Eric of Denmark, provides for a periodical redistribution of hides, and remeasurement of the agricultural area.[9] The somewhat earlier Jutish Law excepts only certain special improvements from a similar process.[10] The Law of

the West Goths and East Goths in Sweden states explicitly under what conditions and in what manner a *by* or village may be divided in severalty amongst its occupants.[11] The individual land unit of the early Middle Ages, among Teutonic peoples,—the *huf* of Germany, the *bo* of Scandinavia, the *mansus* of the Frankish documents,—is at least as likely to be a share in an undivided village, or a shifting severalty, as it is to be a definite and permanent area.

Its basis.

The question naturally arises—upon what basis was this settlement effected? What was the link which bound together the farmers of the village? It is so very unlike all that we know of barbarous men to suggest a fortuitous partnership, based upon perceptions of utility, that we may leave such a notion out of account, at least for primitive times. Three other possible suggestions present themselves.

A proprietary domain?

One is, that the hidated village represents the organization of a proprietary domain by a single landowner. It is, of course, barely possible that the hidated village of Germany was produced by a process similar to that which took place on a great Roman villa, where a gang of slaves, working under the control of a *villicus* or

labour-master, gradually developed into a body of *coloni*, bound to the soil, but enjoying undisturbed possession of their respective plots of land. There are even traces of primitive German customs which might have led to such a result.[12] It is possible, of course, that arrangements which seem to us very primitive may have been the outcome of a gradual improvement in the position of the cultivators of the soil. But all that we know of the general course of legal developement is opposed to this view; and, apart from general considerations, there are special objections to the theory. It is almost impossible to imagine an autocratic proprietor fettering the management of his estate by parcelling it out into the intricate subdivisions revealed by the terriers of the open-field villages. Still less is it possible to believe that he would have applied such a process to his own *terra indominicata*, his demesne land, his "home farm," as we should say. And yet the terriers show that the half-acre strips, the *Morgen*, cover the whole arable land of the village. Moreover, the *Polyptica*, or land registers of the ninth and tenth centuries, classify the *mansi* of the farmers as *ingenuiles* and *serviles*; and, though the term *ingenuus* may,undoubtedly, in the Middle

Ages, mean a freedman, yet it is hardly likely that the great bulk of the *mansi ingenuiles* of the *Polyptica* are the holdings of enfranchised slaves.[13] We must remember that the *mansus* (without any qualification) is the taxable unit of the Karolingian empire. When Charles the Great is making his supreme effort at military organization, in the year 807, he bases the liability to military service, after the holders of fiefs, on the holders of *mansi*, or, as he otherwise expresses it, of *propriæ possessiones*.[14] And, as he expressly qualifies the manse-holder as a freeman, and, moreover, treats the freeman who has no manse as an exceptional person, we are left with the alternative of supposing, either that the average manse-holder was a freeman by birth, or that the reign of Charles the Great, with its wars and conquests, had converted the bulk of the population of the Frankish empire from slaves into freedmen. We are also compelled to suppose that a similar revolution had taken place among the heathen Saxons about the same time. For, on his conquest of that turbulent people, the pious conqueror requires that his newly Christianized subjects shall contribute two manses of land and a house to each newly founded church.[15] The theory of

a proprietary origin of the village may possibly fit the Romanized south of Gaul, where the Keltic nobles seem rapidly to have assimilated Roman ideas. It may apply to Teutonic settlements in conquered lands, such as Britain and the Slav countries to the east of the *limes Sorabicus*. It will not account for the primitive village of German Germany.

A household or clan settlement?

The two other suggestions may be taken together. The primitive village of Germany may be either the settlement of a single household, which has expanded by natural increase into a group of cognate households, and has subdivided the original territory to provide for its offshoots. Or it may be the settlement of a clan which has reclaimed a plot of land from the wilderness by the joint labour of its members. It is difficult to choose between these alternatives; for, before doing so, we should like to know which is the older institution in Teutonic society, the Household or the Clan. And this is a question which the present state of our knowledge does not enable us to answer. The passage from Cæsar to which allusion has been made, unfortunately, leaves the question open. He tells us that the magistrates and princes (whoever these

may be) annually allot to *gentes et cognationes* of men such and such quantity of land as they think fit.[16] To a Roman of Cæsar's time, the words *gens* and *cognatio* would correspond almost exactly with our words *clan* and *household, i.e.* with a larger and somewhat indefinite and with a smaller and definite body of relatives. There are some things in the scheme of the German village settlement which strongly make for the view that the original foundation was by a clan, or larger gentile group, especially the curious repetition of the arrangement of strips in each field, which looks as though each field were laid out once and for all at the time of clearing. But these are mere conjectures.

Not a creation of the State.

Happily, for our immediate purpose, there is no need to decide between these rivals for precedence. Once admit, as we probably shall, that the German hidated village (including always the *by* of Scandinavia) is not the creation of a landowner, but the spontaneous work of a group of relatives, we are brought face to face with a cardinal fact in the history of Law. The great landowner is a creature of the State; the village group of farmers is not. The individual proprietor of vast domains cannot maintain his position

unless he can obtain the powerful assistance of the State courts, and the strong support of the military power. His interests conflict too evidently with the interests of those who serve him, and without whose labour his domain would be worthless. He is the favourite of the State, and every step of State progress is marked by a corresponding increase in his ranks. When the State extends its conquests into hostile lands, it plants its faithful soldiers as landowners on the conquered soil. When it annexes the domains of the Church, it distributes them among a new territorial aristocracy. When it finally breaks the power of the Clan, it converts the Clan chief into a landlord. On the other hand, the Clan and the Household are older than the State, and utterly opposed to it in principle. The Clan and the Household are social groups; the State is a collection of individuals. The village, like the Clan, is older than the State, and long remains outside its influence. Much has been said, by those who deny the existence of the co-operative village, about the silence which the *Leges Barbarorum* maintain on the subject of village organization. Nothing more natural. The Barbarian Codes are drawn up under the auspices of

And outside its influence.

the State; they handle only matters with which the State has some concern. When these conflict with the customs of the village, when the stranger bearing the king's letter wishes to settle in the village,[17] when the villagers desire to plough up the king's highway,[18] these matters are settled by the Codes. The management of internal affairs is for the village itself, not for the State.

The Hundred.

But it must not be supposed that the original land settlement of the Teutons confined itself to the village. All Teutonic countries know a unit which, under the name of *hundert, hærath, hundred, huntari,* comprises a number of villages, and is, at the time when Teutonic history begins, the primary judicial unit. The etymology of the name points irresistibly to the conclusion that it was also, at one time, a military unit. But this is not to say that it had not an older character, and, it may be, an older name. Dr. Meitzen has shown strong reasons for supposing that it is a relic of the pre-agricultural stage, in which the members of a clan fed their flocks and pitched their tents on a patch of territory which afterwards, as agriculture developed, became divided into villages.[19] The curious rule of old Swedish law which, in a legal contest between the *hærath*

or Hundred and the *by* or village, gives the preference to the former, seems to strengthen the conclusion that the larger unit is the older;[20] and the complete control which the Hærath of Sweden exercises over its constituent villages confirms this view. Moreover, the extraordinary differences in the sizes and contents of the Hundreds, seem to show that they could hardly have been in origin military institutions, nor is there any direct evidence of their connection with any general military system. A police institution they do, undoubtedly, become; but this is later. Furthermore, it is just in those countries in which the State, the military organization, is most powerful, that the Hundred most completely disappears, while in the countries in which the State makes little headway, in the Scandinavia of the Middle Ages, the Hærath is seen at its strongest.

The shire or county

Above the Hundred we observe yet another ancient institution, the *gowe* of Germany proper, the *pays* (pagus) of Gaul, the *shire* of England, the *land* of Sweden. That this is also originally a settlement of a national or popular character, there seems small reason to doubt. The persistence of the popular elements of this unit in the

purely Teutonic countries is the best warrant for the belief. In spite of all the politicalizing and feudalizing which it undergoes, there is a deep consciousness of independent life which breaks out now and again into such powerful manifestations as those which produce the Dutch Republic and the *Vehmgerichte* of Westphalia. The *laghman* of Sweden, the *ealdorman* of England, and the *Asega* of Bavaria and Frisia, are the spokesmen of the gowe. The laborious geographical researches of M. Auguste Longnon establish the substantial identity of the Civitas of Roman and Keltic Gaul, with the Gowe of Frankish Gaul.[21] Whether this unit is again to be referred to an older state of civilization, it is impossible to say with certainty. The Gowe may be the hunting ground of the clan, just as the Hundreds may be its pasture grounds, and the villages its agricultural areas. The Swedish laws which give the preference to the claim of the Hærath over that of the By, give a corresponding preference over the Hærath to the Land.[22]

Rivalry between the State and the Clan.

But the State cannot afford to allow this gentile organization to maintain an independent existence. The State is, as we have seen, in its origin, merely a band of warriors; it perpetuates

and extends itself by undertaking new functions. It finds these functions fulfilled, to a greater or less extent, by non-political bodies, the Village, the Hundred, the Shire. It has, practically, the choice of two methods. It may seize upon and appropriate the gentile units; or it may create new units of its own. Much of the success of the State, as an institution, will depend upon the method adopted.

The creation of land-owners.

The invasion and settlement of a new country afford an excellent opportunity for an attack on the village system. The invaders are a body of warriors; their numbers are, in proportion to the country invaded, probably, small. The booty they have acquired has made them rich. The inhabitants of the conquered country are, by the ancient rules of war, slaves of their captors. Everything is favourable to a change from groups of petty farmers to estates of single landowners. That the old village system transferred itself to that Britain which became England, is a strong proof of the vitality of the system under unfavourable circumstances.[23] The warrior of Hengst and Horsa remembered that he was a clansman as well as a warrior. But we cannot doubt that large tracts of conquered lands went to the

favourite followers of the kings. Quite early in the Anglo-Saxon Laws we note the appearance of the king's thegn,[24] the lord of land,[25] who takes his place as of right alongside of the reeve and men of the township in the Hundred and Shire moots,[26] who is subject only to royal jurisdiction,[27] and who accuses the churl suspected of crime.[28] The same result happens in the Frankish kingdom; alongside of the men who have *mansi* are the men who have *beneficia*;[29] we may, perhaps, suspect that the professional *scabini* who, under Charles the Great, take the place of the *rachimburgi*, are great landowners. Even in Scandinavia, the *lænder* or fief-holder appears beside the *bondi* or free farmer.[30] In Gaul, the *seigneur* finds the way prepared before him by the arrangements of the provincial Empire. All over Europe a landed aristocracy springs up; and this aristocracy is created by and pledged to the State.

Reaction on the village.

But the domain of the landowner cannot exist beside the communal village without powerfully affecting it. The landowner is expected by the State to act as policeman, guardian of law and order, in his neighbourhood. The practice of *commendation* springs up. It is expressly legislated for by Charles the Great,[31] whose immediate

successors order its universal adoption. The seniorat becomes a general institution. It is the same in England. Every man must have a lord;[32] and unfaithfulness to him is visited with the severest penalties.[33] The Westgötalag shows us the lænder as a collector of fines, *i.e.* as a person in authority.[34] The common speech of France adopts the maxim: "No lord, no land." The village moot has been replaced by the hall moot:[35] the reign of the landowners has begun.

Fate of the shire.

Nor is the State content with attacking the minor units. The Teutons who broke in upon the Roman Empire found a political organization which seems to have commended itself powerfully to the views of their leaders. Briefly speaking, the Western Empire, at any rate in the prefecture of the Gauls, was a great mass of *civitates*, each under the control of a *comes*, a state official with almost plenary authority. The Comes administered, judged, taxed; to the provincials of his district he represented the State.[36] One State function he did not perform; he had no military authority. But this was because the Roman Empire had ceased to rely on compulsory service; it employed mercenaries and taxed its subjects to pay them.[37]

The Roman Count.

The German Graf.

Whether the Teutons of the invasions had any official corresponding with the Comes it appears difficult to say. If not, they immediately adopted the Roman idea, and made it the cardinal principle of their government. The German *Graf* and the Latin *comes* are convertible terms in the *Leges Barbarorum*. That the Graf is a royal official, is proved by the special protection accorded to him in the Codes. His life is guarded by the triple wergild. Royal also are the *scîr-gerefa* or sheriff in England, and the *landshærra* or provincial governor in Scandinavia; and the existence of these officials looks as though the Teutonic State had arrived at the institution without the aid of Roman ideas. So too does the important fact that the Teutonic Graf and his congeners are military officials, while the Roman Comes of the late Empire is not. The Karolingian Count is the normal agency through which the host is summoned.[38] The English sheriff leads the forces of the shire. The landshærra is shown us as levying the militia.[39] This function stamps them at once as State officials. But the researches of M. Longnon, before alluded to, have even established the geographical identity of the Frankish *comitatus* with the Gaulish *civitas*.[40] It

is fairly clear that the *Grafschaft* is but another name for the Gowe. In the cases of the landshærra and the sheriff, *res ipsa loquitur.* The State has annexed the province of the Clan ; the royal official, at first existing side by side with the gentile official, ultimately drives him out. The ealdorman disappears before the sheriff, the laghman before the landshærra, the asega (except in a few cases) before the Graf or Count.

Feudalism.

The danger to the State comes, indeed, through its own officials. The Roman background, so to speak, of the countship, renders it enormously powerful. The Frankish kings and emperors cannot hold their officials in hand. The practice of granting countships as fiefs or benefices has led to their becoming hereditary. The absence of any regular salary has caused them to be looked upon as opportunities for exploitation. They cease to be organs of the State at all; they become independent estates, whose lords make use of political powers in their own interests. In despair, the State grants immunity from their jurisdictions to favoured landowners, especially to clerical landowners. These immunists promptly take up similarly independent positions. During the disturbances of the ninth and tenth centuries,

the Teutonic State dissolves, as we have seen, into its component parts, and has to be built up again from its foundations. But it never recovers control of the counties. These remain proprietary fiefs, owning an allegiance to the State, but admitting of no interference within their boundaries.

The difference in England.

This fate is, however, confined to the countries which form part of the Frankish Empire. In Scandinavia and England, the developement of feudalism is comparatively slight. In Scandinavia, the State very slowly makes headway against the clan; the landshærra and the lænder never attain anything like the position of the Graf and the seigneur, and are, consequently, never tempted to revolt. In England, the State obtains a sudden and complete victory through the circumstances of the Norman Conquest.

The Norman Conquest.

The Conqueror of England knows the dangers of feudalism only too well. In his earlier days he has had to fight his rebellious vassals at Val-és-Dunes. He knows exactly how much, or, rather, how little his duchy of Normandy is an integral part of the French kingdom. He determines that the English shire shall not become a feudal county. He and his successors do, indeed, create a few palatinates; but, happily for England,

these soon become extinct, or are annexed to the Crown. The Palatinate of Durham is the only important exception; and, as that is an ecclesiastical fief, the danger of it is small, for it cannot become hereditary, and the king has a good deal to say in the appointment of its holders. The Norman kings seize at once upon the shire, and administer it as a State district, making its sheriff account annually at the Exchequer, and sending royal officials frequently to report upon it. They endow their titular earls with the third penny of the shires; but it is to be observed that the earls do not administer the shires from which they take their titles. The Norman clerks persist in calling the shire a *comitatus* and the sheriff a *vice-comes;* but the names are meaningless. Only in the bad times of Stephen are the sheriffdoms proprietary; the little shire of Westmoreland is the only shire which becomes permanently hereditary. The Norman king accepts the gentile shires of the Somersætas and the Wiltsætas; but he turns them into royal districts.

Danger from the sheriffs.

Nevertheless, England does not entirely escape the fate which has befallen the Frank Empire. Confident in their power to control the sheriffs, the Norman kings entrust to them the exercise

of that great increase of State authority which, as we have seen, follows upon the Norman Conquest. They very nearly go too far. But, thanks to the stern genius of the first Angevin king, the danger is averted. On his return from the Continent in 1170, Henry Fitz-Empress hears evil tidings of his sheriffs, and he sets about reform in good earnest. He makes a clean sweep of the existing staff. But that is not enough. The office must be shorn of its dangerous attributes. So the sheriff is forbidden to exercise criminal jurisdiction; this shall be the work of the itinerant justices who, for a great part of the year, are under the king's personal eye. The sheriff's civil jurisdiction shall be diminished by new methods of trial conducted by the Justices of Assize and Nisi Prius, and, later on, by a strained interpretation of the Statute of Gloucester. The militia is being replaced by mercenary troops; and these shall not be entrusted to the sheriff. Later on, the Justices of the Peace, the local landowners, will rob the sheriff of his police jurisdiction. When the militia is revived, in Tudor times, it will be administered by a newly created official, the Lieutenant of the County. At the end of the Middle Ages, the State i

England is found to have discovered a great secret, the secret of annexing a gentile institution without turning it into a feudal benefice. The secret is very simple. It consists in maintaining the identity of the unit, but dividing the exercise of the authority. Sheriff, Lieutenant, Justices of Assize, Justices of the Peace, all have the same area of jurisdiction; but they hold distinct authorities from the State, they can be dismissed by the State at a moment's notice, none of them is strong enough to defy the State. The shire is an executive unit, a military unit, a judicial unit, a police unit; but each of these functions is lodged in different hands.

The position peculiar t England.

Very simple the secret seems. But England is the one instance of its discovery, if we except perhaps, Scandinavia, where, however, the State does not attain a commanding position till the end of the Middle Ages. In later times, the system will be extended to Wales, Scotland, and Ireland, when these countries are definitely incorporated into the English scheme of government. But there it stops. Let us now look for a moment at what other States are doing to solve the problem.

Other countrie

If a State cannot adopt and absorb older

institutions, it runs very great risk of being overshadowed by them. This is the case with the newly-created States of France and Germany in the tenth century. They are, as we have seen, bare military organizations, having little or no power to interfere in the internal organization of their territories. In self-defence, they must organize new schemes of their own; and it so happens that these two States afford excellent examples of contrasted styles. We may term the one the proprietary, the other the military system.

France. The proprietary system.

The French system is the proprietary system. Long after the election of Hugues Capet, the chief strength of the French kings lay, not in their royal powers, but in those broad domains on the Seine and the Loire which had first marked them out as leaders of a feudal aristocracy. Their direct influence on the rest of their kingdom was limited to the summoning of the host and, possibly, the prevention of violent internal disorders. But, in their own domains, they enjoyed all the rights of the great feudal seigneur, intensified by the prestige of the royal crown. Here it was that their administrative capacity made itself felt. Here it is that we notice the gradual

developement, in the tenth, eleventh, and twelfth centuries, of that system which characterises the monarchy of the earlier Capetians. *Mairie*, *prévôté*, and *baillage*—these are the three concentric circles which cover the royal domain, and which stand, as rivals, side by side with the *châtellenie*, *vicomté*, and *comté* of the great fiefs, it may be with the *commune*, *centaine*, and *pays* of the old popular settlement. As the great fiefs are gradually annexed by the crown, the *baillage* or *sénéchaussée* is extended to them; its extension marks the advancement of the royal domain. The supervision of the royal bailiffs becomes one of the most important functions of the Parlement of Paris. Three times a year the bailiffs are to present themselves before the Chambre des Comptes at Paris. Twice a year they are to hold perambulating Assises in their bailiwicks. To them is committed the supervision of the provosts.[41]

Weaknesses of the system.

But the system contained the seeds of three fatal vices. The districts of the officials were arbitrary, or, at least they became so, whatever they may have been at first. The enlargement of the royal domain was the result of a fierce and protracted struggle, in which the kings, when

Arbitrary areas.

they could not annex great fiefs, like Normandy and Touraine, were content to secure little estates to which their legists asserted royal claims. As each of these little conquests was acquired, its inhabitants were made to "resort" to the jurisdiction of some provostship or bailiwick, often separated from it by feudal territories over which the royal officers had no authority.[42] The provostship and the bailiwick thus became arbitrary and fantastic groups of isolated localities, having no local unity. Again, the bailiff and the provost had far too much power. Like the old Karolingian officials, they exercised the whole of the State's authority in their districts—they summoned the troops, collected the taxes, presided in the royal tribunals, executed the royal orders. They were like the sheriffs whom Henry Fitz-Empress destroyed. Finally, the mayors and the provosts, at least, were proprietary officials in more senses than one. They paid themselves out of the profits of their offices. The kings were always promising that the provostships should not be given *en ferme*;[43] but they did not keep their word. The bailiffs were intended to be salaried officials; but, with their subordinates farming their offices, and their superiors of the

Concentration of powers.

Proprietary offices.

Parlement holding their posts as hereditary property, it is not to be supposed that the bailiffs formed a real exception.

Changes in the system.

The kings are, in fact, afraid of the hierarchy which they have created. Philip the Long deprives the bailiffs of their military character, and places a Captain General in each bailiwick.[44] The institution of Royal Receivers by the same monarch robs them of much of their financial power.[45] Philip of Valois forbids them to style themselves "governors,"[46] and prohibits them holding inquests, except by consent of the parties.[47] In the sixteenth century, their Assises cease to be held.[48] At first, many of their functions are transferred to *lieutenants généraux*, or military governors; but this policy is so disastrous that it is hastily reversed, leaving, however, a legacy of trouble, which it needs the genius of a Richelieu to cope with.[49] Finally, the French monarchy adopts the *intendant*, originally a temporary inspector sent down from head-quarters, then gradually made permanent. But his district is not really a local unit at all. It is merely the *généralité*, or taxable area recognized by the Treasury at Paris, just as the Intendant himself is a bureaucratic official.[50] There is no

Lieutenants-généraux.

Intendants.

true local government in France after the triumph of the ancient monarchy, nothing which, like the English shire, will afford scope for local activities, while submitting to the unquestioned control of the State. There are the great fiefs, which, the State has been unable to deprive of their anarchic privileges. There are the chartered towns, which the early kings have called into existence as rivals to the great feudatories, and which the later kings are now trying to crush. There is the généralité, administered from Paris, and known chiefly to its inhabitants as a machinery for the extortion of taxes. This is the great thought of the centralized monarchy. The kingdom, as the result of a long and successful struggle on the part of the Crown, has become indeed a royal domain. *L'État, c'est moi.* But the answer to this boast is the French Revolution.

Germany. The military system.

Gaueintei-lung and *Vogteien* of Charles the Great.

In Germany, the story is very different. The political genius of Charles the Great had seen the dangers of feudalism, and had striven, by a subdivision of the counties, and an improved organization of the royal domain, to stem the progress of feudal disintegration. But the task is too gigantic for his feeble successors; and

even the royal bailiffs become feudal proprietors, the Landgraves and the Burggraves of the later Middle Ages; while the great fiefs, Austria, Bavaria, Saxony, Brandenburg, Hannover, grow to be the independent kingdoms of modern Germany. Only in a few cases, mostly in the lower Rhine country, do the counties remain *reichsunmittelbar*, direct dependencies of the State. Even of these, some break away at the close of the Middle Ages, and, falling back on the older traditions of popular organization, federate themselves into the independent Republic of the United Netherlands. The real efforts of the State are limited to the maintenance of internal order, and the conduct of military affairs.

Peace Districts.

The *Landfriedensbezirk* of the eleventh century, the Peace District under the control of a captain (*Hauptman*) and committee of royal officials, is a genuine and well-meant effort to create a local unit directly responsible to the State. How far it becomes universal and systematic, we hardly know. But this, unfortunately, we know, that its administration is entrusted to princes who are also great feudal chiefs; and these naturally treat their offices as fiefs, rather than as royal deputations.[61] A desperate effort

of the earlier Habsburgs, in the thirteenth and fourteenth centuries, to transfer the control of the Peace Districts to the Imperial bailiffs, only results in strengthening the feudal power of these officials, who, as Landgraves, help to swell the list of the petty independent German principalities of the later Middle Ages.[52] The celebrated *Kreiseinteilung* of Maximilian I. and Charles V., purely military in character, though its framers endeavoured to make it serve other ends, came too late to arrest the progress of decay.[53] It could not maintain itself in the face of its feudal rivals; it failed even to provide a satisfactory basis for the organization of the Imperial army. After the Treaty of Westphalia, the German Empire becomes merely a loose collection of federated principalities; its Diet merely an assembly of potentates, far too intent on their personal interests to work together for a common purpose. The Holy Roman Empire proclaimed its formal interment in 1806; it had been a decaying corpse for more than two hundred years.

Military Circles.

The comparative success of England in the matter of local government has given her a unique place among Teutonic countries, if we except, perhaps, Scandinavia. With this possible

Consequences of English development.

exception, England, and England alone, has succeeded in reconciling the absolute supremacy of the State with the existence of local independence. While the State in France became a rapacious bureaucracy, tempered only by municipal and feudal disintegration; while the State in Germany died of inanition, and gave place to a crowd of absolute principalities, whose rulers treated their subjects as food for the cannon, or as milch kine for the supply of taxes; the State in England developed into a strong unity, whose elements yet maintained that vivid consciousness of local life which is essential to the existence of a free and self-respecting nation. The State in England has not ruled through feudal proprietors; therefore there have been no hereditary local despots who have defied her mandates. She has not destroyed the old landmarks; therefore her subjects have not felt themselves to be helpless atoms under the heel of a bureaucracy. Her officials have not been a privileged caste of adventurers, speculating in their offices, and exempt from the ordinary rules of law; therefore they have respected the rights of the citizen, and are by him regarded neither with jealousy nor with fear. The State has boldly used the local

No hereditary jurisdiction.

No bureaucracy.

No privileged officials.

Union of State and Clan.

units as the basis of its own organization. The parish and the county are the pivots of the electoral system. Only in one instance does the State conspicuously fail to absorb an older institution. After one or two half-hearted attempts, it allows the Hundred to die out; and the somewhat clumsy efforts made in later times to replace it, by Poor Law Union, County Court District, Sanitary District, point eloquently to the danger of allowing a deeply rooted institution to disappear. But even that is better than putting provostships to farm, as the French kings did; or than formally handing over the Hundreds to the great landowners, as Frederick II. of Germany did.[54] In England the State has fearlessly left to local control much that a timid State keeps in its own hands—police, roadmaking, sanitation, education. The result of the whole policy has been to foster, if not to produce, some of the best features of the Englishman's political character: his deep respect for law, his independence in the face of authority, his self-reliance, his practical good sense, his willingness to compromise, his sincere though silent patriotism.

Local self-government.

NOTES TO CHAPTER V.

[1] *Siedelung und Agrarwesen der Westgermanen und Ostgermanen, der Kelten, Römer, Finnen, und Slawen.* See especially Book XII. (in vol. ii.).

[2] *L'Alleu et le Domaine Rural.* See also *Le Colonat Romain,* and *Du Régime des Terres en Germanie,* both in *Recherches sur Quelques Problèmes d'Histoire.*

[3] As to these arrangements, see *Die Schriften der Römischen Feldmesser,* ed. by Lachmann and Rudorff; especially Siculus Flaccus, *De Conditionibus Agrorum,* in vol. i. pp. 134–165.

[4] See, for examples, Meitzen, *op. cit.,* vol. i. pp. 320, 321.

[5] This is certainly the meaning in Titles xvi. (5) and lviii. (4). On the other hand, Titles ix. (8) and, possibly, xxxiv. (1), refer to field hedges (*Lex Salica,* ed. Hessels and Kern).

[6] III. 18.

[7] Compare the well-known passages: Cæsar, *De Bello Gallico,* vi. 22; Tacitus, *Germania,* 26; and the discussion of their meaning by Fustel de Coulanges, *Du Régime des Terres,* cap. vii.

[8] See specimens of many of these reproduced in the appendix to Meitzen's work.

[9] Kolderup-Rosenvinge, *Samling of gamle denske Love.* vol. ii.; and Thorsen, *Eriks sællandske Lov,* ii. 53 (p. 61).

[10] Kolderup-Rosenvinge, *op. cit.,* vol. iii., *Jutkse Low.* i. 51.

[11] Beauchet, *Westgötalag.* C. A., *Jordthaer bolkær,* xiv. and notes.

[12] Tacitus, *Germania,* 25.

[13] On the subject of the *Polyptica,* see F. de Coulanges, *L'Alleu et le Domaine Rural,* cap. xiii.

[14] Capitulary of 807, *Memoratorium,* 1 and 2. Boretius, vol. i. p. 134.

[15] *Capitulatio de Partibus Saxoniæ,* 15. *Ibid.,* p. 69.

[16] *De Bello Gallico,* vi. 22.

[17] *Lex Salica,* xiv. 4.

[18] *Lex Gundobada,* xxvii. 3.

[19] Meitzen, *op. cit.,* vol. i. pp. 140–151.

[20] Beauchet, *Westgötalag.* C. A., *Jordthaer bolkær*, xvi. On the meaning of this preference, see my article in the *English Historical Review* for 1896, pp. 510–514.

[21] *Atlas Historique de la France.* Planches, ii., vii., viii., ix., x., and *Texte explicatif*, p. 89.

[22] *Westgötalag.* C. A., *Jordthaer bolkær*, xvi.

[23] On the land settlement of England, the student will, of course, consult the classical works of Mr. Seebohm (*The English Village Community*) and Professor Maitland (*Domesday Book and Beyond*).

[24] Schmid, *Gesetze der Angelsachsen.* Ine's Dooms, 45; Alfred's and Guthrum's Peace, 3, Cnut, ii. 71; Liebermann, pp. 109, 126, 359.

[25] Schmid, App. v. 3, *By People's Ranks and Law.*

[26] Schmid, App. xxi. 7, § 2. This document was drawn up after the Norman Conquest, but it represents a much older condition of things.

[27] *Ibid.*, Æthelred, iii. 11; Liebermann, p. 230.

[28] Schmid, iii. 3.

[29] Capitulary of 807, *Memoratorium*, 1. Boretius, vol. i. p. 134.

[30] *Westgötalag.* C. A., *Jordthær bolkær*, v. (1).

[31] Lex Salica, *Extravagantia*, A., ii., ed. Hessels, p. 420.

[32] Schmid, *op. cit.*, Æthelstan, ii. 2; Liebermann, p. 150.

[33] Schmid, Ælfred, iv. § 2; Liebermann, p. 50.

[34] *Westgötalag*, ed. Beauchet. C. R., *Orbotœmal*, i. 15.

[35] Schmid, *op. cit.*, App. xxi. 9, § 4.

[36] F. de Coulanges, *L'Invasion Germanique*, p. 19. *La Monarchie Franque*, pp. 196–220.

[37] *Ibid.*, *La Gaule Romaine*, cap. ix.

[38] *Ibid.*, *La Monarchie Franque*, p. 213.

[39] *Westgötalag*, ed. Beauchet. C. R., *Kirkiu bolkær*, iv.

[40] See also on this point *La Monarchie Franque*, pp. 198, 199.

[41] Testament of Philip Augustus, 1190 (in Laurière, vol. i. pp. 18–22), also *Ordonnance* of 1361. (*Ibid.*, vol. iv. pp. 409–412). And cf. Luchaire, *Manuel des Institutions Françaises*, pp. 546, *et sqq.*

[42] Cf. the almost countless *Ordonnances de Ressort* in Laurière.

[43] *Ordonnances* of 1303, 1401, 1408, 1493, in Laurière.

[44] *Ordonnance* of 1317, in Laurière, vol. i. pp. 635, 636.

[45] *Ordonnance* of 1320. *Ibid.*, pp. 712–714.

[46] *Ordonnance* of 1342. *Ibid.*, vol. ii. p. 175.

[47] *Ordonnance* of 1346. *Ibid.*, p. 241.

[48] Esmein, *Histoire du Droit Français*, p. 369.

[49] *Ibid.*, pp. 593–595.

[50] *Ibid.*, pp. 595–602.

[51] Schröder, *Deutsche Rechtsgeschichte*, p. 538.

[52] *Ibid.*, pp. 487, 488.

[53] There were three distinct attempts to create this scheme —viz. by Albert II. in 1438, Maximilian I. in 1500, and Charles V. in 1521. (See the constitutions in Koch, *Neue . . . Sammlung der Reichsabschiede*, and a map of the divisions of 1521 in the appendix to Schröder, *op. cit.*)

[54] *Constitutio in Favorem Principum* of 1232, cap. 7, in Mon. Germ., *Constitutiones*, vol. ii. p. 292.

CHAPTER VI.

POSSESSION AND PROPERTY.

Possession a question of fact.

AT the present day, the fundamental distinction between Possession and Property is familiar to every one. As it is frequently, and not incorrectly put, the one is a question of fact, the other a question of law. By Possession, at least when we speak carefully, we mean that physical relationship with a tangible object which enables a man to control its user. I possess the table that is in the house which I occupy, because, in normal circumstances, I alone determine what use shall be made of it from hour to hour. I possess the garden annexed to my house, because, normally, I alone decide what shall be grown in every part of it. Whether I am justified by law in exercising this control is, for the existence of Possession, an immaterial question. I may have stolen the table or poached the garden; but, while I do in fact control them, they are in my

Possession. Still less does it matter that I am only a tenant of the garden, or a borrower of the table. My Possession may be brought to an end very speedily; but, whilst it lasts, it is, none the less, Possession.

Property a question of Law.

With Property, or, as it is called, Ownership, the case is different. Property is an interest, recognized and protected by law, which entitles the person in whom it is vested, not as a matter of fact, but as a matter of right, to the full and complete enjoyment of the subject over which it is exercised. If I have stolen the table, it is not my Property; if I am merely the hirer of it, it is not my Property. The first case is clearer than the second. No system of Law will recognize a title acquired by theft; for theft is a breach of the law, and for the law to recognize an interest acquired by defying its clearest mandates, would be to stultify itself openly. Sometimes, no doubt, a system of law treats as Property an interest of a terminable or partial character. English law, for example, knows the phrases "special property," "limited ownership"; but the very existence of such phrases shows that the idea of completeness is recognized as the natural feature of Property or Ownership. And, in any case, the phrase

"lawful owner" is mere tautology, or, at best, the result of a confusion of ideas which should never have been allowed to find its way into law-books. Happily, we have not, as yet, heard of "unlawful owners." On the other hand, the "unlawful possessor" is a clearly recognized person.

Relationship of Possession and Property.

It is a commonplace of historical jurists that early systems of law do recognize Possession, but do not recognize Property; that the Possession which they recognize ultimately ripens into Property or Ownership. This is a delightfully simple doctrine; and there is, no doubt, this one justification for it, that even very early systems of law recognize a lengthened occupation of land or movables as conferring substantial rights on the occupant. But the doctrine receives no other support from the facts of Teutonic Law. So soon as we see Possession, we see Property. We may say, if we like, that the Property recognized by the Anglo-Saxon Dooms and the Lex Salica is not Property as we understand it. But then we must also make the same observation about Possession. The first lesson to be learnt from the study of legal history is, that the fundamental conceptions of modern

Law are the result of a slow growth which has been going on for ages.

The Anglo-Saxon Dooms.

We open our Anglo-Saxon Dooms, which have this advantage over the somewhat earlier *Leges Barbarorum* of the Continental Teutons, that they are written in the vernacular tongue, and are probably, on that account, freer from the unconscious influence which a translator always exercises. The first document which they show us is the collection of Dooms named after Æthelbirht of Kent, the convert of St. Augustine, whose reign covers the last forty years of the sixth century. The Dooms of Æthelbirht are thoroughly archaic in character, far more archaic than the famous Lex Salica, in spite of the seniority attributed to the latter document. We read the first of Æthelbirht's Dooms; the oldest rule of English Law which we know in authentic form.

The Church's cattle and the Church's peace.

"God's cattle and the church's, twelve-fold fine. Bishop's cattle, eleven-fold fine. Priest's cattle nine-fold fine. Deacon's cattle six-fold fine. Clerk's cattle three-fold fine. Church peace two-fold fine. Court peace two-fold fine."[1]

No better starting-point for our enquiry could be found. The oldest rule of English Law

speaks neither of Possession, nor of Property; but it speaks of two things from which the ideas of Possession and Property will grow. Happily, there can be no mistake about the distinction; for the text does not merely use different words, it prescribes a different treatment. To make the distinction absolutely clear, we may confine ourselves strictly to what is said about the Church.

The Church's cattle.

First, the Church's cattle twelve-fold fine. (*Godes feoh and ciricean xii. gylde.*) There need be little difficulty about that. The Dooms were set in Saint Augustine's day. The saint will probably care for the interests of the Church. So the rule is laid down—probably it was already established in practice—that he who steals or destroys the Church's cattle shall pay twelve-fold. Two questions naturally arise out of this doctrine.

What are the Church's cattle?

The first is—What did the pronouncers of the Doom understand by the Church's cattle? The form in which they deliver their saying leaves the answer, of course, very doubtful. It is clear that they allude to a relationship between the Church and the cattle, which to their contemporaries was familiar enough, for they do not describe it, except by the use of the possessive

pronoun. Probably they would have found it very difficult to give any exact definition; but, if they had been pressed, it is highly probable that they would have declared that the cattle were those of which the Church was *âgend*, for, in the next Kentish Dooms, we find this word used unmistakeably in such a sense.[2] One passage speaks of cattle being stolen, and the *âgend* coming up with the thief; the other describes the claim of the *âgend* to cattle which have been unlawfully sold in the London market. Now we shall hardly be far wrong in translating *âgend*[5] by "owner," or "lord." It is the modern German *Eigentümer;* and Wiklif's Bible speaks of the ox knowing his lord, where the A.V. describes him as knowing his owner.[3] Moreover, in the same Doom Book of Æthelbirht, we read that, if one man slays another, he must pay for it with his *âgene scætte*, which can hardly mean anything else than with his "own money."[4] But nowhere in the Dooms do we find the substantive *âgen*, or "ownership."

How did the Church acquire them?

The second question which arises is — how did the Church become *âgend* of the cattle in question? We may safely assume that Saint Augustine and his fellow-missionaries did not

bring cattle with them from Rome. Even if we give to the word *feoh* its later and more expanded meaning, and let it stand for belongings of any kind, we may still be very certain that the Doom does not refer merely to the scanty apostolic outfit, the scrip and staff, or even the sacred vestments, which the missionaries may have brought with them. Liberality to the Church was one of the first lessons taught to the Teutonic convert. We have seen that, when Charles the Great imposes a rather forcible Christianity upon the conquered Saxons, one of his first stipulations is, that each church shall be endowed with two *mansi* and a house. We may fairly suppose that the cattle to be seen grazing on the common meadow of a primitive English village, had either been bred by their *âgend*, or were the produce of a successful raid on a neighbouring village. But the cattle of the Church were the gifts of converts. This is one of the many important principles of Law which the Church is to foster. Cattle may be given to the Church; and the man who steals them must pay twelve-fold. But let us go back to Æthelbirht's Doom.

The Church's peace.

"The Church's peace, two-fold fine." (*Cyric*

frith ii. gylde.) Now this is, obviously, something very different from the theft of the Church's cattle. For one point, we must not accuse the doomsmen of saying the same thing twice over in the same Doom. For another, still less would they, in the same Doom, pronounce two such widely different penalties for the same offence. It is clear that the latter part of the Doom refers to a breach of the Church's peace, which may not have anything to do with the loss of cattle or goods. Two men meet in a church, and quarrel. The quarrel leads to blows. The Church's peace has been broken; the offender must pay two-fold, *i.e.*, probably, twice the sum payable by the aggressor as *wer* for the damage done to his victim. If both were in the wrong, the Church will not be very sorry, for she will get a fine from each. The notion of the Church peace is not in the least singular. Every man has a peace in his own house. If one guest calls another a liar, he pays, in addition to his fine to the party primarily injured, a fine of a shilling to the householder.[5] If one guest merely snatch a cup from another, when a friendly drink is going on, he incurs a similar liability.[6] The peace of an earl's house is more

precious than that of an ordinary freeman.[7] The king has a very terrible peace. If a man fights in his house, he forfeits all his inheritance; and it is at the king's pleasure whether he live or die.[8] By the days of Ine, the Church has adopted a fixed sum as her peace fine. It is the very handsome amount of one hundred and twenty shillings.[9]

Two distinct notions.

Now here we have two perfectly distinct ideas. On the one hand, there is the offence of depriving a man of valuable things. On the other, there is the offence of creating a disturbance within an orbit over which a man is assumed to have physical control. Our forefathers had distinct names for these ideas. The one was a breach of *mund* (*mund-bryce*); the other a breach of *frith* (*frith-bryce*). Doubtless, usage often confounded the two expressions. Doubtless they were very near akin. But even the early Anglo-Saxon Dooms distinguish clearly between the two notions. When a man's wife, children, slaves, or cattle are stolen or injured, there is *mund-bryce*. When disturbance is created in his house, although no ownership is damaged, there is *frith-bryce*. Even where the names are not used, the difference of the penalties will tell us at once which is

intended. The two notions are elaborately and carefully distinguished in a semi-official document entitled *Be grithe and be munde*, which we may perhaps attribute to the reign of Knut.[10]

Let us follow up these two ideas a little, and see whither they lead us. It has been said that the action of the Church probably contributed very powerfully towards establishing one of the elements of which our modern notion of Property is composed. It established the idea that goods might be alienated. But other influences were at work.

The payment of fines.

The earliest object of recorded law is, as we have before seen, the suppression of the blood feud. To achieve this end, it at first persuades, and afterwards compels the injured party or his relatives to accept a money payment (*wer*) in satisfaction of the claim for revenge. The two offences earliest recognized are assault and theft. The law does not, at first, profess to deal with hot blood. If a man is attacked, he may repel force by force, and the law will not inquire too curiously about proportion. If the thief is caught red-handed, he may be slain. But if a man wounds another and escapes, if a man is found slain, if a secret theft is committed, the injured

party or his relatives ought to bring the offender before the moot, and then the elders will urge the parties to swear the peace, and compel the offender to give pledges to pay the appropriate fine.

Payment in goods.

But how is the fine to be paid? If we are to trust first impressions, the early Teuton has a great deal of money. The fines are, in many cases, enormous. The thirst for blood can only be assuaged by tempting offers. Thirty shillings for unlawfully binding a freeman, forty-five shillings for stealing a tame stag, fifteen shillings for removing three poles from a hedge—these are fines taken at random from successive Titles of the Lex Salica.[11] When we think of the scarcity of money in primitive times, when we remember that some of the pieces mentioned in the records of the early Middle Ages are not coins at all, but merely money of reckoning, we shall wonder that the *wergild* system does not break down at once, owing to the impossibility of carrying it out. But a very useful passage in the Lex Ribuaria helps us considerably.

"If a man begins to pay a *wergild*, let him hand over a horned ox, unblinded and healthy, as two shillings. A horned cow . . . as three

shillings. A horse . . . as twelve shillings. A mare . . . as three shillings. A sword without a sheath as three shillings. A good cuirass as twelve shillings;" and so on.[12] It is clear that the *wergild* system must have resulted in frequent transfers of goods; a litigant who had made good a heavy claim might have found himself with a large collection of miscellaneous articles on his hands. Many of these would, probably, be quite useless to him. He would naturally try to barter them away.

Barter and sale.

This brings us to the next influence which is to develope the nascent law of property. The Anglo-Saxon Dooms recognize the merchant, perhaps we ought rather to say, the pedlar; for it is nearly always a stranger who is assumed.[13] Apparently, the general view taken of trade is, that it is a practice affording unlimited opportunities of fraud. "When a dealer from outside deals with our folk," say Ine's Dooms, "let him do it before witnesses. When a man claims stolen goods from a dealer, and the latter has not made his purchase before good witnesses, let him prove clearly that he was neither an accomplice nor a thief, or let him pay thirty-six shillings fine."[14] Æthelstan forbids the purchase of any

goods above twenty pence, except in the presence of the portreeve or the reeve in the folkmoot.[15] In later times, the transaction witnesses of the Hundred and the borough become an official institution; and the "sale in market overt" acquires a peculiar validity, which it retains to the present day.

The royal influence.

It is not very difficult to trace the influence under which the law of sale developes. It is quite opposed to the spirit of gentile society, with its abhorrence of strangers, and its exclusive maintenance of the Clan group. The merchant is nearly always a foreigner; if he does evil, he flees, no one knows whither: he has no kin to be responsible to the injured party. In course of time, he will form *gilds*, which are artificial clans; and they will be responsible for his misdeeds, will bury him when he dies, and feast him while he lives. In the mean time, clumsy expedients are tried. The merchant must bring all his servants before the king's reeve in the folkmoot, and with them men who will be responsible for them; if he wishes to increase their numbers, he must obtain permission of moot and reeve.[16] The Kentish man who buys cattle in the London market, may do so before two or three good

churls. But he may also do so before the king's *wik-gerefa*.[17] If a stranger is slain, the king gets two-thirds, or, at least, half of the *wer*.[18] The stranger is, probably, a merchant. For reasons which will hereafter be considered, the king is anxious to establish the practice of sales, under due restrictions.

So far then we have arrived, at a very early period in our legal history. Things may be given to the Church, may be handed over as *wer*, may be bought before witnesses. To these sources of ownership, we may safely add capture and production. Subject to rules about hunting grounds, and to the law of theft, that which a man captures is his. So also are the cattle which he breeds, and the spears and helmets which he makes. Behind these elementary notions of ownership, the law does not carry us. Earlier stages must be left to the psychologist. All analogy suggests that the root of ownership is user. When a man has used a thing once, he wishes to use it again. He resents any interference with the exercise of this wish; it is a breach of an incipient custom. But these are speculations. What seems fairly established is, that, at the earliest period of our recorded legal history, the things which a man had received

as *wer*, had bought before witnesses, had made, or had captured, were in his *mund*. Interference with them was theft, or *mund-bryce*.

Subjective notion of ownership.

But again we must be careful not to attribute to primitive law ideas which it does not grasp. The notion of ownership, even in movables, is not *objective;* it has not a separate existence. It is slowly disengaging itself from the law of sale and the law of theft, but, at present, it is still essentially bound up with these ideas. Nothing can show this more clearly than an account of that picturesque process known to all early Teutonic societies as Following the Trail. The extraordinary agreement between the various accounts of this process, which we get in the different *Leges Barbarorum*, points irresistibly to the conclusion, that it was an institution developed by the Teutonic races in their earliest homes.

Following the Trail.

The man who loses a beast follows the track of its footsteps till he comes to the house at which they cease, or till he finds it in the hands of a stranger. Observing the due forms, he has a right to search the suspected house, even, as the Westgötalag says, the *invistær hus*, the granary, the barn, and the sleeping chamber.[19] If the animal is found under suspicious circumstances,

e.g. locked-up or covered with straw, the presumption is irresistible. The householder is a thief, and must pay the fine, the owner seizing his beast.[20] But, if the man in whose hands it is found attempts to justify himself, the question arises—What is to become of the article in the mean time? Modern systems of law would take the view that the claimant must prove his title, and that, until he has done so, there is no presumption against the holder. Apparently this is not the view of early law. The holder must prove by the oath of his neighbours that the beast was born and bred in his house,[21] or he must produce his warrantor.[22] In the mean time, if the loss of the claimant is not three days old, he may insist on the beast being lodged in the hands of a third party; if three nights have passed, the holder may retain the beast pending the trial.[23] But the duty is still on him to justify his position. He calls upon his vendor to clear him of the charge of theft. Now we see the point of the sale before witnesses. The vendor can hardly deny a transaction thus publicly conducted, and so he has to take the place of the accused. He becomes, in fact, his *warrantor*. Sometimes we seem to trace a

difference between the mere witness, and the *vin*, who is responsible for the vendor's title.[24] But we can hardly doubt that this is a later refinement. The witness does not, as a rule, guarantee the title of the person from whom the accused party bought. He knows nothing about that. But he swears that the accused acquired by a *bonâ fide* sale. The accused is free from the charge of theft. What then? The process must continue against the man who sold to the accused, who, in turn, calls upon his vendor, and so on, until the thief is found at last, or it is proved that there was no theft. But, in the mean time, we seem to have lost sight of the article about which all this fuss arose. The object is to obtain a theft-fine. No doubt, if the claimant proves a theft, he is allowed to recover his chattel, either from the convicted party, or from the custodian, in whose hands it is deposited. But, unless the holder should, while clearing himself by oath-helpers from the suspicion of theft, voluntarily give up the article, the conviction appears to be a necessary condition of success.[25] A strong presumption for this view lies in the fact that, at a very early date, the limit to which the process may be carried is

fixed at the third previous vendor. If the history of the sales proves to be innocent for three stages, the claimant can go no further.[26]

But, in any case, the spirit of the process is clear. All depends on proving a theft, or, which is the same thing, raising a presumption of theft which is not rebutted in a formal way. The destination of the subject-matter seems to be a secondary incident, turning a good deal on fortuitous circumstances. There is no claim to recover the subject-matter simply on the ground of title. The clear scientific thought of Roman Law—*I say that this thing is mine*—is entirely wanting. It appears to be the best opinion that Teutonic Law never, of its own motion, reached this stage.[27] There is a singular passage in Bracton which shows how monstrous this fact appeared to his educated mind, and yet how strong was the influence which it exercised on English law. Bracton tries to explain the rule away by saying that, although it might appear at first sight that the action to recover a specific movable should be *in rem*, yet, as the defendant would have the option of giving the thing or paying its price, it was really *in personam*.[28] This is, of course, to give the

Hand muss Hand wahren.

consequence of the rule as the reason for its existence; but it is very significant that even the powerful influence of the King's Courts in the thirteenth century has not been able to expand the old idea. We may go further than that, and say that, until the nineteenth century, English Law never recognized the *ownership* of movables in legal process. The man who tried to recover his chattel had to prove that the holder had committed a wrong in respect of it. If he succeeded, he would get judgement for its value, by way of damages for the wrong. But it was at the holder's option to pay the value or surrender the chattel; and, if he chose the former alternative, he became unassailable in respect of the chattel. Substantial justice was done by an elaborate series of rules which treated an unlawful holder, who had really acted throughout in good faith, as though he had committed a deliberate wrong. But the old principle held fast in theory. *Hand muss Hand wahren. Meuble n'a suyte.*

Land. Hitherto we have spoken only of movables. Now we must think of land, which, in a society that has reached a territorial or sedentary stage, becomes in each succeeding generation more precious, as population increases. Land differs

conspicuously from movables in two respects. It cannot be multiplied, and it cannot be carried away. These are, however, physical differences which, powerful as is their influence, do not necessarily strike the primitive mind. A philosopher would, doubtless, make the distinction the basis of a Law of Property. But the primitive man is not familiar with philosophy. We must look elsewhere for the ideas which guide him.

Land ownership a share in the group.

If the view previously taken of the character of the Teutonic land settlement be correct, the early Teutonic agriculturist was a member of a group. The question of what land was worked by the group would be only of secondary importance to him. With the virgin forest to fall back upon, he would feel that a migration, irksome though it might be, would not mean destitution. The really important question for him would be—To what group do I belong? It might be the original village of the Hundred, which the clan first laid out when it settled down to agriculture; or it might be one of the daughter villages which, it seems likely, were settled by swarming from the parent hive. That is only, on a small scale, the process of colonization which goes on always in expanding races.

Whether this group was strong or weak, persevering or idle, peaceful or quarrelsome, would be of infinite importance to the individual clansman. And we cannot doubt that any intrusion on the domain of the group would be jealously resented. Furious as is the controversy which has raged over the "migrating man" of the Lex Salica, we cannot but see that there is something more in the matter than a simple case of trespass. The Law has, in fact, discussed the very case of trespass several Titles before; and the word which it has used is *adsallire*. The man who "assails" another's vill, is to pay a fine of sixty-three shillings.[29] But the offence of migrating cannot be dealt with in this simple way. The passage is so interesting that the important parts may be given at length.

The village is an exclusive group.

The *homo migrans*.

"If any one shall wish to migrate upon another in a vill" (one family of texts reads simply "shall wish to migrate upon another's vill"), "if one or any of those who stand (*consistunt*) in that vill shall wish to receive him (*suscipere eum*), but if one there be who objects, he shall not have leave to migrate thither." (Then follows an elaborate form of protest, to be used if the offender continues obstinate.) "And because he

was unwilling to hear the law, he loses what he has worked (*laboravit*) there, and is, further, liable to a fine of thirty shillings." And then a later text adds: "But if he shall claim to migrate into another vill' (or "another's vill") "before the moot (*conventus*) has been held, he pays a fine of forty-five shillings." [30]

The offence alluded to in this passage is described in the old Frankish gloss as *uuedresitelo*, which Dr. Kern, the learned commentator on the Malberg speech, translates as "obstinacy." [31] On the other hand, the offence of trespass, upon which a fine of sixty-three shillings is imposed by the earlier Title, is described as *fecthis* ("fighting"), *turphaldeo* ("housebreaking"), *alafalcio* ("farmbreaking"). [32] The inference is irresistible, that, while the earlier Title alludes to a violent trespass, the later speaks of an attempt to join an agricultural group. The whole of the arrangements of the *by*, so minutely described in the Scandinavian Laws, are absolutely inconsistent with the free admission of strangers. One of the rules laid down by Lydekin, an author of the early fourteenth century, in his commentary on the Westgötalag, is, that if a stranger makes any use of the *almænninger*, or common lands, he forfeits

his goods.[33] The Dooms of Ine state that if a stranger or an unknown person wanders off the road in a wood, and neither shouts aloud nor blows his horn, he may be treated as a thief.[34]

The State breaks up the village;

But, as in so many cases, we get our clearest proof of the exclusiveness of the village from the efforts which are intended to break it down. These efforts merit careful attention. The policy which directs them will be decisive in the formation of modern ideas of Property.

by repressing communal action,

There is a very striking passage in the Laws of Liutprand of Lombardy, attributed to the year 733. "If the men dwelling in a *vicus* have any complaint to make concerning field or vineyard, meadow or wood, and have gathered together in strength and said—'let us scourge him' (the offender) 'and turn him out by force'—and they have gone about to do it, and any tumult has been caused and blows or cruelty inflicted, or any man been slain, let them make fine according to the former law."[35]

The meaning of this is evident. The village has been exercising its communal right of managing its own affairs, and the State, jealous of its own authority, perhaps reasonably apprehensive of disturbances, interferes with a strong

hand. The actors in the movement are to pay a fine of twenty shillings "to the party who in the field or the vineyard, or the meadow, or the wood, *did his labour*." Beyond this, they must make their peace with the State; and the State expressly says that the offence is neither a broil, nor an outbreak of servile insubordination, nor an ebullition of rustic high spirits, but a deliberate plot to murder.[36]

by encouraging freedom of settlement,

The State is not content, however, with merely repressive measures. It will break up the exclusiveness of the village. If the king chooses to give a man Letters of Settlement, and he desires to settle anywhere, he produces his Letters in the public moot, and any one who dares to "protest" against him (the word is the same as that used to describe the process of expelling a *homo migrans*), incurs a fine of two hundred shillings.[37] After a stranger has remained undisturbed for twelve months, he can no longer be ejected.[38] On the other hand, if a man desires to leave his home, and settle elsewhere, he obtains the "witness" of the ealdorman of the shire whom he first followed.[39] The meaning is quite plain. The State will convert the exclusive group of communal farmers into

a chance collection of isolated individuals, owing allegiance directly to itself. But we follow the process a step further.

by protecting sales.

It is hardly to be supposed that a group such as we have examined would voluntarily allow its members to dispose of their interests to strangers, or even to other members. The former transaction would lead to the introduction of new settlers, the latter to disturbance of family claims, to inequality of position among the constituents of the group, to difficulties in the common ploughing. And yet it is certain that, at a very early date, such transfers were made; no less certain that they were subject to serious restrictions.

Claims of the village.

In the first place, it is clear that the other members of the village group had, originally, to be consulted. The formal transfer of Swedish Law, the *Umfaerth*, is clearest on this point. The intending transferor of land must fix a *siunættinger*, or meeting of the Thing, at which all the members of the village are entitled to be present. Then follows a solemn procession round the fields and meadows, and a return to the homestead. In addition to the witnesses, who testify to the sale or other arrangement which has preceded the formal transfer, there must be nine *fastir*, who,

with hand on staff, sanction the proceedings. One of them, the *styrifaster*, pronounces a solemn formula of confirmation.[40] This can hardly be anything else than the consent of the village to the contemplated transfer. The land which, as the Anglo-Saxon Dooms put it, is invested by shire's witness, is free of all claim, before death and after death, to sell and to give to whom he will.[41] For this protection, the acquirer is well content to pay the *land-côp*.[42] Even among the Ribuarian Franks, whose original ideas of land-ownership must have been powerfully affected by the Roman fashions with which they came into contact, the conveyance of land took place in the public moot.[43]

Claims of the kin.

But the would-be transferor has to reckon, not only with his neighbours, but with his own household. "No one," says the Law of the Saxons, "may make a transfer of his inheritance *except to the king or the church*, and so disinherit his heir, unless he do it compelled by hunger, to be fed by the man to whom he transfers it."[44] If a man wishes to sell an immovable, says the Westgötalag, "he must first offer it to his heir."[45] The latter has a month in which to exercise his right to purchase. This is, of course, a derogation from

the old strict rule; but it none the less clearly points to the existence of the rule. The *retrait lignager*, or right of the heirs of a vendor of land to set aside their ancestor's sale, exercised, during the whole of the Middle Ages, a greater or less influence on the transfer of land, and is too well known to need further explanation. We can see that the originally indefeasible claims of the Family and the Clan are being steadily broken down on one pretext or another.

Royal and clerical influence.

Nor can we doubt what is the influence at work. Looking back at the provision of the Saxon Law, we see that the strictness of the old rule is relaxed only in favour of two recipients, the Church and the king. Looking at the Law of the Alamanni, we find that the first clause provides that gifts to the Church shall not be disturbed by the heirs of the donor after the latter's death.[46] An early Capitulary of Ludwig the Pious, intended to be read as part of the Custumals (*legibus addenda*), declares that every man shall have perfect liberty to dispose of his *res* for the safety of his soul, and that his heirs shall on no account seek to recover them.[47] As this passage speaks of a solemn delivery (*legitima traditio*) in a county, we can hardly doubt

that it alludes to gifts of land; and we are interested to note that, if the delivery cannot be made in the county, because of the donor's absence on the king's business, it should be made in the presence of his neighbours (*pagenses*).[48] Stiernhöök relates that it was the Swedish custom in old days, after the solemn announcement of a sale of land, to invite the king and his court to a banquet at three tables; and then, in the presence of the king, the *skötning*, or solemn pitching of a morsel of earth into the bosom of the transferee, took place.[49] It is impossible to doubt the existence of the design. The State, and its *protégée*, the Church, are bent on turning the intermixed Hide, the undivided share in the village lands, into the separate individual *alod* of later times. They do it by encouraging transfers, by substituting for the old formal and open ceremonial of conveyance the documentary conveyance of Roman Law, by treating newly-reclaimed land as the individual property of the claimant,[50] by insisting on enclosure wherever possible. "A churl's field ought to be closed summer and winter," say the Dooms of Ine. "If it is unenclosed, and his neighbour's cattle enter through the opening, he gets no

damages, but must lead them out and bear his own loss."[51] "If churls have a grass plot in common, or other partible land to hedge, and some have hedged their lots, and others not, and they (*i.e.* cattle) eat their common acres or grass, then let them go whose gap it was, and make fine to the others, who have hedged their lots."[52] Contrast this with the rule of the Westgötalag: "No one may enclose land, at least without the consent of those who own an *attunger*."[53] The undivided share of the primitive farmer has become the *othal, udal, alod,* the separate estate of the *bondi* or churl. The commentator Lydekin shows us the jealousy which existed between the two in the period of transition.[54] The distinction is marked in Sweden by a difference of title, which separates the *othalbondi* from the *almœnningsbondi*.[55]

The State's landowners,

And we must not forget, of course, that, all this time, the State has been setting up its own special class of landowners, who hold their land on very different principles from those which the village understands. They are not the members of agricultural groups; they are professional soldiers or servants of the State, who treat their land as a reward and guarantee of service to the

king. They are *gesithcundmen*, who, if they fail to attend at the summoning of the host, forfeit their land and pay a heavy fine;[56] or they are thegns, who to the king's *utwære* (host) five hides have.[57] They are the holders of those *beneficia* who, as Charles the Great rules, are first liable to service in the army of Gaul.[58]

and their tenants.

But, just because they are not agriculturists, they must get some one to work their lands for them. We have good reason to suspect that, even in purely gentile society, the Clan group finds itself obliged to recognize in some way a circle of dependants, or settlers who, without being members of the village, contrive to hang on its outskirts, and pick up a living in some way. They may be men who have been expelled from other villages, they may be escaped slaves, or strangers from a distant land. They are the *cotsetlæ*, or cottagers of English law, who hold no Hide nor part of a Hide in the arable fields, the *köter* of Germany, the *casati* of Frankish documents. But we see beside them another class, who, whatever their origin, are evidently in a very different position. This is the rent-paying man, the *gafolgilda* of the Anglo-Saxon Dooms, the *landboe* of Sweden, the *tacksman* of Scottish law.

He is, at first, probably, a mere agent, or *bailiff*, to whom the land has been bailed or delivered, that he may work it for the owner, and render an account of profits; but he later becomes the *firmarius* or farmer, who pays a fixed rent. Even in early days, the rent-paying man is the equal of the "boor," the typical member of the village.[59] The man who fights in his house pays the same fine as the man who fights in the house of the boor.[60] As a landmark in the history of Contract, the holder of loan land, the rent-paying tenant, as we should say, is highly important. But he is still more important as helping to break down the notion of that landholding by groups which the State has set itself to destroy. Through him, and through his employer, the notion of land-ownership as a share in a joint enterprise becomes changed into that universal system of *tenure*, or landholding as the subordinate of a lord, which, as the private side of feudalism, is so strongly marked a feature of the later Middle Ages. It is a great thesis, yet to be proved, that the individual landholder, the king's thegn or the beneficiary, because he finds it difficult to obtain voluntary tenants, makes his way into the village group, and compels the villagers to do him

The manor.

agricultural service in return for military protection, thus producing that striking institution, known far and wide as the "manor," which is the kernel of the feudal system. It is not yet absolutely proved; but every accession of knowledge renders its truth more probable. Without making any rash assertions, however, we are able to see that the action of the State has set up, beside the primitive land unit, a totally different kind of unit, the individual holding of a tenant or loansman, who will look to his lord, and not to his Clan, for the protection of his interests. Beside the alod or the Hide appears the benefice or fief; beside the folkland, the land owned by old customary right, appears the *terra testamentalis*, the bookland, the land held by charter of a lord. We can hardly doubt what the fate of the older institution will be. The State does not like it, even after it has become transferable and individual. There are grave doubts whether its owner is liable to military service. Even so late as the fourteenth century, Philip the Fair has to admit that the alod is free from many kinds of taxation.[61] In England, the oath of Sarum quietly ignores its existence, and we hear little more of it in that country. In France, in the

Disappearance of the alod.

fourteenth century, Jean Boutillier will say that if land is not held of any one else, it must be held of God.[62] The *alleu* has to bear the whole weight of the maxim: "No lord, no land." Again and again formally abolished, again and again it re-appears, till the Revolution sweeps away fief and alod, and substitutes a new conception in their room.[63] In Germany, the feeble State fails to stamp out the alod;[64] after its fall a great resurrection of allodialism takes place in the independent fragments of the dissolving Empire.[65]

But we have yet to notice two determined and successful efforts on the part of the State to break down the old notion of membership of the agricultural group, and substitute for it the notion of individual property in land. The first of these is the enforcement of execution against immovables; the second, the developement of the law of inheritance and testament.

Execution against land.

It seems beyond measure clear, that early Teutonic Law did not recognize the liability of the agricultural group to be broken in upon by the creditors of its members. Owing to the rudimentary condition of the law of Contract, which, as we shall see, is barely recognized as

an institution by primitive law, there could be few contractual claims against individuals. But, after the developement of the system of wergilds, and indeed before it, there is much liability for wrongs; and, when once the rule of pecuniary compensation has been established, there will be many claims for the satisfaction of injuries. There is a good deal in the *Leges Barbarorum* to suggest that the primitive village incurred responsibility for the crimes (as we should call them) committed, or supposed to have been committed, by its members, especially when the offender could not be identified. "If a man is slain outside a house," says the Westgötalag, "the villagers must pay a fine of nine marks, or deliver up the slayer."[66] If a man is slain on the unclaimed land between three villages, the villages must clear themselves of complicity. If they fail, they must pay the fine; but, in compensation, they may divide the land between them.[67] The dislike shown by the Anglo-Saxon Dooms towards the "landless (or lordless) man of whom no right can be got," is probably a relic of the same rule,[68] which is itself, doubtless, only another form of the liability of the kin for the misdeeds of its members. The liability of

Village liability.

the township survives into Norman times, till it is superseded by the State's institution, the tithing.[69] But the right to seize the goods of the individual offender is clear too; and it is one of the early efforts of the State in the Administration of Justice to secure that this seizure shall be conducted by its own officer.[70] Only, the seizure is limited to the movables of the offender. The extreme limit of liability in respect of land is shown by the famous and picturesque procedure of the *Chrene Cruda*. Apparently, it applies only to the single case of homicide. The offender who cannot pay the fine has one chance for his life. If he can persuade one of his relatives to undertake the liability, he enters into his house, and, standing on the threshold, looking inwards, he throws over his shoulders with his left hand a handful of earth, which he has collected from the four corners of his land, upon his surety. Then, stripped to his shirt, unshod, with staff in hand, he leaps over the hedge, and, it can hardly be doubted, disappears for ever from the village which he has disgraced, leaving his land to his redeemer.[71] But it will be observed that the strictest limits are put to the process. It only applies to the single case of homicide.

Seizure of movables.

The *Chrene Cruda*.

The offender must swear that neither above the earth nor below it has he wherewith to pay the fine. He must choose his nearest relative to redeem him; if such an one cannot be found within the third degree, he can go no further.

Forfeiture by the king's ban.

But the State steps in with a powerful remedy. It is familiar already with the punishment of *forfeiture;* for, as we have seen, the *gesithcundman* who fails to attend the summons to the host loses his land, which has been loaned him by the king. The summons to the host is the original *ban.* But the idea is capable of extension. Any failure to obey a royal summons can be visited with outlawry and confiscation. The State will place this formidable procedure at the disposal of the private creditor. If the accused party refuses to appear before the moot (a step which always places the Clan tribunal in a difficulty), if he is a notorious evil-doer and, instead of paying his fines or getting his relatives to stand surety for him, takes to wandering about the woods, the king will place him "outside his speech," and any one who pleases may kill him at sight.[72] He is *forbannitus,* and any one who harbours him will incur a fine of sixty shillings;[73] all his goods will go to the king.[74] It might be thought that

this is a poor solace for the creditor; but we note that Charles the Great, in his additions to the Lex Ribuaria, gives a satisfactory explanation. After the *missio in bannum* has taken place, a year must elapse; during which time, no doubt, the offender may buy his peace by paying the fine, or by appearing in court and disproving the charge. If he does neither, the king may be spoken with on the subject; and he will pay the fine out of the offender's goods. If these are insufficient, recourse may be had to his benefice.[75] But we are still left in doubt whether the village land of the culprit can be seized, until a Capitulary of Ludwig the Pious, of the year 818, sets the matter at rest. Here it is expressly stated, that, if the movables of the offender will not suffice to pay the fine, then the deficiency is to be made up out of his immovables. And, as if to place it beyond all cavil what immovables are meant, the Capitulary goes on to explain, that if the immovables are still in a state of undivided owership (*si nondum cum suis coheredibus proprium divisum habuit suum*), the count must call together the coheirs and insist upon a division.[76] The State will enforce the claim of the creditor against the claims of the kin.

Lastly, in the law of Inheritance and testament, the State discovers a powerful weapon of attack on that community which it has set itself to destroy. The subject of Inheritance is so vast and complicated, that it would be impossible to treat it with the thoroughness which it so unquestionably deserves, in a work which does not profess to be technical. Probably there is no subject which so well repays the attention of the student of society. It takes us back to the most elementary form of that principle of association which is the beginning of History. In the changes which it has undergone, we trace the rise and spread of ideas which have dominated the human race. It touches man's closest interests, and shows him in his most genuine light. Here we are merely to see, in briefest fashion, how the State has used the law of Inheritance as a means of destroying the Clan.

The Law of Inheritance.

It seems fairly clear that the earliest and most important step towards the developement of a law of Inheritance, in the modern sense, is the organization of the blood feud. The restriction of the duty (perhaps we ought to say the right) of revenge, to a comparatively small circle of kindred, leads to a distinction between the larger

The blood feud kin.

group, or Clan, and a smaller group, the *sippe*, or *maeg*; while the success of the blood feud, a success which we are apt to underestimate, itself tends to the peaceful accumulation of property, and undisturbed possession of goods. The introduction of the wergild system is a still more decisive step. The *wer* of a slain man is paid to those of his kin who were bound to revenge him; they are compensated for the loss of their comrade-in-arms, it may be also for their loss of the fierce pleasures of revenge. The *Leges Barbarorum* are full of the details of arrangements which are made for distributing the blood fines among the avengers of the deceased. But we have no reason to suppose that, at first, the rights of the *maeg* extended beyond the dead man's *wer*.

The heirs of the Hide.

Hide, the homestead and its accompaniments, the *familia et penates et jura successionum* of Tacitus,[77] go to the sons; failing them, to the brothers; failing them, to the paternal uncles of the deceased. No doubt, these will be very much the same persons as the kin who revenge his death. But we dare not say that they will be exactly the same. In the blood feud group there will probably be several degrees of relations, who will divide the *wer* proportionately amongst

them.[78] Amongst the homestead heirs, the nearer degree excludes the remoter entirely. But we see a strong resemblance of principle between the two cases, which we may conveniently call gentile, or *agnatic*. The woman does not share the feud, although, curiously enough, she transmits it to her children; no woman, no relative through a woman, inherits the Hide. The reason in both cases is clear. The woman does not fight; therefore she does not share the feud.[79] The woman, when she marries, goes into the *mund* of her husband. *Mund* and property are inseparable. By leaving her father's *mund*, she forfeits all claim to his property. She cannot be allowed to bring a strange *mund* into her paternal household. There are even traces among the primitive Teutons of a right of primogeniture; and there should be nothing in that to surprise us.[80] Both primogeniture and the exclusion of women are far older practices than the feudal ideas to which they are often attributed. But primogeniture, if it ever existed in the early Teutonic world, has disappeared before the page of history definitely opens.

The exclusion of women.

The meaning of the system just described is clear. It is a deliberate cause, or an inevitable consequence, it is hard to say which, of a system

The gentile law of Inheritance.

of gentile community. If the solidarity of the Clan group is not maintained by the law of inheritance, the clan itself breaks up. That is precisely what the State desires to see; and we may now rapidly review the process by which it is effected.

The admission of women.

In the *Leges Barbarorum*, we perceive that an attack is being made on the rule which excludes women from the inheritance. The exclusion is, in fact, nowhere strictly maintained. But the position in which we find female heirs tells its own tale. In the earlier texts, they are always postponed to males. The older edition of the Westgötalag invariably adopts this practice. The daughter is postponed to the son, the sister to the brother, and so on.[81] In the Lex Salica, there has evidently been a compromise; the daughters and sisters appear (though the text is corrupt) to inherit movables along with the sons and brothers. But the famous clause which excludes women from the succession to land is, perhaps, the best-known fragment of all the *Leges Barbarorum;* and it has a meaning, though not that generally attributed to it.[82] The Ribuarian Law adopts much the same rule. Women succeed generally along with men; but

they are excluded from the "ancestral inheritance," which can hardly mean anything else than the Hide.[83] Even the Burgundians, powerfully as they are influenced by the Roman Law, which knows no preference of sex, only give the inheritance to the daughter if there is no son.[84] But we see the tide of exclusion slowly receding. The later MS. of the Westgötalag, about a century younger than the *codex antiquior*, merely allows the male a somewhat larger share than the female successor.[85] The Edict of Rothar places legitimate daughters on the same footing as illegitimate sons.[86] The Edict of Hilperic, which amends the Lex Salica, admits daughters even to the succession of lands, after the sons.[87] A Lombard jurist of the early eleventh century, commenting on the same Law, says roundly, "if a man has died leaving a son and a daughter, they share alike."[88]

The rule which excludes women is, in fact, hard to defend; and we may suspect that popular feeling was, to a certain extent, responsible for its downfall. There are two obvious flaws in it. The woman may not marry at all; and then she will be in her father's *mund* at his death. Or she may marry without *mund;* for the informal

marriage soon makes its appearance, if, indeed, it is not older than its rival. And then there will be no necessary conflict of authorities. Possibly the right of succession was first extended to those women who had not left the paternal household; the daughter on marriage received a marriage portion, and lost all further claims.[89] We shall also not be far wrong in attributing some weight to the powerful influence of Roman Law, and to those new rules on the subject of prohibited degrees of marriage which the Church is endeavouring to introduce. But, for all that, the action of the State is undeniable, though it may be difficult to prove. As we have seen, the *Leges Barbarorum* are drawn up under royal auspices. When we trace an innovation, we may strongly suspect the influence of the king and his advisers. No doubt, they cannot do very much; but they may expedite the adoption of a budding reform. According to Swedish tradition, the admission of the daughter to share with the son was due to the powerful example of Birger Jarl.[90]

Admission of the emancipated.

But a much more deadly attack is made on the Clan system when emancipated heirs, the *forisfamiliated*, are admitted to share the inheritance of the father whom they have cast off.

That a child should be able of his own will to escape the parental yoke, is so contrary to primitive rules, that we wonder how the right has been secured. We turn to the title of the Lex Salica in which the process is explained. The man who wishes to remove himself from his kin (*parentilla*), comes to the moot before the *thunginus*, and there, breaking three alder twigs over his head, casts the fragments into the four corners of the court. Then he renounces by oath all share in the inheritance and property of his kin. If afterwards any one of his relatives is either slain or dies a natural death, he can claim no share of the murder-fine or inheritance. Then follows a most significant clause: "But, if he himself should happen to die or be killed, his inheritance and fine go to the fisc."[91] After this, we are not surprised to find the State encouraging the practice of emancipation. But what is a little surprising, and most important for our purpose, is to discover that the emancipated person ultimately acquires a right of succession to the paternal inheritance. Yet this stage has been reached by the beginning of the eighth century, for we find the Lombard Capitularies of Liutprand declaring, that if a man before his

death gives daughters in marriage, and afterwards dies, leaving other daughters domiciled with him, the married and the unmarried daughters share alike in the paternal inheritance.[92] The same rule is to apply in the case of married sisters; and we can hardly doubt that, before long, it is held to apply to emancipated sons. There are, indeed, expressions in the Capitularies of Liutprand which confirm this view.[93]

Admission of representatives.

But we go a step further, and note another serious inroad upon the ancient principles of inheritance. This we may call the right of representation, the principle by which, if A's son dies in A's lifetime, leaving children, the latter will share A's inheritance along with their uncles, the sons of A. The principle seems so natural to us, that we hardly realize that it can ever have been an innovation. But it is contrary to all agnatic ideas, which, to use technical expressions, regulate succession *per capita*, and not *per stirpes*. We see the new principle cautiously admitted in the Laws of Grimoald of Lombardy, drawn up towards the end of the seventh century. But it there only applies to the sons of a man who has died "in the bosom of the grandfather," *i.e.* domiciled under the paternal roof.[94] The

Burgundian Law allows it for a grandson, but expressly denies it to a granddaughter.[95] Hildebert II. extends it to the offspring both of sons and daughters; but has to admit that it does not apply to a brother's children.[96] The Visigothic Law seems to have first admitted it for the latter case.[97] The acceptance of the principle marks the definite defeat of the agnatic system. In the place of the ancient Household, held together by the *mund* of the House-father and the Clan, in the place of the blood-feud kindred, we get the cognatic family of modern times, founded simply on blood relationship, dissolving and reforming with each successive generation. We know the force of metaphor amongst unlettered peoples; and we may suspect that the State has been making use of a fascinating metaphor, which regards the deceased as the head, and his relations as the limbs, of a corporate body. Immediately below the head comes the bosom; there is but one bosom, and there is but one blood in a man's descendants. But, beyond the bosom, everything is double; two arms, two thighs, two knees, and so on. This is the notion of inheritance which prevails after the old agnatic ideas have died out, and before the Canon Law,

Cognatic Inheritance.

with its Family Tree, has come in. We can easily see how a skilful pleader might work it in favour of cognatic succession.

The Testament.

Still more dangerous to the Clan than the alteration of the law of succession, is the admission of testamentary gifts. While it is true, as a great writer has said, that the Barbarians had no Testament until they borrowed it from Roman Law,[98] or until the priests persuaded people, as the Westgötalag puts it, that an heir cannot, without mortal sin, forbid his ancestor to make a deathbed gift,[99] yet we cannot help seeing that they had developed institutions which amounted to very nearly the same thing. The *Gairethinx* of the Lombards, the *Adfatimus* of the Franks, are not borrowed from Roman Law. In the former, the intending donor appears "before the freemen" (surely, in the moot) and, holding his spear (*gisil*), pronounces the word *lidinlaib, i.e.* "on the day of my death I will leave it." He cannot then, unless for good cause, dispose of his substance elsewhere, at least without giving the donee an opportunity of redeeming it.[100] In the *Adfatimus*, which, likewise, takes place in the moot, *or before the king*, the donor makes over his effects to the donee, by throwing a

wand into his bosom (*fathm*). The donee takes solemn possession of the donor's house, accompanied by witnesses whom he feeds at the donor's table. If during twelve months the donor's heirs raise no claim, the transaction is unimpeachable.[101] We need not suppose that this right was unlimited; every probability points to the conclusion that it could at first only be exercised in default of lineal descendants. We know, as a matter of fact, that English Law is unique in the liberty which it allows to a testator to ignore the claims of his immediate relatives, and that, in kindred systems, the right of the direct heirs to upset a testament never wholly disappeared. But, for all that, the *Gairethinx* and the *Adfatimus* are very significant for our present purpose. They mark the final conquest over the remoter gentile heirs, those *parentes legitimi* whom the Lombard Laws cannot quite ignore,[102] and those *vicini* whom Hilperic sets aside.[103] Their connection with the State is quite plain. "If any one has no natural and lawful sons or daughters," says the Ribuarian Law, "let him give all his property by adoption to any one that he likes, relative or stranger, *in the presence of the king*."[104] Charles

the Great extends this jurisdiction to the count and the *missi*, both royal officers;[105] and, in thus doing, starts that important practice of conveying land by fictitious lawsuit, which is so striking a legal feature of the Middle Ages, which does so much to facilitate the transfer of land, and which, when it does not disappear too soon before more modern ideas, produces without effort a system of land registration. We may indeed exaggerate the consciousness of intention with which the policy that we have just traced has been followed by the State. But that the instinct of hostility is there, is beyond measure plain; and it is none the less interesting that it is unconscious. When the State offers to effect a division of a joint inheritance between brothers,[106] when it constitutes itself heir of the deceased who leaves no relatives within a certain degree,[107] it may not look beyond the immediate convenience or profit of the step. But it is none the less guided by that instinct of self-preservation, which is found in institutions as well as in individuals. That the State sets itself to break down any communal system of property which exists within its territories, may be seen by the curious resurrection of the struggle which takes place after the

Repetition of the process after the appearance of feudalism.

appearance of feudalism. We have remarked before on the similarity between the Fief and the Clan. It is seen again in the recrudescence of gentile notions on the subject of property. According to the doctrines of orthodox feudalism, the vassal must not sell his fief, for that would be to break the tie between himself and his lord, between himself and his co-vassals. For the same reason, his creditors must not be allowed to take it in execution; nor may he leave it by will. For other reasons, a peculiar system of inheritance, which strongly recalls the blood feud kin of gentile society, grows up among the holders of fiefs. All the questions have to be fought over again; and the victorious combatant is always the State. We may safely say, that a deep-rooted instinct, sharpened by practical difficulties, leads the State to wage incessant war against any institution which adopts economic principles different from its own.

The State and Property.

But this brings us very near to another proposition. In its struggle with the Clan, the State has created Property, as we now understand it, especially Property in land. For what do we understand by Property? Is it not that interest in tangible things which can be bought and sold,

taken in execution for debt, left to descend to one's heirs, or disposed of by Will? These are the very essentials of our notion of property; and we see how they are one by one established in the course of the struggle between State and Clan. It is a commonplace of the Analytical Jurists that Property is the creature of the State. The dogma may have a new meaning for us, who have realized that it has a historical background.

The Peace. In conclusion, we have only to look back for a moment at that other primitive notion, the notion of the *frith*, which seemed to be the root of Possession, as the *mund* was the root of Property. Fortunately, this will not take us long.

Extension of the idea. It has not appeared, in the course of our study, that the idea of the *frith* has produced Property. But it has a great history, for all that. It is a very fertile notion, as may be seen from an interesting passage in the Laws of Liutprand.[108] If a man steals the clothes of a woman who is bathing, and compels her to walk home naked, he forfeits his wergild; because, says the Laws, if her husband or brother or kinsman heard of the deed, he would of course take vengeance, and one of them would be slain. Evidently the notion of the Peace may be pushed to a great length.

And it is so pressed. For when, after the resurrection of the State in the latter part of the tenth century, the Peace of the King swallows up the Peaces of the Household, the Church, and the Folk, we get a rapid developement of the list of offences which come within its orbit. The law of theft is a very striking example. The original notion of theft certainly implies secrecy. It is contrasted with robbery, which is committed by force, and which, if attempted by a sufficient number of persons, may really amount to a rebellion.[109] Nevertheless, at least in England, where the State is strong, theft soon becomes a breach of the State's Peace, and is matter for the King's courts. A little further, and we find it established that every *trespass*, every interference with the physical control of a thing, is a breach of the peace. It is against the peace of our Lord the King. Only one serious danger does the rapidly-growing principle encounter. The notions of feudalism do not attribute to the fief-holder that interest which we, in modern times, call *ownership;* he has the interest of a holder, of a *tenant*, of a person whose interest is less than that of the donor, out of which it is carved. This is, of course, very like Possession. But the fief-holder

Seisin and Possession.

is, as we have seen, on feudal principles the justiciable of his immediate lord, most especially in matters which affect the title to his fief. These matters must be decided in the lord's court. But the subtlety of the royal lawyers is equal to the emergency. The book which goes by the name of the *Grand Coutumier* attributes, as we have seen, the solution of the difficulty to Simon de Bucy, President of the Paris Parlement in the fourteenth century. He has distinguished between that *seisin*, which is the interest of the fief-holder, and that mere corporal *possession* which any one may have, as a matter of fact, of any tangible thing. In truth, the difficulty has been solved in England before Simon's time; and the solution is probably due to the revived study of Roman Law, which had made the King's lawyers familiar with the subtle doctrines of the classical jurists of Rome. This is not to say, for a moment, that the English notion of Possession is borrowed from the Roman Law. It is merely to say that, stimulated by the study of a masterly system, the English jurists have grasped a logical distinction which is to lead to results of vital importance. With the Possessory Assizes and the Writ of Trespass, the Law of Possession in England

starts on a new and glorious career. The King's Peace will develope, alongside the actions founded on Property, a new series of actions founded on Possession, which, in the long run, will swallow up their rivals. But, for all that, the notion of Property and the notion of Possession remain intrinsically separate. The one may lead into the other; as where a long continued Possession is treated as equivalent to Property. But we have seen no reason to suppose that, historically speaking, Property is, as it is sometimes said to be, Possession protected by Law. Each is a fundamental conception of Jurisprudence.

NOTES TO CHAPTER VI.

[1] Schmid, *Gesetze der Angelsachsen*, Æthelbirht's Dooms, 1; Liebermann, *Gesetze der Angelsachsen*, p. 3.

[2] Schmid, Hlothære's and Eadric's Dooms, 7 and 16. Liebermann, pp. 10, 11.

[3] Isaiah i. 3.

[4] Schmid, *op. cit.*, Æthelbirht's Dooms, 30. Liebermann, p. 5.

[5] Schmid, Hlothære's and Eadric's Dooms, 11. Liebermann, pp. 10, 11.

[6] Schmid, 12; Liebermann, p. 11.

[7] Schmid, Ine's Dooms, 6, §§ 2, 3; Liebermann, pp. 91, 92.

[8] Schmid, 6, pr. Liebermann, p. 91.

[9] Schmid, § 1. Liebermann, p. 91.

[10] Printed in Schmid, *op. cit.*, pp. 384–389. Liebermann, pp. 470, 473.

[11] *Lex Salica*, ed. Hessels, Titt. xxxii.–xxxiv.

[12] *Lex Ribuaria*, xxxvi. (11).

[13] Schmid, *op. cit.*, Hlothære's and Eadric's Dooms, 15; Ælfred's Dooms, 34. Liebermann, pp. 11, 69.

[14] Schmid, Ine's Dooms, 25. Liebermann, pp. 100, 101. I have ventured to differ slightly from Schmid and Liebermann in the translation; but the difference is of no importance to the point.

[15] Schmid, Æthelstan's Dooms, ii. 12. Liebermann, pp. 156, 157.

[16] Schmid, Ælfred's Dooms, 34. Liebermann, p. 69.

[17] Schmid, Hlothære's and Eadric's Dooms, 16. Liebermann, pp. 10, 11.

[18] Schmid, Edward and Guthrum, 12. Liebermann, pp. 134, 135.

[19] *Westgötalag*, ed. Beauchet. C. A., *Thiuvæ bolkær*, v.

[20] *Ibid.*

[21] *Ibid.*, xvii. (1). This is said of a slave; but, obviously, the principle would apply to an animal.

[22] *Lex Ribuaria*, xxxiii. 1. *Westgötalag*, ed. Beauchet. C. A., *Thiuvæ bolkær*, xii. (1).

[23] *Lex Salica*, ed. Hessels, xxxvii. (2). The rule of the Westgötalag is that the accused party finds a surety (*tak*). Cf. C. A., *Thiuvæ bolkær*, viii. (1).

[24] *Westgötalag*, ed. Beauchet. C. A., *Thiuvæ bolkær*, xix.

[25] *Lex Ribuaria*, xxxiii. (4).

[26] *Westgötalag*, ed. Beauchet. C. A., *Thiuvæ bolkær*, viii. (1) § 1.

[27] On this subject, see Holmes, *The Common Law*, pp. 165, 166, and Pollock and Maitland, *History of English Law*, vol. ii. pp. 152–157.

[28] Bracton, *De Legibus et Consuetudinibus Angliæ*, Bk. III. 3, § 4.

[29] *Lex Salica*, ed. Hessels, xiv. (6).

[30] *Ibid.*, xlv. (1) and (2).

[31] *Ibid.*, Glossarial Notes, § 222.

[32] *Ibid.*, xiv. (6), and Kern's notes.

[33] *Lydekini Excerpta*, ed. Beauchet, § 114.

[34] Schmid, *op. cit.*, Ine's Dooms, 20. Liebermann, pp. 98, 99.

[35] *Leges Langobardorum*, Liutprand, 134.

[36] *Leges Langobardorum*; see rest of Title.

[37] *Lex Salica*, ed. Hessels, xiv. (4). *Leges Langobardorum*, Rothar, 177.

[38] *Ibid.*, xlv. (3).

[39] Schmid, *op. cit.*, Ælfred's Dooms, 37. Liebermann, pp. 70, 71. (It is possible, however, that this passage refers to police rather than proprietary arrangements.)

[40] *Westgötalag*, ed. Beauchet. C. A., *Jordthær bolkær*, ii.

[41] Schmid, *op. cit.*, Cnut's Dooms, ii. 79. Liebermann, pp. 366, 367.

[42] Schmid, Æthelred's Dooms, iii. 3. Liebermann, pp. 228, 229.

[43] *Lex Ribuaria*, lix. (1).

[44] *Lex Saxonum*, 62.

[45] *Westgötalag*, ed. Beauchet. C. A., *Jordthær bolkær*, iii. (1).

[46] *Lex Alamannorum*, I. (1) and (2).

[47] Capitulary of 818, cap. 6. Boretius, vol. i. p. 282.

[48] *Ibid.*

[49] Stiernhöök, *De Jure Sveonum et Gothorum*, Bk. II. cap. v.

[50] *Lex Baiuwariorum*, xvii. (Text I.). The whole learning of *essarts* is most valuable in this connection.

[51] Schmid, *op. cit.*, Ine's Dooms, 40. Liebermann, pp. 106, 107.

[52] Schmid, 42. Liebermann, pp. 106, 107.

[53] *Westgötalag*, ed. Beauchet. C. A., *Jordthær bolkær*, xiv. (1).

[54] *Lydekini Annotationes*, ed. Beauchet, § 139.

[55] Beauchet, *op. cit.*, p. 231, notes.

[56] Schmid, *op. cit.*, Ine's Dooms, 51. Liebermann, pp. 112, 113.

[57] *Ibid.* Be Wergilde, App. vii. 2, § 9.

[58] Capitulary of 807, Mem. 1. Boretius, vol. i. p. 134.

[59] Schmid, *op. cit.*, Ine's Dooms, 6, § 3, Liebermann, pp. 92, 93; and see Vinogradoff, *Villainage in England*, p. 145.

[60] Schmid, *op. cit.*, Ine's Dooms, 6, § 3. Liebermann, pp. 92, 93.

[61] *Ordonnance* of 1314, Laurière, vol. ii. p. 22.

[62] *Somme Rurale*, i. 84, ed. Charondas, p. 490.

[63] Viollet, *Histoire du Droit Français*, pp. 597–603.

[64] Schröder, *Deutsche Rechtsgeschichte*, p. 382.

[65] Schröder, *Deutsche Rechtsgeschichte*, pp. 735, 736.

[66] *Westgötalag*, ed. Beauchet. C. A., *af mandrathi*, xiv. (1).

[67] *Ibid.*

[68] Schmid, *op. cit.*, Æthelstan's Dooms, ii. 2, 8. Liebermann, pp. 150–1, 154–5.

[69] Pollock and Maitland, *History of English Law*, vol. i. pp. 550–554.

[70] Cf. the examples collected in Esmein, *Les Contrats dans le Très Ancien Droit Français*, p. 93.

[71] *Lex Salica*, ed. Hessels, lviii.

[72] *Chilperici Edictum*, 10. Boretius, vol. i. p. 10.

[73] *Lex Ribuaria*, lxxxvii.

[74] *Lex Salica*, ed. Hessels, lvi. (6).

[75] Capitulary of 803, 6. Boretius, vol. i. p. 118.

[76] Capitulary of 818 (? 819), 11. *Ibid.*, p. 283.

[77] *Germania*, 20, 32. And see Fustel de Coulanges, *Recherches sur Quelques Problèmes d'Histoire*, ii. cap. 5.

[78] Schmid, *op. cit.* Be Wergilde, App. vii. i. § 5. Liebermann, p. 392.

[79] *Leges Langobardorum*, Liutprand, 13.

[80] See Fustel de Coulanges, *Recherches*, ii. cap. 5.

[81] *Westgötalag*, ed. Beauchet. C. A., *Arfthær bolkær*, i. (1).

[82] *Lex Salica*, ed. Hessels, lix. (5).

[83] *Lex Ribuaria*, lvi. (4).

[84] *Lex Gundobada*, xiv. (1).

[85] *Westgötalag*, ed. Beauchet. C. R., *arvæ bolkær*, i. (1).

[86] *Leges Langobardorum*, Rothar, 158.

[87] *Chilperici Edictum*, 3. Boretius, vol. i. p. 8.

[88] *Quæstiones et Monita*, § 4. Mon. Germ. fo. Leges, iv. p. 590.

[89] *Leges Langobardorum*, Rothar, 181.

[90] Beauchet, *op. cit.*, p. 171, n.

[91] *Lex Salica*, ed. Hessels, lx. The passage is specially interesting to English readers; for it finds its way, almost verbatim, into the Leges Henrici Primi (Schmid, *op. cit.*, App. xxi. 88, § 13). Liebermann, p. 604.

[92] *Leges Langobardorum*, Liutprand, 2.

[93] *Ibid.*, *tamquam filii masculini.*

[94] *Leges Langobardorum*, Grimoald, 5.

[95] *Lex Gundobada*, lxxv.

[96] *Childeberti II., Decretio*, cap. 1. Boretius, vol. i. p. 15.

[97] *Lex Wisigothorum*, iv. 2, § 8 (Canciani, v. p. 104). But the rule only applies if there are no surviving brothers or sisters of the deceased.

[98] Maine, *Ancient Law*, 1st. ed. p. 172.

[99] *Westgötalag*, ed. Beauchet. C. A., *Arfthær bolkær*, x. (1).

[100] *Leges Langobardorum*, Rothar, 172, 173.

[101] *Lex Salica*, ed. Hessels, xlvi.

[102] *Leges Langobardorum*, Rothar, 158–160.

[103] *Chilperici Edictum*, cap. 3. Boretius, vol. i. p. 8.

[104] *Lex Ribuaria*, xlviii.

[105] *Capitulare Legi Ribuariæ Additum* of 803, cap. 8. Boretius, vol. i. p. 118.

[106] *Capitulare Aquisgranense* (801–813), cap. 7. *Ibid.*, p. 171.

[107] *Lex Salica*, ed. Hessels, xliv. (10). *Leges Langobardorum*, Rothar, 158.

[108] *Leges Langobardorum*, Liutprand, 135.

[109] See the interesting distinctions between theft, *hloth*, and *here*, in Ine's Dooms, 13, § 1 (Schmid, p. 26. Liebermann, pp. 94, 195).

[110] *Ante*, p. 119.

CHAPTER VII.

CASTE AND CONTRACT.

Caste society.

THE view taken by the primitive Teutonic speculator of the constitution of society may be gathered from the following passage, paraphrased from the Elder Edda.

"Edda bare a child, dark of skin, and they named him *Thrall;* wrinkled was the skin of his hands, clumsy his fingers, dirty his face, curved his back. He it was who dug trenches, manured the fields, and cut turves. From him is sprung the race of serfs. Amma bare a child. They called him *Karl*, the red and ruddy; he learnt to tame the kine, to make ploughs, to build houses, to erect barns. From him is sprung the race of farmers. Modir bare a child. They called him *Jarl;* yellow were his locks, clear his cheeks, shining his eyes. He learnt to shake the spear, to ride horses, to wield the sword; God taught him runes, bade him secure the inherited fields

and the ancestral home. He was wise in runes; he learned to understand the cry of birds."[1]

This passage, though not very old, if we reckon by centuries (it dates from about the year 1150), is very old from a comparative point of view. Scandinavia in the twelfth century is very primitive, more purely Teutonic, perhaps, than any other country, because it has mixed less with alien races. Moreover, the passage itself betrays its archaic character. There are but three classes of men to be accounted for. The warrior-priest, the free farmer, the agricultural serf. It is a simple society, a society which reappears in all the most primitive records of Teutonic history. The *etheling*, the *churl*, and the *theow* or *læt* of the Anglo-Saxon;[2] the *edhiling*, the *friling*, and the *lazz* of his continental brother;[3] the *nobilis*, *liber*, and *litus* of the Frisian Laws;[4] all are merely different names for the same social organization. Fighting, farming, and labouring the ground; these are the occupations of Teutonic society as we first see it.

A caste society.

It will have been observed, moreover, that the sole event which the Edda regards as determining the rank to which an individual shall belong, is the event of birth. Social ranks are

hereditary; it is a system of caste. We know nothing positively of the influences which first determined the outlines of this hereditary system. But it is not difficult to make a tolerably safe conjecture. All gentile societies attribute a special pre-eminence to the nominal founder of the clan and his direct descendants. We know the names of many of these noble families. They are the Merowings of the Franks, the Amali and Balthi of the Goths, the Billings of the Saxons, the Agilolfings of the Bavarians, the Gungings of the Lombards, the Æscings of the Kentish men. The eponymous hero may simply have been a successful adventurer, he may have been an entirely mythical personage; it is but rarely that we can assure ourselves of his actual existence. But the important fact to notice is, that his descendants insist upon their hereditary claim. Rothar, king of the Lombards, in the prologue to his Laws, enumerates not only his predecessors on the throne (who seem to have been, in most cases, strangers in blood); but his own personal pedigree. He informs us that he is *ex genere Harodos;* and he traces his descent back for eleven generations, without, however, reaching the eponymous Harod, or Haros.[5]

The noble.

With the middle class, the *bondi*, the *churl*, the *friling*, we need have no difficulty. He is the ordinary member of the Clan, not distinguished by any special relationship with the Founder. The serf, or slave, for both are recognized in early Teutonic society,[6] is, he or his ancestors, the result of capture in war. History cannot show us a time at which the captive was not deemed bound to serve his captor. By the universal rules of war, his life was at the disposal of his conqueror; it was a mitigation of ancient severity that he should be treated as a domestic animal rather than as a wild beast. The process of time still further alleviates his lot; the slave becomes a serf, a being between a chattel and a man, bound to labour for his master, but having something in the nature of personality. With him ranks the man who, for any reason, has fallen out of the Clan group, or, being a stranger, has never belonged to it. The shades of difference between one class of servile persons and another, which the *Leges Barbarorum* show us, are puzzling and doubtful. The practice of formal manumission is just coming in; and, if it makes some things clearer, it makes others more obscure. The enfranchised

The farmer.

The serf.

are, generally speaking, in the third rank of society; they are at least quasi-servile. But different forms of manumission have different results. The man who has been set free by the spinning of the coin *(Schatzwurf)*, the *denarialis regis* of the Franks,[7] the *fulcfreal* of the Lombards,[8] the *folc-frei* of the Anglo-Saxon Dooms,[9] is in a better position than the privately enfranchised person, the *haldius* of Lombardy, the *litus* of Germany.

Manumission.

But it will be observed that the practice of manumission is, in any form, inconsistent with the principles of hereditary caste. In a purely caste society, no man chooses his position or has it chosen for him. As he is born, so he lives and dies. We are very far from saying that the act of manumission is a Contract. What we, in modern times, understand by a Contract, is a promise or collection of promises, enforceable by law, to do or refrain from doing a particular act or series of acts in the future. The manumission is an act the fulfilment of which is contemporary, or almost contemporary, with its inception. It leaves no promise to be fulfilled. Still, it is an act of free will; a deliberate departure from the existing order of

things in favour of another which the doer of the act prefers. It must be noted as one of the earliest stages in the breakdown of a purely caste society; and we need not wonder that Society places considerable restrictions on its exercise. So far as we can see, no man can, according to the *Leges Barbarorum*, by a merely private act render a slave a full freeman. To secure that result, there must be a solemn ceremony, the approval of the king, the presence of the assembly, the declaration by the Church. But this very restriction tends to defeat its own object; for the privately manumitted person is never treated by the law as purely servile. He is ranked in a middle position between the freeman and the slave; and his existence tends to obscure the old sharp lines of caste.[10]

State nobility.

Two other very powerful influences also begin to work at an early date. We have argued that the Teutonic migrations were probably responsible for the creation of one of the most powerful of all human institutions, the State; and we have recently had occasion to notice the struggle carried on by the State to secure its victory over older institutions. We can see the same struggle going on in the organization of

society. When we look carefully at the *Leges Barbarorum*, we observe a significant fact. The noble by blood is giving way before the official nobility of the State. We find the noble by blood only among those races which have not come, or have only just come, under the dominion of that State which has assumed the powerful traditions of the Roman Empire, the kingdom of the Franks. The noble by blood is to be found among the Frisians, the Saxons, the Anglo-Saxons, the Thuringians, the Bavarians. He is not to be found among the Franks, the Burgundians, the Goths, and the Lombards, who have had a hard struggle to establish themselves within the Empire. In the course of that struggle, the new military institution, the State, has become strong; it has replaced the old nobility of blood by a new nobility of service. These are the *Antrustions*, the men *in truste dominica* among the Franks, the *proceres* and *seniores* of the East and West Goths, the *optimates* of the Lombards. They are not a hereditary caste. They take their rank exclusively from the royal service; they bear decisive marks of their character as servants of the king. The explanation and establishment of this important fact

is one of the numerous services which students of medieval history owe to the late M. Fustel de Coulanges. It would be a waste of time to glean where he has garnered the harvest. They who doubt the correctness of the position may read for themselves the overwhelming proofs adduced by M. Fustel.[11]

But, it may be asked, how does this fact affect the caste character of society among the early Teutonic races? Just in this way, that it breaks in upon the principle of heredity, and substitutes for it an exercise of free will. No man was born an Antrustion or an *optimas;* at least there is no proof that the children of such persons inherited their father's rank. On the other hand, there is abundant proof that the rank was acquired by something very like what we should call a Contract. There is a formula in the collection of Marculf which explains the process completely; and, as it is a formula and not an isolated diploma, we may feel pretty sure that the transaction was a common one. "Right it is that they who promise us unviolated faith (*fides*) should be protected by our aid. And because such and such a loyal man (*fidelis*) in our palace . . . with his arms in our hand has sworn

to us trust and faith, therefore by this present order we decree and command that from henceforth he be reckoned in the number of Antrustions. And if any one shall dare to slay him, let him know that he incurs a fine of six hundred shillings for his wergild."[12] The rank of Antrustion is conferred by an arrangement under which the recipient renders himself the liegeman of the king, and the latter confers on him official rank. It is an early stage in the history of feudalism; but, for our immediate purpose, it is more important as a step towards the breakdown of hereditary caste. The Antrustion need not even be a freeman, at least not a freeborn man. The Lex Salica shows by direct inference that the *litus* might become an Antrustion;[13] the *Recapitulatio*, a commentary certainly as old as the ninth century, speaks expressly of the *Romanus vel lidus in truste dominica*, and the *puer regis in truste dominica*.[14] The Roman and the lidus are certainly manumitted serfs; the *puer regis* is, probably, a slave. It is curious to note that these persons retain their relative social rank even after admission to the royal trust. The wergild of a freeman in the king's service is, at least when the deed is concealed,

eighteen hundred shillings; that of the lidus nine hundred.[15]

Clerics.

Another influence, almost equally powerful, is that of the Church. The Church, though a foreign institution, wisely draws recruits from Teutonic sources. Professing a religion which regards all men as equal in the sight of Heaven, she cannot well refuse to enrol men in her priesthood on account of social inferiority. We know, as a matter of fact, that all ranks of men, from serfs to kings, weary of the world, entered the priesthood. Nor was the practice confined to men. Women became nuns, took the veil, and entered immediately into a new rank in life. Perhaps the Edda was hasty in speaking of only three castes. The position of the woman in Mund is, surely, very like a caste. It comes by birth and, according to primitive ideas, survives till death. A woman may be transferred by father to husband; but she will still be in Mund. Nay, if her husband dies, she will still be in a similar position; if she marries again, the second husband must pay the modest sum of three shillings and a penny as *Reipus* to the relatives of the deceased, evidently as compensation for loss of Mund.[16] But the woman who takes the

veil shakes off the Mund, and enters a new rank. The Laws are full of provisions which show that women are very anxious to avail themselves of this opportunity. The frequency with which they take the step is evidently shaking a caste society to its foundations;[17] and, of course, the legislators, who are men, accuse them of taking it with the worst of objects.[18] With the general acceptance of Christianity by the Teutonic peoples, we have to note the appearance of a new order, that of the cleric, which is not a caste, because it is not hereditary, and because no one can be forced into it against his will. The rapidity with which it fills may partly account for the disappearance of the blood nobility; for, according to gentile principles, the noble is both priest and warrior. The professional cleric is a production of comparatively late times. *Neque Druides habent*, says Cæsar, speaking of the Germans of his day.[19]

The wergild system an index to social organization.

We get our best picture of the organization of early Teutonic society, after these changes have taken place, from the extraordinarily minute and complete Tables of Wergilds which the *Leges Barbarorum* contain. In order that the wergild system, upon which the whole peace of society

depends, may be easily worked, it is necessary that the value of every one's life and members should be indisputably known, at least to the elders who pronounce the Dooms. Any delay in ascertaining this value would probably give rise to an outbreak of the feud. Hence the elaborate care with which nearly all the *Leges Barbarorum* fix the penalties for the death or wounding of members of every rank of society, as well as for every other recognized offence. Hence the reason that modern writers have described the Laws, most unjustly, as mere *Bussordnungen*, or lists of fines. In the Tables of Wergilds we see exactly the relative importance attributed to each rank of society—noble, official, freeman, cleric, serf.

But if the wergild system is the result of the organization of society into ranks, it is the starting-point of the movement which is to revolutionize that organization. The examination of its consequences will lead us directly into the history of Contract.

Nature of the wergild.

The wergild is, as we have seen, a bribe to the injured man or his kin to forego the feud. But it is only payment, not judgement, which stops the feud; if the offender cannot pay, the claimant

proceeds with his vengeance. He seizes upon the body of the offender or the debtor (for we may now call him either), and kills him or, at his option, binds him to slavery. Great difficulties have been made over a famous clause of the Twelve Tables, which appears to authorize the creditors of an insolvent debtor to divide his body amongst them. There is nothing in this in the least inconsistent with early law. It is hastily assumed that the insolvent debtor is an unfortunate merchant, who has failed from no fault of his own. This is an absurd anachronism. The debtor is a man who has been guilty of some offence (probably homicide), and has either confessed the fact, or been found guilty by a tribunal (*æris confessi rebusque jure iudicatus*), and ordered to pay the fine. He fails, after repeated opportunities, to find a surety or to pay. The right of vengeance can no longer be denied to the kin. They could have divided the wergild; they now divide the body, perhaps with a faint survival of cannibal notions. Revenge may in early days well have been sharpened by hunger, and the blood feud system may have been a means of distributing food as well as revenge.

But, in course of time, milder counsels prevail.

The wergild system has, as we have seen, led to the transfer of chattels. It is the custom to pay the wergild by handing over goods. This leads to the practice, so important in early law, of the seizure of an offender's chattels by the unsatisfied claimant, the famous *nam*, which is simply the modern German *nahmen* (to "take," or "seize"). The Laws of Liutprand still know the debt-slavery which plays such an important part in early Roman history. If a man is a spendthrift, or has made shipwreck of his affairs, so that he has not wherewith to pay a fine, the court (*publicus*) ought to hand him over as a slave to the injured party. If the fine amounts to twenty shillings or more, he becomes a slave for life; if for less, he serves till his labour has paid the debt.[20] Nay, the right of revenge is still in the background. If, says the same code, a thief cannot pay the fine, the court should hand him over to the injured party, and he may do with him what he will.[21] But the *nam*, or seizure of goods, becomes the general remedy. The Westgötalag allows the claimant the option of getting the debtor banished.[22]

The *nam*.

But this procedure is evidently open to grave objections. Not only does it lead to violence and

confusion where it is justified; but there is the very grave objection that it may be used in cases in which the claim is really unfounded. Accordingly, we are not surprised to find attempts made at an early date to set bounds to its exercise. The older edition of the Westgötalag,[23] the Laws of the Burgundians,[24] and the Laws of the Frisians,[25] apparently still recognize it as the normal remedy, though the Burgundian Code introduces a useful rule that slaves, horses, and plough cattle are not to be seized if there are other beasts.[26] But the later edition of the Westgötalag,[27] the Anglo-Saxon Dooms,[28] the Lombard Codes,[29] the Visigothic and the Bavarian Laws,[30] place more sweeping restrictions upon the practice. These restrictions generally take one of two forms. The seizure may only be made by the claimant on his own authority in certain specified cases, of which the most important is the case of offenders caught red-handed, or, which amounts to nearly the same thing, of offences discovered and tracked within a brief space after commission. Or there is the requirement of some judicial formality as a condition precedent to the exercise of the right. We have seen, in examining the process of

Its exercise restricted.

Following the Trail, how the former restriction works. The latter is the more important for our immediate purpose.

The pledge as a defence.

The object of the delay is, of course, to give the accused an opportunity of disproving the charge. The Edict of Rothar forbids a claimant to seize the goods of his debtor, till he has "appealed" him, once, twice, and thrice. If he ventures to do so, he pays nine-fold the value of the thing taken.[31] Ine's Dooms compel a man who seizes the goods of another before "bidding him to right," to restore the goods seized and pay a fine of thirty shillings.[32] The appropriate Frankish formality goes by the name of *Nextig Anthigio*.[33] Other Codes simply forbid seizure except with the permission of a court.[34] But what if the right is duly exercised?

It can hardly be doubted that, originally, the goods seized were taken in compensation for the claim. The Lex Salica shows us an elaborate process in which the elders of the moot, the *rachimburgi*, accompany the officer of justice to the house of the debtor, and there put a value upon his goods. The debtor may even, if he pleases, name two representatives to share in the task.[35] Our modern notion of selling goods taken

in execution is yet very far off. The man who sold goods which were notoriously another's might find himself liable to a charge of theft. But, in the Code of Rothar, we get a glimpse of a new practice which is going to be very important. We notice a significant change in the name of the process. The old simple word *nam*, which simply means to "seize," or "take," gives way, almost universally, to the word *pledge*, and its equivalents. The ordinary word in the Codes which are drawn up in Latin is *pignus;* to seize a debtor's goods is *pignerare eum*, or, *pignerare in rebus suis*. Teutonic equivalents are *wed*, *pant*, *tak*. The meaning of the expression becomes clear from the passage in the Code of Rothar, to which we have alluded. The seizer of the goods must keep them in safety for a certain number of days, varying with the distance between his residence and that of the debtor; and, during that time, they will be at the seizer's risk. If, at the expiry of that time, the debtor has not *liberated* them, they will stand at his risk.[36] The goods seized are no longer a payment, but a means of securing payment or some other act.

The pledge as a security.

What this act is, will depend on the circumstances. If the debtor acknowledges the claim

and pays his debt, there is nothing further to be done. The object of the proceedings has been achieved. Should he, however, deny his liability, what is to be done? Obviously, he must come before the court, and let the case be tried. But every piece of evidence that we possess shows that men were exceedingly unwilling to come into courts, especially in the character of defendants. And one of the weaknesses of primitive tribunals is, that they seem to possess no direct means of compulsion. The clumsy procedure of Summons detailed in the Lex Salica,[37] which, after a long and intricate course, results in the outlawry of the contumacious defendant, is a good illustration of this weakness. The ultimate remedy is, no doubt, effectual enough; but, as it plays directly into the hands of the State, it is not likely to be looked upon with favour by the popular tribunals. The seizure of goods acts as a useful intermediary. The accused cannot get his goods back without appearing in court to answer the complaint. The seizure of goods has become a *Distress*,[38] a means of compelling a man to do a thing he does not want to do.

But now, suppose the parties before the

tribunal, and the accused to deny his liability. Here we come upon one of the most characteristic features of ancient procedure. It has been a matter of great difficulty to get the accused before the court; if he is once allowed to depart, all this work will be to do over again. Nay, it is even very doubtful if he can be compelled to come a second time, by any direct means. He has attended the court and so fulfilled his liability. When the doom (*Urtheil*) has been pronounced, the court will be *functus officio*. We remember the penalty appointed to the man who raises a plea which has been before discussed.

Security for reappearance.

And yet, it is clear that, if the accused persists in his denial, the matter cannot be disposed of all at once. The elders may pronounce the Doom; but they must also arrange for proof of the accusation. It sounds odd to modern ears to speak of the judgement as preceding the trial; and yet, if we use modern terms at all, that is what we must say. The elders name the fine appropriate to the offence charged; and then they declare that "the oath is nearer to A" (the claimant) or "to B" (the accused). The latter, unless he is a person of evil repute, is usually entitled to the oath, *i.e.* to clear himself

by oath-helpers, and, if he brings the appropriate number, and they swear "with united hand and mouth" that he is innocent, he will get off. Where modern tribunals speak of the burden of proof, ancient tribunals think of the right or privilege of proof. And this generally belongs to the accused; since, as the Dooms of Æthelred put it, "denial is ever stronger than assertion, and claim is nearer to him who holds than to him who demands."[39] The Westgötalag contains minute rules for the award of the privilege of proof (*vitu*).[40] Later on, with the introduction of the ordeal and the judicial combat, ideas change.

The surety.

But, to return to our former difficulty. What is to be done to get the accused back into court, or to compel him to pay the fine, if he fails in his proof? The answer that the *Leges Barbarorum* give is, that he must find a surety, a man or men who will be responsible for his reappearance, and also for the payment of his fine, if the proof goes against him. The liability of the accused being dissolved by the appearance in court and the delivery of the Doom, some one must be found to take his place. We can hardly doubt that, originally, the surety's body was actually handed over to the creditor.

The Germans of Tacitus were quite familiar with the practice of voluntary dedication to slavery;[41] and there are traces of its application to the practice of suretyship in later times. The Treaty made by Charles the Great with the conquered Saxons stipulates that no one shall by any means dare to give another as pledge.[42] A Capitulary of the year 803 speaks of the freeman who has committed himself to the power of another as a pledge.[43]

Developement of suretyship.

But the simplicity of this primitive arrangement soon breaks down in favour of more advanced ideas.[44] The surety still places himself in the power of the creditor; but it is by a symbolic procedure which, while it is clearly intended to act as a transfer, probably leaves the surety at liberty until default has actually been made by the original debtor. Among the Franks, this process was the *exfestucatio*, the handing over of the rod, which is one of the best-known symbols of authority;[45] among the Lombards, it seems to have been the *Gairethinx*—the surety is alluded to in close connection with this process in the Laws of Rothar.[46] Contemporary *formulæ* and documents show that the ceremony was frequently used. Expressions such as *per*

festucam adrhamire, per festucam fidem facere, are common.[46] But there seems to have been a simpler alternative. If the surety accepted the pledges belonging to the debtor from the hand of the creditor, he thereby took upon himself the liability attaching to them. To use the language of the Laws: the debtor received back his pledges by the hands of a surety.[47] The reasoning is not difficult to follow. The pledge had come to be looked upon as a means of securing payment or, at least, appearance in court. The liability seemed to be attached to the pledge. The man who voluntarily assumed the pledge, assumed the liability attaching to it.

By these means, the finding of a surety came to be looked upon as the first duty of the accused. *Tô borge settan for withertihtlan,* to give a surety against an unjust claim, is the expression of the Anglo-Saxon Dooms.[48] The general direction of the Alamannic Laws is, that a man who is sued must, at the first summons, promise oath-helpers (*sacramentales*) and find sureties (*fidejussores*), as well as give a pledge to the presiding official for his reappearance and payment.[49] The latter clause is suggestive. By the giving of sureties, the original debtor is released from liability to

the claimant; the surety has assumed the liability, and it cannot be enforced against two distinct persons.[60] It would seem that even the surety himself could only recover payment from the original debtor by the indirect means of holding his pledges; until a Capitulary of Charles the Great gave him a direct claim for damages.[61] But by taking his pledge, the Court binds the principal debtor to performance of his duty.

Appearance of Contract.

Up to this point, the notion of Contract has not definitely appeared. The claims for which men give sureties are claims on delict—murder-fines, theft-fines, assault-fines, and so on; not claims on contracts. The transactions of sale and exchange (*ceâp* and *hwearf*, as the Anglo-Saxon Dooms have it), which, as we have seen, are recognized as defences to the charge of theft, are completed transactions, not promises to fulfil obligations at a future date. Even the Antrustion's homage and the priest's vow are much more like self-surrenders than promises. At any rate, they are not enforceable by action before the popular tribunal; there are more effectual remedies open to the king and the Church. Still less are the oaths of the oath-helpers, the *sacramentales* of the Laws, in the nature of contracts.

They are mere assertions, not promises. With hand on the Holy Gospels or on the sword, the oath-helpers swear that the accused did not commit the deed.[52] There is no contract there. Even where a man has had goods or land delivered to him on loan (*commendata, præstita*), he is not looked upon as being bound by contract to return them. If he fails to do so, he is simply treated as a thief.[53]

Position of the surety.

But the surety is in a different position. He has undertaken a liability which looks very much as if it were contractual. He has bound himself to pay if the original debtor does not. The names given to the arrangement by the Codes, *fides facta, fidejussio,* are significant. So also is the fact that the transaction was often accompanied by an oath, which may have been to some extent promissory.[54] Most significant of all, we begin to get traces of a direct undertaking of liability, without the interposition of a surety. The famous Edict of Hilperic, which amends the Lex Salica, declares that, if a man is called upon to find a surety in court and cannot do so, he may pass the *festuca* which he holds in his left hand into his right, and so, apparently, constitute himself his own surety.[55] Two hundred years

Extension to the principal debtor

later, a Capitulary of Charles the Great provides that if a freeman cannot pay a fine, or get sureties, he may give himself in pledge to the claimant, until he has paid the fine.[56]

But we can hardly suppose that a law published by the enlightened Charles is going back to the days of actual debt slavery. We have seen, as a matter of fact, that the same Charles strenuously forbids this latter practice to his Saxon subjects. The giving of the pledge, like the giving of the *festuca*, has become a mere ceremony; but a ceremony with which is bound up the idea of a liability incurred, the performance of which is to redeem the pledge. We soon find both the Festucal Oath and the Pledge used outside the limits of the moot; notably in those processes of self-help which are still commenced by the extra-judicial seizure, of which, as we have said, the most important are the red-handed capture and the Following of the Trail. In the latter case, if the accused cannot produce his warrantor, who corresponds closely with the oath-helper of judicial proceedings, he makes faith with six sureties that within fourteen days he will clear himself on oath from the charge of theft, and that he will give up the chattel unharmed.[57]

The Dooms of Eadmund provide that the (unintentional) slayer shall send his representative (*for-speca*) to the kin of the dead man and give pledge (*wed*) for the peace and payment of the *wer*. This done, he must then find surety (*borh*) for the latter undertaking, the original offender having finally purchased his peace with the pledge.[58] The last passage shows us that the practice is not now confined to even quasi-judicial procedure, such as that preliminary seizure of a disputed object which will go down into the Middle Ages as the *Anefang*. The giving of a pledge has become the formal recognition of a liability incurred; it is but the shortest of steps till we find it as the means of incurring a liability.

The pledge as a contract.

The step is soon taken. The Code of Rothar only knows the *wadiatio*, the pledging, as a judicial arrangement, or, at most, as a step in that process of extra-judicial seizure which is very like legal procedure.[59] But the Code of Liutprand, some seventy years younger, knows it as a purely private arrangement, a means for securing the enforcement of obligations. Quite general is the rule. "Whatever man under the ægis of our kingdom shall henceforth give pledges to

any one, and produce a surety in the presence of two or three witnesses, . . . must make it good in all things."[60] One very famous application of the rule soon makes itself conspicuous. This is the betrothal, or contract to marry. Among the Lombards of the eighth century, the Mund is in full force; and the marriage contract is not made between the lady and her future husband, but between the latter and the lady's *mundius*, *i.e.* her father or other relative in whose hand she is. It is a contract of sale and purchase; but a contract which is to be fulfilled in the future. The parties are *spunsatæ*; and, if either side breaks off, he incurs a substantial penalty.[61] Meantime, what is the process by which this arrangement, technically known as *Mita*, is concluded? Obviously by the delivery of a ring, which the Lombard Dooms call an *arra*[62] (perhaps, but not quite certainly, borrowing from Roman Law), but which the Anglo-Saxon Dooms call, in the vernacular, a *wed*. The exchange of rings is the *wedding*; afterwards, the parties may be affianced to each other in the presence of the Church. At the present day, we reverse the order of things; but the engagement ring survives to mark the ancient rule. Nor is the practice

at all confined to the betrothal. Any contract in Anglo-Saxon times is a wedding; any breach of contract is *wed-bryce*. "And first we teach," say the Dooms of Alfred, "that every man hold to his oath and his wed." But *wed* is, of course, simply a pledge. The chief difficulty with which the nascent institution has to struggle is, apparently, its original connection with suretyship. In its origin, as we have seen, the pledge has nothing to do with sureties. But, when the pledge comes to be given, instead of taken, then the accidents of procedure connect it with the institution of suretyship, and people learn to think of the two as inseparable. The idea is further strengthened by the equally close connection between the two institutions in those few cases in which seizure of a pledge is still allowed. The man in whose hand a stolen beast is found must produce a surety; he may also have to give up the beast as a pledge to a third party. The Laws of Lombardy, from which we learn so much of the developement of the pledge, always speak of it in connection with suretyship. But the Anglo-Saxon Dooms and the Frankish Laws treat it, as we have seen, as an independent institution; and a classical passage in the so-called

Lex Romana Curiensis,[63] which probably dates from the early ninth century, shows us that, in south-eastern Germany, the purely symbolic *festuca* has become the regular means of creating a binding contract.[63] But, even in this passage, a reference to the surety suggests that the practice of direct pledging is a novelty which has to be explained. The Law is careful to say that the parties may make a stipulation, without writing and *without sureties*. As so often in similar cases, the primitive mind has taken the accidental for the essential, the symbol for the reality.

The Oath. Before passing, however, to the later history of Contract, mention ought to be made of a celebrated controversy which denies to the Pledge the credit of being the sole fountain head of the great stream of contractual institutions. Many authorities declare that, beside the Pledge, or Real Contract, there can be traced, in the *Leges Barbarorum*, the Oath, or Formal Contract. The controversy centres on the famous passage of the Edict of Hilperic, which describes the process of passing the rod from one hand to another without the intervention of a third party. We have previously assumed this to symbolize a transfer of Mund, by which the debtor pledges

himself to the creditor. But it is possible to treat it as setting the right hand free, that it may be raised for the purpose of taking the Oath. There is no doubt that the Oath is older than the introduction of Christianity. It was sworn with the right hand uplifted and the left holding a weapon, long before it was sworn on the Gospels; and a part of the older form survives in Scotland to the present day. Unhappily, the corrupt state of the text renders it impossible to say whether the transfer described by the Edict of Hilperic took place from right hand to left, or from left to right. The latter reading would make powerfully, though not decisively, against the theory of the Oath. But certainly, under the Church's teaching, the Oath assumed the character of a sacred obligation. We remember the first of the pious Alfred's Dooms. Certainly, also, there is a strong probability that the Church enforced the performance of Oaths by the threat of excommunication, sometimes with the approval of the lay tribunals. But there is no proof, it would seem, that the Contract by Formal Words ever formed part of Teutonic Law, in the sense that it would be directly enforced by the courts of the Clan, the Fief, or the State. The one

contract which they recognize in early times is the Contract by Pledge.

Developement of the idea of Contract.

It will easily be understood that the incipient Law of Contract has not surmounted all the weaknesses and dangers of childhood when it has arrived at this stage. To have admitted that any promise was enforceable if it were accompanied by a pledge, would have been to raise to its fullest height a difficulty which always weighs upon primitive tribunals, the difficulty, namely, of proof. A scientific law of evidence comes very late in legal history. Primitive tribunals know only formal and preappointed methods of proof and disproof—the transaction witnesses of the hundred and burgh, who speak only to a special class of acts, the oath-helpers, who clear the character of the accused. The simplest and best proof of all, as it seems to us, the proof by writing, is, of course, unknown in primitive times; and, even when writing becomes known, it is long before it is used as a vehicle for expressing contracts. So true is this, that the Lombards, who, when they settled in Italy, found the Roman inhabitants using written contracts (the *syngraphæ* and *chirographa* of late Roman Law,) seem to have been utterly puzzled

The written contract.

by them. We must not suppose that even the *syngrapha* and the *chirographum* were written contracts in our sense of the words; but they fulfilled the very important function of recording or proving the existence of contracts. The Lombards seem to have treated them, not as proofs, but as *pledges*. The pledge having, as we have seen, become a mere symbol, the written document would serve as well as anything else. A very learned German jurist, Dr. Brunner, has established the interesting fact that, among the Franks, in the parallel case of conveyances of land, the blank parchment upon which the record of the transaction was ultimately to be written, was handed over, with the turf, twig, glove, or other symbol, to the intending purchaser, who *subsequently* caused it to be inscribed with a record of the proceedings.[64] Sometimes even the inkpot played a similar part.[65] Dr. Brunner has also noticed facts which suggest that a similar idea governed the case of Contracts. The early contractual documents of Lombardy expressly mention that the *cartula* is written, or, at least, "completed" by the notary *post traditam*, after it has been handed over.[66] It is doubtful if the

signatures of the parties were necessary. The Laws of Liutprand speak of a man who has a law suit in a distant city pledging himself by messenger or by letter to appear and prosecute his cause; but the letter is not his own, it is from his *Schultheiss* or *judex*, who is responsible in damages if he (the claimant) does not appear in accordance with his pledge.[67] It is the old idea of *wed* and *borh*, surviving under new forms. A very remarkable passage in the same Code expressly forbids, under a heavy penalty, the writing of *cartulæ* "except according to the Law of the Lombards or the Romans."[68] The legislator is, apparently, frightened at the unlimited prospect of a contractual age opened up by the new fashion of pledges. But, of course, the tide cannot be stayed. The document, which is at first a mere pledge, becomes a record, finally a regular method of proof. The very passage from which we have last quoted is obliged to make an exception in favour of those persons who deliberately wish to "descend from their own law and make agreements and covenants between themselves." It does not say that these agreements shall be enforceable; but it relieves the parties from penal consequences. The idea

of the Pledge lingers longest in the penalties so frequently attached by medieval contracts to the breach of their provisions. In time, however, even this practice disappears, and the written contract, through the Lombards, passes into France and Germany proper, as the typical contract of the Middle Ages, being finally made statutory in the former country by the Ordonnance de Moulins in 1566.[69]

England does not recognize.

But the rule never reaches England. The English Common Law does not know the written contract; such written contracts as exist in England at the present day are the creation of comparatively modern statute, and, even so, are not written contracts, in the sense that writing is of itself sufficient to secure their validity. The English Law of the Middle Ages does indeed know the contract *under seal;* but this has a different origin. It is the contract made in court, or, at least, in the presence of an official who can testify to its genuineness; for the seal is a symbol of public authority, which, in the days of feudalism, has got into private hands. Feudalism is so weak in England, that this fact is soon forgotten; but in France the seal is long the exclusive privilege of the *seigneur.* The private

person cannot use a seal; he must get his contract sealed by the bailiff of the lord "under whom he is couchant and levant." [10]

The witnessed contract.

One other method of proof, perhaps the most natural of all, remains to be noticed. This is the proof by witnesses who were present at the making of the alleged contract. There is abundant beginning for this institution, in the transaction witnesses so often mentioned, and in the sureties who, as we have seen, were so closely connected with the early contract by pledge. At one time it seems to have been the rule, that the offer of witnesses was a necessary preliminary to every attempt to enforce a contract, as well as in other cases; and the name given to these witnesses by the French medieval Custumals, *les garants*, is particularly significant. But, again, the defective machinery of the popular tribunals blocks the way. The defendant may disprove the claim by a word for word denial, a *twertutnay*, backed by a greater number of oaths than those which the claimant offers. Cross-examination is unknown. In the royal and baronial courts, at least in serious cases, the defendant may challenge the claimant's witnesses to battle. In the thirteenth century books, the

The "suit."

Saxon Mirror and the *Coutumes de Beauvoisis*, we find it said that, unless the contract has been partly performed, even the production of witnesses will not do more than put the defendant to his *deresne* or clearing oath. Such a claim is mere *sormise*, a "try on," as modern slang would put it.[71] In England the "suit" disappears entirely before the Trial by Jury, where the jurors speak to their own knowledge, and rely on any evidence they please.[72]

The English theory of Contract.

It would seem, then, that to England, where the Jury is unfettered by rules of proof, we must look for an original theory of Contract. And we are not disappointed. The doctrine of English law on the subject of "simple contract," *i.e.* contract not proved by record or sealed document, is unique and interesting. It can be told in a few words.

If the student searches the *Regisitrum Brevium*, or Fitzherbert's Treatise on the Nature of Writs, he will find no writ which is framed for the direct purpose of enforcing a contract, except, of course, the writ of Covenant, which only applies to contracts under seal. Glanville, in fact, tells us that the king's courts are not in the habit of enforcing private covenants. Perhaps the

Church courts may, but they can only use spiritual penalties; perhaps the popular courts may, but they soon almost entirely disappear.[73] It looks as though England were going to fail entirely in one of the most important branches of legal developement.

Trespass on the Case.

But, though there is no writ of simple contract, there is, after the year 1285,[74] a very useful writ of Case, or Trespass on the Case. Its orbit is vague; it may be used to cover any set of facts in which a plaintiff has suffered damage from an act which can be made to look like a trespass. Very gradually, the Courts come to admit that if *Assumpsit.* a man has undertaken (*assumpsit*) to do a thing upon another's goods, or body, and does it badly, the damage which ensues will be in the nature of damage by trespass. At first, this notion seems to apply only to cases in which the undertaker is a person possessing special skill. If a smith undertakes to shoe a horse, and lames it, if a surgeon undertakes to amputate a limb and mauls it, he is liable in Trespass on the Case. The argument soon gets extended beyond these limits. As the different ranks of society become less sharply distinguished, the liability attaches to any person who undertakes a work, and

negligently performs it, so that the plaintiff suffers damage. The gist of the action is still, clearly, the *wrong*; that, and the consequent damage to the plaintiff. But, after a sharp struggle, the Courts extend the doctrine from misfeasance to non-feasance. The man who undertakes a work and then fails entirely to perform it, is just as guilty of a wrong as the man who commences the work and does it badly. The damage to the other party may be just as great. The first half of the fifteenth century sees this important change; when it has been accomplished, English Law has a new and, apparently, very elastic theory of contract. The doctrine is, that any undertaking, no matter how made, will, if badly performed or not performed at all, give rise to an action for damages. This action will be, in form, an action of Trespass till the middle of the nineteenth century; but, in reality, it will be an action to enforce a simple contract. No special forms of undertaking are required, no writing, no fixed number of witnesses, no pledge. If the jury are satisfied that the defendant undertook (*emprist sur lui, assumpsit*) that he failed to perform, and that the plaintiff suffered damage, there will be no enquiry as to forms.

Considera-tion.

But one enquiry there will be, and it is a somewhat curious one, though to a commercial society it seems natural enough. The Court will ask—What did the plaintiff give the defendant in return for his undertaking? This is the famous doctrine of *Consideration*, one of the many unique peculiarities of English Law. The origin of the term and of the doctrine are alike obscure; they make their appearance along with the action of Assumpsit, as an integral part of it. The name is a little younger than the doctrine; we do not get the name *Consideration*, in its technical sense, till the reign of Henry VIII. But the doctrine is coeval with the full recognition of the Action of Assumpsit; it may be said to date specifically from the year 1425.[75] It is obviously connected with a much older doctrine of *quid pro quo*, a doctrine appropriate, not to the Action of Assumpsit, but to the Action of Debt. This, in its origin, supposes a man bringing an action for non-return of articles bailed to him, and would have been an action *in rem*, but for the old Teutonic doctrine of *Hand muss Hand wahren*. In such an action, it was natural to ask the plaintiff what the defendant had received, that he should be called

upon to pay for its non-return; and, apparently, the judges, somewhat frightened at the unlimited vista opened up by the theory of *assumpsit*, introduced a similar doctrine into that action. But, most fortunately, the "tortious" character of the latter proceeding expanded the doctrine of *quid pro quo* in a very important way. The gist of *assumpsit* is damage to the plaintiff; the defendant may have gained some advantage by neglecting his undertaking, but that is not the point. He may be simply a fool, who is neglecting his own interests. And so we find it gradually settled, that loss to the plaintiff is Consideration, equally with advantage to the defendant. But this time it is loss suffered by entering into the undertaking; not loss resulting from its breach, though the latter will still be the measure of damages. From these simple beginnings, the doctrine of Consideration, worked out with infinite subtlety by generations of English lawyers, becomes an integral part of the Law of Contract. It is not a mere matter of proof, like the writing and the witnesses of Continental contracts; an agreement may be never so clearly proved, by writing or witnesses, but, if it was not made upon Consideration, it is not

a binding contract. All kinds of suggestions as to the origin of the doctrine have been made. The most familiar is, that it is an adaptation of the Roman doctrine of *causa*, borrowed from those ecclesiastical and quasi-ecclesiastical courts, whose jurisdiction in the earlier stages of Contract Law we have before had occasion to notice. But there is little or no evidence to support such a view. "Cause" and "Consideration" are, in fact, contrasted with great effect in a famous little book, entitled *Doctor and Student*, which first made its appearance about 1530, just when the new doctrine of Consideration was becoming prominent.[76] A still more remote origin is alleged, in the *Launegild*, or loan-money, of Lombard Law, which, it is known, possesses many striking affinities with the English system. But the Consideration seems to be a purely native idiosyncrasy. It is certainly not the *pledge* of the old Teutonic contract, for the simple reason that the pledge passed from the debtor to the creditor, while the Consideration must "move" from the creditor to the debtor. The ancient pledge survives in the "God's penny" of the Middle Ages, the "King's shilling" of the modern enlistment contract, and has quite a

different history. Likewise, it is not the "part performance" of the *Saxon Mirror* and Beaumanoir; for, from the very first, Consideration might consist merely of a promise. Still less is it a matter of proof; the Consideration may be promised by word of mouth, or be gathered from the circumstances. These are the Continental theories of Contract, and it is interesting to note that, after having been recognized by Glanville in the single case of Sale, they have, apparently, disappeared before the influence of the doctrine of Uses. If I "bargain and sell" specific goods to C, by mere word of mouth, no conditions being made about payment, the property in the goods passes at once to C. That is still the doctrine of English Law in petty sales. But the older doctrine is revived for heavier cases by the famous Statute of Frauds, passed in the year 1677. By that statute, no contract for the sale of goods for the price of £10 is to be valid unless either (1) the buyer shall accept part of the goods so sold, and actually receive the same, or pay part of the price—this is the "part performance" of Beaumanoir, or (2) give something in earnest to bind the bargain—this is the "God's penny" or pledge, or (3) that some memorandum

in writing of the transaction be made and signed. Certain other kinds of contracts must always be evidenced by writing, and this is a real innovation. But, it will be observed, the Statute in no way diminishes the necessity for the existence of Consideration in every unsealed contract. In fact, when the Courts come to define the contents of the written memorandum which the statute requires in various cases, they will say that a statement of the Consideration must be one of them, for Consideration is an integral part of every unsealed contract.

Summary of the History of Contract.

To sum up our long story of the origin and growth of Contract. Contract begins, in Teutonic Law, with the staying of the blood feud. A man buys the peace by depositing a pledge, and finding sureties to guarantee the payment of the fine or the disproof of the charge. He redeems the pledge and frees the sureties, by performing his duty. The practice survives, in a mock form, in the pretty children's game of Forfeits. The offender deposits an article in the custody of an older person, who represents the primitive tribunal, or of the offended party, and, afterwards, redeems it by the performance of a penalty imposed by a blindfolded arbitrator, who

represents the impartial Justice of the Law. In more solemn form it survives in the Recognizance or Record Contract, by which a person whose reappearance is desired is compelled to acknowledge a liability to pay a substantial sum if he fails to reappear, and, usually, to find sureties who will acknowledge a similar liability. The transfer of the rod, the symbolic pledge, from one hand of the accused to the other, is the "taking a man's own recognizances" of the present day, the *Selbstbürgschaft* of German Law. This step helps powerfully to rid the incipient institution of Contract of the encumbrance of suretyship, which, from historical causes, seems, at first, to be inseparable from it. When this point has been gained, the liability of the principal debtor becomes the conspicuous feature in the transaction; and it is argued that this liability may be undertaken without the intervention of a tribunal, if the proper solemnity of pledge, which has by this time become, for most cases, a mere symbol, is retained. The notion is strengthened by the survival of those extra-judicial proceedings, the Following the Trail, the seizure of trespassing cattle (the *Akernam* of Sweden), which result in the constitution of a

pledge between the accused and the injured party. Gradually it becomes accepted that a man can bind himself to perform any obligation by the delivery of a pledge.

But here legal procedure creates a difficulty. Men may make agreements if they like, but the Courts will not enforce them unless they can be proved in some orthodox way. Various rules are adopted. Some tribunals require proof by witnesses, others by writing, others by public testimony evidenced by seal; others consider part performance as evidence of the terms of the arrangement. The pledge is merely a sign that an arrangement was made; it gives us no help in ascertaining its terms. English Law, exceedingly lax in the matter of proof, alone adds an essential to the constitution of the Contract. There must be mutuality; if A is to hold B to his promise, he must show that he too incurred a detriment by the arrangement. But no special form of proof is required in England, till the Statute of Frauds introduces foreign rules.

Thus, briefly, is it that the Law of Contract makes its appearance to revolutionize society. By means of it, the old caste organization will be broken down; a man's position will no longer

be that to which he was born, but that which he acquires by the exercise of his own free will. It is hard to say who or what is responsible for its developement. It begins with popular Justice, and is favoured by the State as tending to maintain the Peace. It is also largely used by the State as a means of breaking up the old gentile organization. The kindred are replaced by the lord and the *borh*, both of whom are, in a sense, creatures of Contract. But it cannot be supposed that the institution is favoured by the Clan, whose caste principles it defies; and we have seen a distinct inclination on the part of the State tribunals to put limits to its adoption. This attitude of the State is to be amply justified by history; for politics are to be revolutionized in theory by the Original Contract, and in practice by the *Bund* of the Swiss cantons and the *Leges Upstalsbomicæ* of the Netherland counties. A new principle presents itself in politics; the principle that a State may be founded on Contract. It is not likely that the older type of State will accord a warm welcome to its younger brother, the Republic of the Swiss Cantons, the Republic of the United Netherlands. In truth we look, for the future of Contract, not

to the gentile organization of the Clan, nor to the military organization of the State, but to some as yet undeveloped institution, which shall supersede them both.

NOTES TO CHAPTER VII.

1 Sæmund's Edda, *Rígsmál.* (I have translated from the Latin version; the metrical form may be seen in Thorpe's edition. London, 1866.)

2 Schmid, *Gesetze der Angelsachsen*, Æthelbirht's Dooms, 13, 14, 15, 16, 26; Wihtræd's Dooms, 12, 13, 15, 21, etc. Liebermann, pp. 4, 13–14.

3 Nithard, *Historiæ*, iv. 2 (Mon. Germ. fol. SS. ii. p. 668). In Latin form: *nobiles, ingenui, liti* (*Capitulatio de Partibus Saxoniæ*, 15, 17, 20. Boretius, vol. i. p. 69).

4 *Lex Frisionum*, i. 11.

5 *Leges Langobardorum*, Rothar, Prologue.

6 E.g. *Lex Frisionum*, i. 11.

7 *Lex Salica*, ed. Hessels, xxvi. *Lex Ribuaria*, lvii. 4. See F. de Coulanges, *L'Alleu et le Domaine Rural*, p. 329.

8 *Leges Langobardorum*, Rothar, 224.

9 Schmid, *op. cit.*, Wihtræd's Dooms, 8.

10 F. de Coulanges, *L'Alleu*, cap. xi.

11 *La Monarchie Franque*, cap. iv.

12 Marculf, i. 18 (ed. Zeumer, Mon. Germ. Leges, sect. v. p. 55).

13 *Lex Salica*, ed. Hessels, xlii. 4.

14 *Recapitulatio Legis Salicæ*, ed. Hessels, A. 30, B. 33.

15 *Ibid.*, A. 31, 30.

16 *Lex Salica*, ed. Hessels, xliv.

17 Cf. *Leges Langobardorum*, Liutprand, 101, 102.

18 *Ibid.*, Aregis, 12.

19 *De Bello Gallico*, vi. 21.

20 *Leges Langobardorum*, Liutprand, 152.

21 *Ibid.*, 80.

22 *Westgötalag*, ed. Beauchet. *Additamenta*, xii. (1).

23 *Ibid.* C. A., *Retlösæ bolkær*, vii. (1).

[24] *Lex Gundobada*, xix. 3, cv.

[25] *Lex Frisionum*, Additio sapientium, viii. 2.

[26] *Lex Gundobada*, cv.

[27] Ed. Beauchet. C. R., *Ut giræthæ bolkær*, vi.

[28] Schmid, *op. cit.*, Ine's Dooms, 9, 46, § 2; Alfred's Dooms, i. § 2; Liebermann, pp. 92–95, 110–111, 48–49.

[29] *Leges Langobardorum*, Rothar, 245, 246.

[30] *Lex Wisigothorum*, v. 6, 1 (Canciani, v. 124); *Lex Baiuwariorum*, xiii. 1.

[31] *Leges Langobardorum*, Rothar, 245.

[32] Schmid, *op. cit.*, Ine's Dooms, 9. Liebermann, pp. 92–95.

[33] *Lex Salica*, ed. Hessels, l. (2).

[34] *Lex Baiuwariorum*, xiii. 1. *Edictum Theoderici*, cxxiii.

[35] Ed. Hessels, l. (3).

[36] *Leges Langobardorum*, Rothar, 256.

[37] Ed. Hessels, i., lvi.

[38] *Lex Alamannorum*, xxxvi. (2), (3).

[39] Schmid, *op. cit.*, Æthelred's Dooms, ii. 9, §§ 3, 4. Liebermann, pp. 226–7.

[40] Ed. Beauchet. C. A., *Jordthær bolkær*, v., vii., etc.

[41] *Germania*, 8, 20.

[42] *Capitulatio de Partibus Saxoniæ*, 25. Boretius, vol. i. p. 70. This passage may, however, possibly refer to the seizure of a pledge from another person.

[43] *Capitulare Legibus Additum* of 803, 8. *Ibid.*, p. 114.

[44] *Lex Ribuaria*, xxx. 1.

[45] *Leges Langobardorum*, Rothar, 172.

[46] See Esmein, *Étude sur les Contrats dans le très ancien Droit Français*, 75–77.

[47] *Leges Langobardorum*, Liutprand, 38.

[48] Schmid, *op. cit.*, Edward's Dooms, i. 1, § 5. Liebermann, pp. 140–1.

[49] *Lex Alamannorum*, xxxvi. (2).

[50] *Lex Salica*, ed. Hessels. *Extravagantia*, B. 6, "After the debtor has given a pledge, he will be free."

[51] *Capitulatio de Partibus Saxoniæ*, 27. Boretius, vol. i. p. 70.

[52] *Leges Langobardorum*, Rothar, 359, 363. *Lex Salica*, ed. Hessels, cii. (p. 413).

[53] *Leges Langobardorum*, Rothar, 262. *Lex Salica*, ed. Hessels, lii. *Extravagantia*, A. ii.

[54] *Lex Ribuaria*, xxxiii. 4; lviii. 21; lxvii. 2, etc.

[55] *Edictum Chilperici*, 7. Boretius, vol. i. p. 9.

[56] *Capitulare Legi Ribuariæ Additum* of 803, 3. *Ibid.*, p. 117.

[57] *Lex Ribuaria*, xxxiii. 4.

[58] Schmid, *op. cit.*, Edmund's Dooms, ii. 7. Liebermann, pp. 188–191.

[59] *Leges Langobardorum*, Rothar, 360–362.

[60] *Ibid.*, Liutprand, 15.

[61] *Ibid.*, 119. *Lex Salica*, ed. Hessels. *Extravagantia*, A. i.

[62] *Leges Langobardorum*, Liutprand, 30.

[63] *Lex Romana Curiensis*, xxiv. 2.

[64] *Zur Rechtsgeschichte der römischen und germanischen Urkunde*, pp. 104–107, 262–265.

[65] Loersch and Schröder, *Urkunden zur Geschichte des Deutschen Privatrechtes*, 2nd ed., No. 90.

[66] Brunner, *op. cit.*, p. 99.

[67] *Leges Langobardorum*, Liutprand, 26, 27.

[68] *Ibid.*, 91.

[69] *Ordonnance de Moulins*, Art. liv., *teste* Esmein, *op. cit.*, p. 213, note (5).

[70] Esmein, *op. cit.*, 43, citing Beaumanoir, xxxv. 18. The reader will not confuse the contract under seal with the so-called "contract of record," which does not require a seal, because it is embodied in the court records, and, therefore, indisputable.

[71] Esmein, *op. cit.*, pp. 45–55.

[72] See on this point, Pollock and Maitland, *History of English Law*, vol. ii. 603–607, 634–637.

[73] Glanville, *De Legibus et Consuetudinibus Angliæ*, x. 8, 18. It will be observed that the Pledge (*vadium*) is fully enforceable.

[74] *I.e.* from the passing of the Statute of Westminster the Second, 13 Edw. I., c. 24, § 2, which authorized the Chancery to frame new writs *in consimili casu*.

[75] On the whole subject, see my *History of the Doctrine of Consideration in English Law*, cap. iii.; and, on this point especially, pp. 203, 204.

[76] Second Dialogue, capp. 23 and 24.

CHAPTER VIII.

SUMMARY.

Law now a social force.

So far back as records go, Law has always been the expression of social force. Whatever views men may have held as to the origin of those rules of conduct which they have felt themselves bound to follow, the force which has compelled their obedience has been the approval or disapproval of the community in which they have found themselves. That approval or disapproval may have assumed different forms; that community may have been based on one or other of many different principles, it may have been organized on one or other of many different plans. But, so far back as recorded history goes, the force at the back of Law has always been a social force.

May originally have been individual.

There is, however, not a little in the early history of legal ideas to raise a plausible conjecture that Law, at least in its rudimentary state, is older than society. The non-gregarious animals

are governed by a force to which we apply the name of Instinct, but which, in its results, is hardly to be distinguished from Law. We can predict with almost perfect certainty that such an animal will do certain acts, and will not do certain other acts; far more confidently indeed than we can make a similar assertion of human beings in the best ordered society. And yet, it is certainly not a social force of any kind which ensures this regularity of conduct. It is, if we are to credit those who are best entitled to be heard on such a subject, the force of inherited experience.

Habit. Are we to say that Man, the highest of all animals, never passed through this stage? It may be freely admitted that we have no direct evidence of any pre-social condition of the human race, of any period in which isolated individuals, or even isolated pairs, represent the normal condition of mankind. But there is nothing inherently impossible in such a state of things, nothing at all inconsistent with the recorded stages of human history. Under such conditions Man may very well have acquired, in precisely the same way as the bear and the tiger, instinctive *habits*, which afterwards developed into deliberate conduct. May it not even be that similarity of habits is

the oldest social principle of the human race, the original basis on which human societies were formed?

Becomes custom.

But, whatever may have been the cause, it is quite clear that the effect of the association of men in groups was, ultimately, to transmute the habits of individuals into the customs of communities, and to sanctify these customs by a force wholly unknown to isolated individuals. The weakness of the individual habit is, that it gives way before caprice, before temptation, before mere curiosity. No one can really be a law unto himself; however firmly he may resolve to follow a certain rule, he will break it if he thinks fit. But if he is a member of a community, whose members all regard the rule as binding, the case will be different. If he then breaks the rule, he must be prepared to face the disapproval of his fellows. There may be no regular organization for expressing this disapproval; the form which it will take may be uncertain. But we have no reason to suppose that it will be ineffectual. At the very least, the offender will be "taboo"; and any one who has studied the effect of this process in its modern and very mitigated form of "cutting," or "sending to Coventry," may realize something

The social sanction.

Taboo.

of its efficacy in primitive times, when Man had far less internal resources than he has now. A well-arranged "taboo" would probably mean speedy starvation for the victim.

Joint responsibility.

It is evident, then, that from the association of men into groups we must date a new stage in the evolution of Law. As Man's logical faculties begin to develope, as Reason in its feebler forms takes the place of Instinct, we observe a new idea which is to give tremendous force to the influence of Law. Arguing from the seen to the unseen, unhappily familiar with disasters arising from human agency—with murder, theft, incendiarism —Man believes that the disasters for which no human agency will account must be the work of unseen beings, whose anger has, by some means or another, been aroused. It may be only that they are hungry; hunger always looms largely before the consciousness of primitive Man. And so, propitiatory sacrifices are offered, that the wrath of the Unseen Powers may be appeased, as their hunger abates. But it is equally likely to be that some breach of habit or custom has aroused their indignation. Man is aware that such breaches are a frequent source of calamities arising from human anger; he draws an obvious inference

when he attributes to a similar cause the anger of the Unseen Powers.

It is in this connection that social force begins to work so powerfully on rudimentary notions of Law, that from henceforth the history of Law becomes inseparable from the history of Society. Breach of habit by the member of a social group is believed to be a source of danger, not only to the individual who commits it, but to the group of which he is a member; for the Unseen Powers cannot be expected to discriminate very accurately. The group which harbours an accursed man is itself accursed. The offender must be got rid of. He will be lucky if he is not sacrificed to propitiate the angry gods; lucky if he gets off with "taboo."

There is nothing far-fetched in this theory. It is both antecedently probable, and supported by evidence. A community formed upon similarity of habits would naturally resent any deviation from habit by one of its members. It would argue that a strange animal had got into its midst; and we know the fate that a strange beast meets with in a herd of animals. The evidence of the intense dislike which primitive communities show towards the man of strange ways is

overwhelming. Tolerance is one of the very latest virtues of civilization.

Law a conservative force

It would appear, then, that the force exercised by Society, through the medium of Law, is a wholly conservative force. It makes steadily for a maintenance of the existing order. Enlightened systems of Law contain provision, of course, for change; but this is only in very modern times, and, be it respectfully suggested, with somewhat doubtful sincerity. It may be questioned whether there have been many legislators who were willing to recognize that their work was only temporary. The difficulty of procuring any alteration in Law, expressed or unexpressed, is proverbial.

The revolutionary instinct.

But Man is not wholly, even now, a social animal. Besides his social, or conservative faculty, which leads him to follow the beaten paths, to do as those around him are doing, he has an inventive, or revolutionary faculty, which leads him to assert his own individuality. In the mass of mankind this faculty is but slightly developed; it shows itself only in those little personal peculiarities which distinguish one character from another. But in a few men it is very powerful, and cannot be suppressed. It

then shows itself in proposals of change, whether in religion, politics, domestic life, or other branch of human economy. It meets, of course, with profound opposition; it awakens the primordial distrust of novelty, which is so deep seated in mankind. An immense majority of the changes thus proposed perish in the proposal. This does not, of course, necessarily mean that they are unsound; it merely means that they are unacceptable to the community. Only a few commend themselves to the general acceptance, and, ultimately, become Law. But what is most important to observe is that, with rare and peculiar exceptions, reforms are not first declared to be Law and then adopted in practice. They are first adopted in practice, and then declared to be Law. The reader who has followed the history of the Sources of Law contained in the first two chapters of this book, will have noticed that, until the full developement of the State in the later Middle Ages, these Sources are not, in form, either imperative or enacting. The only substantial exception to this rule is to be found in the Frankish Capitularies; and we have seen that they were of comparatively little importance. Law is declared, it is not made; it

is a discovery, a statement of the conditions under which, as wise men have shown, life can be lived, not an arbitrary decree enacting that life shall be lived in a particular way.

Law and social organization.

But, if Law is a social force, it will be profoundly affected by the character of the society which administers it. And it may be suggested that a failure to appreciate this fact is, to some extent, responsible for the inadequacy of many of the attempts which have been made to explain the history and nature of Law. For one thing, writers on Law have failed to distinguish between the motives which have led to the formation of human societies, and the principles upon which those societies have been constituted. For another, they have failed to realize the differences between the principles which have been successively adopted as the basis of Society, and the rivalries which have existed between them. Upon the first point, a word or two will be sufficient; the latter requires a little fuller treatment.

Social motives.

Societies may be originally formed, or may continue to cohere, from all kinds of motives. Fear, hunger, desire of wealth, religion, love of knowledge, have all, in their turn, been powerful

factors in the formation of societies. But when we have said that a society was formed as the result of fear, with the object of defence against external attack, we have said nothing as to the principle upon which it is constituted. Is it a purely voluntary association of casual units, or a body forcibly held together by the control of a ruler, or a group of relatives recognizing only the tie of blood as the basis of membership? No doubt the motive of association will be the decisive influence upon the conduct of the society; but the principle of association will be no less important in affecting its organization.

Social principles.

In the course of our researches into Teutonic history, we have observed three fundamental social principles at work, of which all others are mere varieties. These may be termed, the Gentile, the Military, and the Contractual principles. Each results in the formation of a typical society—the Clan, the State, and the Partnership. These typical societies are capable of subdivision and of aggregation; but, whether they are subdivided or grouped with other societies of a similar type, their character is unmistakeable. The member of the Clan or any one of its analogues is such because he is (actually

or feignedly) descended from certain ancestors. The member of the State is such because he owes military obedience to its head. The member of the Partnership is such because he has agreed to become a member. All other societies fall under one of these three types. The Monastery, the Gild, the College, are of the gentile type, although, of course, their gentile tie is a fictitious one. The State, for reasons which will be obvious, has few imitators, except in the monopolist associations which it occasionally creates, and the Rings and Trusts which assert their own power. The Club, the Learned Association, the Voluntary Committee, are, of course, of the partnership type.

The gentile principle.

In point of historical sequence, these principles develope in the order named. If, as has been suggested, human society first began with an association of beings united only by common habits, we have no record of such a state of things, at least in Teutonic history. When first we meet the Teuton in history, he is the member of a gentile society, a society based on the principle of descent from a common series of ancestors. This society is engaged in military, economic, religious, and convivial pursuits; the gentile bond serves for all purposes of association.

In this state of affairs, Law is the Custom of the Clan. And the Custom of the Clan is simply the unified expression of those similar habits which, if our suggestion be sound, originally brought the ancestors of the clan or group of clans together. When the practice of ancestor-worship has invested the deceased members of the clan with a sacred character, a breach of custom will be, not merely an anomaly, but a gross impiety, a deviation from those practices which the gods, when on earth, sanctified by their example. Not only may the party primarily offended revenge himself; but, probably, any member of the clan may destroy the offender as unworthy of membership, or sacrifice him to the angry gods.

The Custom of the Clan.

We know little from Teutonic sources of the details of gentile history, but certain broad features of gentile society can be detected from survivals. Gentile society is not competitive, at least within its own ranks. The place of each member is allotted to him by the circumstances of his birth; he changes it only as the course of time brings him to the position of an elder, and removes him from the control of living ancestors. There is not much encouragement for him to accumulate flocks and herds; for, supposing him

Features of gentile society.

Caste.

to be a full Householder, his right to graze cattle on the Clan pastures will probably be limited, and, if he is a person in Mund, the fruit of his labours will not be at his own disposal. It is extremely improbable that gentile rules of cultivation will allow him to acquire more than the normal quantity of land. Again, gentile society is composed of groups; such organized action as the Clan is capable of manifesting, is applicable only to the Heads of Households; no interference between the House Father and the members of his Household is tolerated. If the Clan requires the services of the latter, it is of the House Father that it must demand them. He is responsible for their misdeeds to the Clan. Finally, the Clan is an exclusive body; it will have nothing to do with a stranger in blood, however desirable an acquisition from a utilitarian point of view, except in extreme cases, and under the elaborate disguise of Adoption.

Groups.

Exclusiveness.

But a society which discourages individual competition, which only acts indirectly upon the bulk of its members, which refuses to recruit its ranks with new blood, contains within itself the seeds of decay. However admirable as a peace organization, it is no fighting machine. Where,

Weakness of gentile principles.

as in ancient Germany or undiscovered America, there is a practically boundless territory, in which weaker communities can maintain themselves without interference by more powerful rivals, the Clan system may last indefinitely. But, so soon as pressure begins to operate, its weakness becomes apparent. Even against its own members, the action of the Clan is feeble; want of executive power is a marked defect in all gentile institutions. Against outside force, its action is still less successful. An army in which age and heredity are the titles to command, whose members have never been accustomed to the wholesome stimulus of competition, whose ranks are not open to merit unless that merit happens to be lodged in the descendants of a particular set of ancestors, is an army doomed to destruction so soon as it meets a force organized on more effective principles. And so powerful a stimulant of inventiveness is physical danger, that we are able to see exactly how it produces the required organ. The disasters of the Clan give rise to the war chief with his band of followers, chosen exclusively for their devotion and military ability. After all, in fighting, the chief thing is to fight well.

Earliest form of the State.

The war chief and his band, of whom we have such abundant evidence in early Teutonic history, are the earliest form of the State. At first, no doubt, they are considered as a temporary institution; but successful institutions have a tendency to become permanent. Victory brings a consciousness of power, and a desire to use it. The war chief and his band may carry their arms into new territory, and settle down as conquerors upon an enslaved population. More probably, they will head a migration of the clans from which their members are drawn, or constitute themselves protectors of those clans in their ancient seats. In any case, they will bring a new element into social life, an element which stands, by its very nature, in marked contrast with the older elements which confront it. This is no fancy picture; the reader may be challenged to point out a single example of a Teutonic State founded in any other way, until the Swiss *Bund* and the Netherland League introduce a new principle into politics.

State principles.

The two institutions, the Clan and the State, stand thus face to face with each other. Linked together against external attack, they are pledged to the deadliest internal warfare. We have seen that the leading characteristics of the Clan are a

caste organization, a respect for the autonomy of its constituent groups, and exclusiveness. The principles of the State are precisely the opposite—encouragement of individual ability by the offer of splendid rewards, an insistence on absolute and direct obedience by every one of its members to its acknowledged head, and a willingness to purchase ability wherever it can get it. Institutions founded on such opposite principles can never exist peaceably together. By its very nature, the State becomes an aggressor upon the province of the Clan. The Clan conducts agriculture by a system of communal groups; the State replies, first, by setting up a system of individual landowners, secondly, by breaking down the communal system of the Clan. The Clan reappears in an artificial form as the Merchant or Craft Gild, with its fixed rules to prevent competition, its insistence on that apprenticeship which is the analogue of Adoption, and its rigid exclusion of strangers. The State does not rest until it has suppressed the gilds, and brought trade and handicraft under its own control. If the Catholic Church of the Middle Ages resembles in its organization the State rather than the Clan, the religious Orders are an

Rivalry between State and Clan.

almost complete reproduction of gentile ideas. But they are the subject of unceasing jealousy on the part of the State, which, in nearly all cases, succeeds in destroying them. The declaration of custom or Law is originally the work of the Clan. The State first procures an authoritative statement of this Custom by the gentile authorities, and then, partly by bribery, partly by force, assumes both the function of declaring and the function of applying the law. In so doing, it stamps Law with its own military character. Law ceases to be, in theory, the discovery of wisdom and piety; it becomes, in form, the command of an autocrat. How far the reality corresponds with the arrogant assumption, we have seen much reason to doubt. But an assumption, steadily maintained, is on the way to become a reality.

The feudal compromise.

The struggle between State and Clan is long and bitter; and at first it looks as though the State were going to fail. The epoch of feudalism marks the end of the first campaign; and, on the whole, the Fief, which is, evidently, a compromise between State and Clan, seems to have more of the Clan than of the State in its composition. Sufficient attention has hardly been paid to feudalism as the resultant of these two rival

principles of association; but this seems to be its true place in the philosophy of history. With the revival of the State, however, in the tenth and eleventh centuries, the struggle is recommenced; and, in the long run, as we have seen, the State is victorious all along the line.

Final victory of the State.

But, like a wise conqueror, the State has not disdained to borrow from its defeated rival. Gentile ideas spring from instincts deep-rooted in humanity, and they cannot be entirely neglected. No doubt that, so far as efficiency, pure and simple, is concerned, the principles of the State are sounder than the principles of the Clan. Strenuous personal rivalry, guided by absolute discipline, and recruited by external talent, will prevail in any struggle against an institution founded on respect for age and hereditary rights, and exclusion of foreign ability. But respect for age, and heredity, and that preference for one's own kin which has acquired the significant name of "clannishness," are not easily got rid of, except in times of extreme pressure, even by purely political bodies. A State which recognizes the existence of an hereditary legislature, which still allows some of its offices to be disposed of by "influence," and which treats the exclusion of

But influenced by gentile ideas.

alien immigrants as a practical question, can hardly be said to have cut itself entirely free from gentile ideas. Nor is it, perhaps, desirable that it should. For, if gentile ideas do not make for efficiency, at least they make for stability. If we have been correct in our survey of medieval history, the most successful State has been that which has absorbed, instead of destroying, the gentile organization with which it has been brought into contact.

An objection met.

The struggle between the State and the Clan is really the key to the internal politics of the Middle Ages; and its existence contributes to medieval history that curious dualism, with its inconsistencies and its oddities, which is to many students the chief charm of the period. But some will find it hard to accept the doctrine as anything but a metaphor, or, at most, as a fanciful theory, in spite of the fact that a similar struggle may be seen writ large in the histories of non-Teutonic peoples—in Grecian history, Roman history, Irish history. The difficulty arises, no doubt, from the want of a clear dividing line between the actors in the great struggle. Objectors will urge that, in certain periods, the inhabitants of a country are, at the same time, members of clans and members

of the State, vassals of feudal seigneurs and liegemen of the King. And that is unquestionably true. Whilst, in the Middle Ages, there are great classes which we can range definitely on one side or other of the struggle, there are likewise great classes of men who might be on either.

Illustrations.

But is this a real difficulty? May not a man be a member of two different institutions, and yet, in time of rivalry, side with the one rather than the other? The House of Commons contains many (perhaps too many) members who are also influential members of railway companies. Let us suppose, which is quite possible, that the House of Commons is at feud with the majority of the railway companies on a question of rates. If the struggle becomes acute, each of such members will find himself bound to take one side or the other; to support the power of the House of Commons against the railway companies, or that of the railway companies against the House of Commons. But, for a large number of students of history, the difficulty can be removed still more effectually by an appeal to the analogy of the older English universities.

To such students it is perfectly well known

that the average graduate of Oxford or Cambridge is a member of two perfectly distinct, though closely connected, bodies. He is a member of his university, and a member of his college. These two bodies are organized in totally different ways, their objects are different, though harmonious, their methods are utterly dissimilar. The government of the University is partly in the hands of the whole body of graduate members, partly in those of resident graduates, partly in those of an elective Council, partly in those of officials appointed by them. The government of the College is, with rare exceptions, in the hands of its Fellows, and of officials appointed by them. The objects of the University are, primarily, educational, in the technical sense; those of the College, primarily, domestic or social. The University proceeds by methods which are, roughly speaking, competitive; it recognizes merit alone in its awards. The College, while recognizing merit, takes many other qualities into account, and exercises a large discretion in dealing with its members.

The relations between the university and the colleges at Oxford and Cambridge are, happily, so harmonious, that it requires an effort of the

imagination to picture a struggle between them. But it is a conceivable, though improbable hypothesis, that there might some day arise within the university a compact and powerful group of men bent on destroying the collegiate system; and this, despite the fact that these men, or some of them, might themselves be members of colleges. Let us suppose them to aim at dividing the corporate property of the colleges among the individual Fellows and Scholars, at insisting that college offices and college livings should be awarded according to some special standard of merit and not according to seniority, at exacting a solemn promulgation of college statutes and at planting a university official in each college to secure their enforcement, at refusing to recognize the college as an intermediary between its undergraduates and the university, in short, at converting the colleges into local departments of the university, dependent upon headquarters for direction and support. In such a policy, though highly improbable, there is nothing fantastic or impossible, nothing that a body of able and strong-willed men might not set themselves to accomplish with reasonable hopes of success, provided only that external circumstances favoured

their scheme. But such a policy would, of course, provoke a struggle so intense, and so bitter, that it would influence the whole of academic life. Every question arising, almost every event, would be found to be in some way connected with this fundamental movement. Such, or something like it, was the question at issue between the State and the Clan; the course of the struggle has been traced in detail in the previous chapters of this book.

Contract. In conclusion, it must be admitted that little can safely be predicted of that important institution the growth of which has been sketched in the immediately preceding chapter. It is certain that the notion of Contract has made serious inroads upon the older ideas of Law and Politics; few thinkers can doubt that it is destined to play a yet greater part in social history. There are already signs that it is regarded with fear and dislike by older institutions; and even the most advanced advocates of change are found to look with suspicion upon it, as an instrument capable of wounding the hand which uses it. But that, in some form or another, it will come into conflict with the military notions upon which the great majority of States are still founded, is tolerably

certain. The appeal ostensibly made to contractual principles by the Southern States, in the American Civil War, was not successful; the surrender at Appomatox is a tremendous precedent against the contractual doctrine in politics. But, in its modified form of Compromise, the Contract is daily doing a great work, even in the domain of politics proper; in other spheres of social life its influence is, of course, enormous. And it is not a little significant, from the point of view which we have assumed, that one of the most influential of English politicians should have made a scientific study of the subject of Compromise, with special reference to its function in the conduct of political life. When an expert has spoken, it behoves a theorist to keep silence.

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SYNOPTIC TABLE OF SOURCES.

NOTES.

1. There has been no attempt on the part of the compiler to attain uniformity of spelling or nomenclature. In each case the source has been indicated by its popular title, which, it need hardly be said, is seldom of official origin. The dates assigned to the various items are those generally accepted by the leading specialists.

2. A title in italics indicates that the source was originally the work of a private composer.

3. A title between square brackets, [ ], indicates that the source does not survive in its original form.

FIFTH CENTURY.

Quarter.	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.
4				(Date uncertain.) Lex Salica.	(466–485?) [Leges Eurici.]		

SIXTH CENTURY.

Quarter.	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.
1			512 Edictum Theoderici.	(bet. 511 and 558.) Pactus pro Tenore Pacis Hildeberti (I.) et Chlotharii (I.).	517 Lex Gundobada (Burgundians).		
2				Lex Ribuaria (part I.).			
3				(bet. 561 and 584.) Edictum Hilperici (successions and misc.).			
4				Lex Ribuaria (part II.). 596 Hildeberti (II.) Decretio (successions).	586–601. Antiqua. (Lex Wisigothorum.)		

SEVENTH CENTURY.

Quarter.	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.
1	Æthelbirht's Dooms (Kent).			[Pactus Alamannorum.]	584 / 628 Præceptio Chlotharii (II.) (misc. For Neustria.)		
				614 Edictum Chlotharii (II.). Frank kingdom.)	(Misc. For whole		
2			643 Rothari Edictum Renovationis.	? Lex Ribuaria (part III.).			
3			668 Grimoaldi Correctio.		652–672 Liber Judicum (Fuero Juzgo).		
4	680 Hatfield Decree against heresy. (North., Mercia, E. Anglia, Kent.) Hlothere's and Eadric's Dooms (Kent). Ine's Ratifications (Wessex). 696 Wihtræd's Dooms (Kent).						

Quarter.	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.
1				Lex Ribuaria (part IV.).			
				Lex Alamannorum.			
			713				
			735 Liutprandi Leges.				
			733 [Notitia de Actoribus Regis.]				
2				743 Statutum Karlmanni (appropriating church lands).			
			745 Ratchis Edictum et Statuta.				
				Decretum (Lex) Baiwariorum.			
			750				
			755 Statuta Ahistulfi.				
					768 Capitulare Aquitanicum. (Pippin. Misc.)		
3				772 Decretum Tassilonis (Bavaria).			
				775 Decretum Tassilonis (Bavaria).			
			Capitula Aregis (Beneventum).				
			779 Capitulare (v. Decretum) Haristallense of Charles the Great. (For whole empire. Important rules for administration of justice. ? Extended to Northern Spain.)				
			780 Consuetudo et Pactum Aregis (Naples).				
				Capitulatio de Partibus Saxoniæ.			
			Notitia Italica. (Charles the Great. Sales.)				
				785? Lex Frisionum.			
4			Capitulare Mantuanum. (Pippin *as king*. Misc.)				
			Capitulare Pippini. (Procedure. Pilgrims.)				
			787 Capitulare Mantuanum IIm. (Pippin. Misc.)				
			787 Capitulare Papiense. (Do. Misc.)				
			790 Capitulare Pippini. (Misc.)				
				797 Capitulare Saxonicum.			

Quarter.	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.
			800 Statutum Cenomannicum (regulating labour-dues of vassals to their lords).				
			Capitulare de Villis (regulating the management of the royal estates, and containing important general rules).				
			801 Capitula legi Lombardicæ addita (misc.).				
			803 Capitula (apud Aquisgranum) legibus addita. (Murder fines, emancipations, suretyship, abuse of legal process.)				
				802 Lex Thuringorum. Lex Frisionum (Additio sapientium).			
				803 Constitutio in lege Ribuaria mittenda. Lex Saxonum.			
			806 Capitulare Pippini (misc.).				
1			809 Capitula Aquisgranensia. (Pardoned criminals, outlaws, attendance at the local courts.)				
			810 Capitula Aquisgranensia (containing the important clause limiting jurisdiction of the Hundred courts).				
				810 Capitula ad Legem Baiwariorum addita (The 8 bans).			
			? 811 Capitulare de Justitiis Faciendis. (Ordinance regulating competence of various courts, and establishing quarterly circuits of the *missi*.)				
			812 Capitulare de Latronibus (definitely constituting theft as a "plea of the crown," unless committed between two slaves of same master).				
			[Pactum cum Venetis.]		812 Præceptum pro Hispanis (purprestures of Crown lands).		
					? 813 Capitulare Aquisgranense (misc.).		
					815–6 Duæ constitutiones de Hispanis profugis.		
			819 Capitula Legibus Addenda. (Important criminal code, recognising execution against land, also power of making wills.)				
				? 819 Capitula Legi Salicæ addita.			
				? Lex Francorum Chamavorum.			
			825 Statutum Olonnense (misc.).				
			827 *Ansegisi Abbatis Capitularium collectio* (an imperfect collection of the Capitula of Charles the Great, Ludwig I., and Lothar I.).				
			829 Capitularia Wormatiensia. (Important rules of imperial administration, authorizing "inquisitiones.")				
2			*Concordia.*				
			836 Pactum Sicardi (Naples).				
			840 Pactum cum Venetis (prob. founded on earlier of 812, not surviving).			844 Præceptum pro Hispanis.	
					853 Capitulare Silvacense (rules for circuit judges).		
					854 Capitulare Attiniacense (rules for circuit judges).		
3					864 Edictum Pistense (important general ordinance regulating procedure, coinage, military service, weights and measures, etc.).		
			866 Capitula Adelchis (Beneventum).				
					884 Capitulare Vernense. (Robberies. Regulation of rival jurisdictions.)		
4		Ælfred's Code.					

TENTH CENTURY.

Quarter.	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
I	901?	Eadweard the Elder's (first) Ordinance.												
	904	Eadweard the Elder's Warnings (C. of Exeter).												
2		Æthelstane's Ordinance for Tithes.												
		Æthelstane's Ordinance of Greatanlea.												
		Judicia Civitatis Lundoniæ.											930	[Ulfljótslög (Iceland).]
	940	Eadmund's Proclamations and Institutions.												
3	946 to 959	Eadgar's Counsel of the Hundred.												
	959 to 975	Eadgar's Counsel (at Andover?).												
	959 to 975	Eadgar's (general) Ordinance (at "Wihtbordestane").			967	Capitulare de duello judiciali.								
4		Æthelred's Counsel at Woodstock.			998	Capitulare de prædiis ecclesiasticis.								

ELEVENTH CENTURY.

Quarter.	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
I		Peace of the English and Danes. (Danegelt.)				The *Capitulare* (collection of Imperial Capitula).								
		Æthelred's Law of Wantage.												
		Counsel of the Witan at Enham (? Ensham).												
	1018	Knut's Counsel at Winchester.												
	?	Witherlags Ret (Knut).			1019	Capitulare de Successione								
					?	*Liber Papiensis.*								
2					1027?	Mandatum de lege Romana.								
					1037	Edictum de Beneficiis.								
3	?	*Rectitudines Singularum Personarum.*			1052	Constitutio de Veneficiis.								
					1070	The *Expositio* (commentary on the Imperial Capitula).								
4		The Ten Statutes of William I.			1077	Pax Italica Henrici Quarti.								
		Ordinance excluding spiritual causes from the Hundred Court.			?	*Lombarda.*								

TWELFTH CENTURY.

Quarter 1

ENGLAND

- 1100 — Charter of Liberties (Henry I.).
- 1108? — Ordinance for holding courts of County and Hundred.
- *Leges Edwardi Confessoris.*
- *Leis e custumes que li reis Will. grantad al pople de Engleterre.*
- *Quadripartitus.*
- ? 1118 — *Leges Henrici Primi.*

SCOTLAND

- *Leges Quatuor Burgorum.*

ITALY

- 1103 — Pax Generalis Henrici Quarti.
- 1111 — Privilegium (Papæ) de Investituris (recognizing imperial rights).
- 1122 — Pax Wormatiensis. (Surrender of imperial rights on investitures.)

GERMANY

- 1125 — *Codex epistolaris Babenbergensis.*

SCANDINAVIA

- 1118 — [Haflidaskrá (Iceland).]

Quarter 2

ENGLAND

- *Consiliatio Cnuti.*
- *Instituta Cnuti aliorumque Regum Anglo-rum.*

SCOTLAND

- Assise Regis David.

ITALY

- 1136 — Constitutio de feudorum distractione.

GERMANY

- 1140 — Freiburger Stadtrecht.
- Soester Stadtrecht ("Justitia").

SPAIN

- 1127 (–1157) — El fuero viejo de Castilla.

Quarter 3

ENGLAND

- 1164 — Record ("Constitutions") of Clarendon.
- 1166 — Assise of Clarendon (procedure).
- [Assise of Novel Disseisin.]
- [Grand Assize.]

ITALY

- 1152 — Constitutio de pace Tenenda. (Criminal Code of Frederick I.)
- 1154 — Constitutiones Feudales. (Roncaglia, General Feudal Code.)
- 1157 — Edictum in favorem Judæorum.
- 1158 — Constitutio de jure feudorum. (Pax Roncalica.)
- 1165 — Constitutio de testamentifactione clericorum.

GERMANY

- 1154 — Concessio Investituræ Episcoporum (Saxony).
- 1156 — Constitutio Ducatus Austriæ.
- 1163 — Lübecker Stadtrecht.
- 1169 — Kölner Stadtrecht.

FRANCE

- 1155 — Ordonnance de Soissons.
- Établissemens de Rouen.

Quarter 4

ENGLAND

- 1176 — Assises recorded at Northampton.
- 1181 — Assise of Arms.
- 1184 — Assise of Woodstock (Forests).
- 1194 — First (?) Plea Roll.

SCOTLAND

- Assise Regis Willelmi.

ITALY

- 1183 — Pacta Placentina (The Lombard League).
- 1186 — Constitutio contra Incendiarios.
- 1191–4 — Mandatum de Appellationibus.
- 1192 — Sententia de feodis Ministeralium.
- ? 1180 – 1200 — *Libri Feudorum* vel *Usus Feudales.*

GERMANY

- 1188 — Magdeburger Stadtrecht.

FRANCE

- 1196 — [Commencement of Exchequer Records (Normandy).]
- *Très ancien Coutumier de Normandie* (Part I.)

Quarter.	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
					1208	Sententia de Teloneis.							1200–2	Slesvigs Bierkerât (Denmark).
							?	Treuga Henrici.	1209	Conventio de feodis regni.				Westgötalag (Sweden).
							?	*Auctor Vetus de Beneficiis.*						
							1215?	*Sachsenspiegel.*						Gulathingslög (Norway).
I	1215	Magna Carta.			1216	Cessio juris spolii.			?	Statuts de Montpellier.				
					1218	Sententia de Immunitate Civitatum.					1217	Espejo de todos los derechos.		Skaanelagen (Denmark).
					1220	Privilegium in favorem principum ecclesiasticorum.			1220	*Très ancien Coutumier de Normandie* (Pt. II.).				*Sjællandske Love* (Denmark).
							1221	Wiener Stadtrecht.						
							1223	Renovatio pacis antiquæ Saxoniæ.						
	1227	The First Register of Writs.			1231	Constitutiones Siculæ.	1231	Edictum contra communia.	1228	Statuts de Marseilles.	1229	Fuero Juzgo.		
								Statutum de constitutionibus.						
					1232	Constitutio in favorem principum.								
								Kulmische Handfeste.						
2				Statuta Alexandri II.			1234	Sententia in favorem ecclesiarum.						
	1235	Statute of Merton.			1235	Constitutio Pacis (" Mainzer Landfried.")							1241	Jydske Lov (Denmark).
							?	*Summa prosarum dictaminis.*	1243	Statuts d'Avignon.				
									1245	Statuts d'Arles.			1244	Frostuthingslög (Norway).
							?	*Deutschenspiegel.*	1248	Commencement of the Plaids de l'Echevinage (Reims).				
							?	*Schwabenspiegel.*						Bjarkeyjarrèttr (Norway).
					1251	Constitutio de jure hereditario nepotum.					1252	Fuero Real.	1254	Kjöbenhamns Bierkerât (Denmark).
									1254	Commencement of the "Olim."			1255	Bjarkoaratten (Sweden).
									1256	Ordonnances de villes.				*Grágás* (Iceland).
									1260	Ordonnance de batailles (St. Louis).			1262	Birger Jarl's Ethsörebrott (Sweden).
3	1267	Statute of Marlborough.							1267	Coutumes de Perpignan.				
									1268	Commencement of Parloir aux Bourgeois (Paris).				
									1269	Edictum de Ecclesiis.			1269	Ribes Bierkerât (Denmark).
							1270	Hamburger Stadtrecht ("Ordelbok").	1270	*Établissemens le Roy* (St. Louis).			1271	Járnsída (Hákonorbók. Norway).
	1275	Statute of Westminster I.							1275	Ordinatio de possessionibus amortisatis.			1274	Magnus Lagabötir's Landslög (Norway).
	1278	Statute of Gloucester.			1276	Sententia de feodo non requisito.							1275–6	Hirdskrá (Norway).
	1279	Statute of Mortmain.					1281	Augsburger Stadtrecht.					1280	Jonsbók (Iceland).
	1283	Statute of Acton Burnel.			1282	Sententia de Partu (" Viliorem conditionem sequi debet ").			1283	Coutumes de Toulouse.				
	1284	Statute of Wales.		Leges inter Scottos et Brettos.	1283	Sententia de comitatibus non dividendis.			1284	Ordinatio de pace infracta.			1285	Ordinances of Alsno and Skeningen (Sweden).
	1285	Statutes of Westminster II. and Winchester.							1287	Ordinatio de burgesiis.				
4		Circumspecte Agatis.		*Regiam Majestatem.*			1292	Hamburger Schiffsrecht.	1291	Ordinatio de Parliamento.				
	1290	Quia Emptores.					1298	Oesterreichisches Landrecht.					1296	Uplandslag (Sweden).
	1292	The First Year Book.			1299	Sententia Alberti I. (excluding women from succession to feudal land).				*Grand Coutumier normand.*				
	1297	Confirmatio Cartarum.						Goslarer Stadtrecht.						Gotlandslag (Sweden).

FOURTEENTH CENTURY.

Quarter.	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
							1303	Stadtrecht von Bremen.	1303	Ordinatio pro gubernatione regni.				Westmannalag (Sweden).
							1305?	*Sächsisches Weichbildrecht.*						
	1307	Statute of Carlisle.							1306	Ordonnance de batailles (Philippe le Bel).				
					1310	Sententia contra privilegia civitatum.								
					1313	Constitutio Majestatis.		*Summa curiæ regis.*			1312	Ordinance of Justice.		
I									1314	Mandatum de alodis.	1314	Ordeniamento de las Tafurerias.		
									1315	Charte aux Normands.				
			1320?	Articuli in itinere Camerarii.					1320	Ordonnance pour nostre Chambres de nos Comptes.				
							1323	Leges Upstalsbomicæ (Zeeland).						
	1324?	Ordinance for Ireland.						*Kleines Kaiserrecht.*						
									?	*Très ancienne coutume de Bretagne.*			1327	Sodermannenlag (Sweden).
														Helsingalag (Sweden).
									1330	Ordonnance d'appels.				
									1340	*Style de du Breuil.*			1334	Magnus Eriksson's Usury Law (Sweden).
2							1342	Reichshofrathsabschied.					1344	Ordinance of Upsala (Sweden).
									1345	Ordonnance de Parlement.			1345	Ordinance of Telge (Sweden).
							1346	Bayerisches Landrecht.						
							1347	Münchener Stadtrecht.						
	1349	First Statute of Labourers.									1348	Siete Partidas. Ordinance of Alcala d' Henares.	1347	Magnus Eriksson's Landslag (Sweden).
	1351	Statute of Provisors.					?	Schlesisches Landrecht.	1351	Ordonnance de Police.			1354	*Thord Degn's Artikler* (Denmark).
	1352	Statute of Treasons.												Gårderath (Sweden).
	1353	Statute of Præmunire. Statute of the Staple.							1355	Ordonnance de l'arrière-ban.				
							1356	Goldene Bulle.						Smålandslag (Sweden).
	1357	Ordinance for Ireland.												Wisby Stadslag (Sweden).
3									1361	Serment des baillis.				
	1362	Act establishing Quarter Sessions.												Magnus Eriksson's Stadslag (Sweden).
									1363	Ordinatio de Parlamento.				
											1371	Ley de Toro.		Landbierkerât (Denmark).
									1372	Ordonnance sur le fait des aides.				
									1373	Ordonnance sur l'Amirauté.				
	1381	Statute of Forcible Entry.												
			1384	Use of Merchis.										
4				*Quoniam Attachiamenta.*					1389	Ordonnances sur les Assises.				
				Iter Camerarii.						*Grant Coustumier de France.*				

Quarter.	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
			1405	Curia Quattuor Burgorum.										
									1411	[Coutume d'Anjou et Maine.]				
	1413	Statute of Forgery.												
1	1414	Statute of Heresy.												
									1417	Coutume de Poitou.				
							1422	Nurnberger Reichs-Heers-Ordnung.						
			1425	Article of Heresy.										
			1426	Statute against "particular" and "foreign" laws.										
				Ordinance establishing "Lords Auditors of Complaints."										
			1428	Ordinances for Commissioners of Shires.										
							1437	Arnsberger Reformation (of Westphalian courts).						
2							1438	Kreis-Ordnung.	1438	Sanction pragmatique.				
			1440	Ordo Justiciaria (James II.).			1442	Frankfurter Reformation.					1440?	Christopher's Landslag (Sweden).
							1447	Dithmarsisches Landrecht.						
			1450	Act for Protection of Leaseholders. Act appointing "Lords of the Articles."					1450	Stille et Coutume de Berry.				
			1455	Statute against hereditary offices.					?	Coutume de Bretagne.				
				Statute establishing borough councils.										
			1458	Act of feu-farm.										
									1459	Coutumes de Bourgogne (duché et comté).				
									1461	Coutume de Touraine.				
3									1462	Ordonnance fondant le Parlement de Bourdeaux.				
									1463	(2nd) Coutume d'Anjou.				
			1469	Act for registration of mortgages.										
				Act of Limitation.			1471	Kammergerichts Ordnung (Friedrich III.).						
				Statute of Appeals.										
			1482	Decision recognizing alienation of land by a married woman.					1477	Ordonnance fondant le Parlement de Dijon.				
	1483	Statute against Benevolences.												
	1487	"Star Chamber" Act.							1484	Coutume de Tours.				
			1491	Statute for holding of Session three times a year.										
4							1495	Kammergerichts Ordnung (Maximilian).	1495	Ordonnance fondant le Parlement de Rennes.				
			1496	Statute for education of heirs of freeholders.					1497	Mandement sur la publication des coutumes.				
							1498	Erbfolge Ordnung.						
							1500	Reichsregiments Ordnung.	1499	Ordonnance fondant le Parlement de Rouen.				

Quarter.	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
1				Statute establishing perpetual court at Edinburgh.					1501	Ordonnance fondant le Parlement d'Aix.				
				Statute making heirs liable for ancestor's debts.			1507	*Bambergensis.*	1507	Coutumes de Touraine.				
			1504	Statute requiring notice to boroughs when taxation proposed.					1508	Coutumes d' Anjou.				
										Coutumes du Maine.				
									1509	Coutumes de Troyes.				
									1510	Coutumes d' Auvergne.				
				Statute for registration of seisins by sheriffs.					1511	Coutumes de Paris.				
							1512	Notariats Ordnung (much about wills).	1514	Coutumes de Poitou.				
										Coutumes d' Angoumois.				
									1520	Coutumes de Bourdeaux.				
							1521–1529	Erbfolge Ordnungen.	1521	Coutumes de Bourbonnois.				
									1523	Coutumes de Blois.				
2	1529	Statute of Embezzlements.	1526	Statute of successions to goods of minors.										
	1531?	Statutes of Uses and Enrolments.	1529	Statute making freeholders responsible for production of their tenants.			1530	Polizei Ordnung und Reformation.						
			1532	Ordinance establishing College of Justice.			1532	Peinliche Hals-Gerichts Ordnung ("Karolina").	1534	Coutumes de Nivernois.				
	1540	Statute of Wills.	1540	Acts for reformation of Courts.					1539	Ordonnance de Villers-Cotterets.				
3			1555	Statute for notice to quit.			1555	Wurtemberger Landrecht.	1551	Fors de Béarn. (There had been several earlier collections.)				
				Statute against leagues and manrents.										
				Statute for registration of all seisins.										
									1561	Ordonnance d' Orléans.				
									1564	Ordonnance de Roussillon.				
			1567	Statute for seisins in boroughs.					1566	Ordonnance de Moulins.	1567	Nueva Recopilacion.		
4			1578	Act establishing convention of boroughs.										
			1579	Statute of prescriptions.					1579	Ordonnance de Blois.				
									1580	(Nouvelle) Coutume de Paris.				
			1585	Statute declaring sovereignty of Parliament.					1583	(Nouvelle) Coutume de Normandie.				
				Statute prohibiting clergy acting as judges or advocates.					1585	Coutumes d' Orléans.				
			1587	Constitution Statutes.										
				Statute for furtherance of criminal justice.										
			1599	Statute establishing general Land Registry.										

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PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, LONDON AND BECCLES, ENGLAND.